



16 April 2015

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email to legcon.sen@aph.gov.au

Dear Secretary

Copyright Amendment (Online Infringement) Bill 2015

Foxtel welcomes the opportunity to comment on the *Copyright Amendment (Online Infringement) Bill 2015* (the **Bill**), referred to the Senate Legal and Constitutional Affairs Committee for inquiry on 26 March 2015.

Online copyright infringement – the problem

There is no question that online copyright infringement is a very significant problem in Australia. There are many examples of the Australian rates of unauthorised access to television programmes and movies exceeding the rates of unauthorised access in much larger overseas countries, including the US and the UK.¹

Online copyright infringement hurts everyone in the entertainment ecosystem—from creators of content, to producers, to buyers and distributors. It hurts actors, writers, the people who shoot or edit a TV show and those who sell tickets at the movies. Consumers are also hurt by online piracy where it undermines the ability of creators and their investors to monetise content, and so produce content in the first place.

The significant impact that online copyright infringement has on Australia's economy has been shown by a range of studies.² When Australians stream unauthorised content instead of obtaining it from legitimate sources they are adversely impacting Australian jobs. Forgone consumer spending impacts content creators and distributors and 'ripple effects' are felt across the economy. Taxes are also forgone, impacting the Government's ability to invest in services for Australians.

¹ For example, the final episode of *Breaking Bad* (ABC News online, *Breaking Bad finale draws record ratings as Australia tops illegal downloads*, 1 October 2013 – available at <http://www.abc.net.au/news/2013-10-01/breaking-bad-finale-draws-record-ratings-as-australia-tops-ille/4990252>.) and the premiere episode of season 4 of *Game of Thrones* (TorrentFreak, *Game of Thrones Premiere triggers Piracy Craze*, 7 April 2014 – available at <http://torrentfreak.com/game-of-thrones-premiere-triggers-piracy-craze-140407/>).

² See, for example, Ipsos and Oxford Economics, *Economic consequences of movie piracy – Australia*, January 2011 – available at http://www.screenassociation.com.au/uploads/reports/IPSONS_Economic_Consequences_of_Movie_Piracy_-_Australia.pdf.

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In addition, Australia has fallen behind almost all comparable countries in relation to regulatory responses to online copyright infringement, which has no doubt exacerbated the rate of online piracy in Australia.

Foxtel firmly believes that online copyright infringement must be urgently addressed to protect the health of Australian creative industries and the livelihoods of the thousands of Australians employed in them. Together with ensuring that rights holders provide speedy, convenient and affordable access to content and the draft industry code developed jointly by internet service providers (**ISPs**) and content rights holders (which is currently being considered by the ACMA), strong legislative action is required if inroads are to be made against the prolific rate of piracy in Australia.

For its part, Foxtel has taken a number of steps in recent years to make content available quickly, at a low price point and conveniently. These include Foxtel's 'Express from the US' strategy, whereby Foxtel fast tracks programmes from the US and UK, Foxtel's IPTV service Foxtel Play, which is available on a range of devices on a month to month contract, Foxtel's companion service Foxtel Go, which allows subscribers to stream linear channels and catch-up content to devices including tablets and mobile phones, the launch of Foxtel's new iQ3 set top box and the new SVOD service, Presto. In addition, Foxtel undertook a major repackaging of its cable and satellite service in November 2014 which involved reducing the price of Foxtel's cable and satellite entry level tier by almost half. Each of these strategies has required significant investment on Foxtel's part.

Overseas success with injunction powers

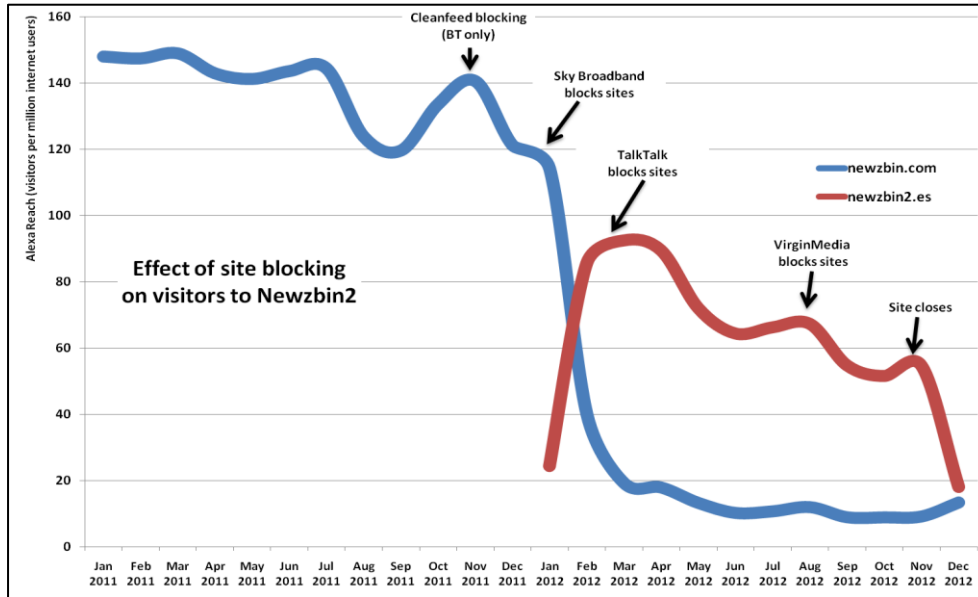
A number of overseas jurisdictions have introduced specific legislation that enables a Court to order ISPs to block access to infringing sites, with great success. Legislation to block access to websites that illegally stream content is present in countries including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Malaysia, the Netherlands, Singapore, Sweden and the United Kingdom.

The injunctive relief power in the United Kingdom under section 97A of the *Copyright Designs and Patents Act 1988* has proved to be extremely effective and efficient in limiting access to websites that offer access to infringing content. Access to over 100 online locations has been restricted since the first injunction order was made under section 97A in July 2011, when British Telecom was ordered to block access to the 'Newzbin2' website.³ Similar orders were subsequently made against other ISPs.⁴ As demonstrated in the graph below, Newzbin2 lost two-thirds of its visitors within 12 months of the blocking orders being put into effect, despite changes in IP address and domain name:⁵

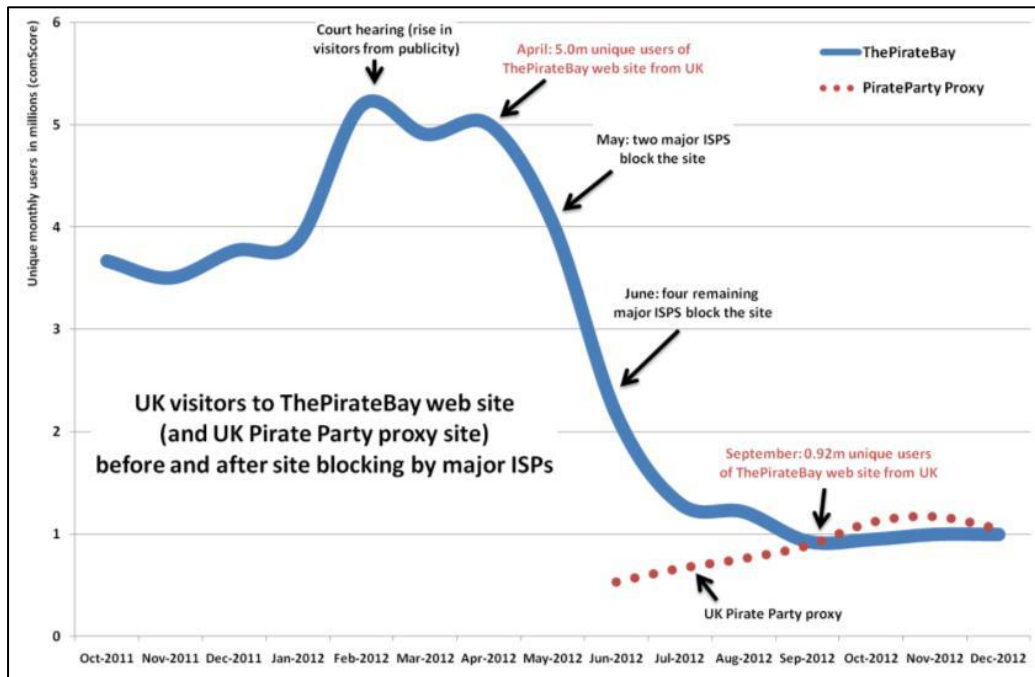
³ *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch).

⁴ See *EMI Records Ltd & Ors v British Sky Broadcasting Limited & Ors (EMI Records)* [2013] EWHC 379 (Ch) at [6].

⁵ NetNames, January 2013.



As a further example of the effectiveness of these orders, several UK ISPs were ordered to block access to The Pirate Bay on 2 May 2012 pursuant to section 97A.⁶ The graph below clearly illustrates that the imposition of this injunction resulted in a significant reduction in visitors to The Pirate Bay website:⁷



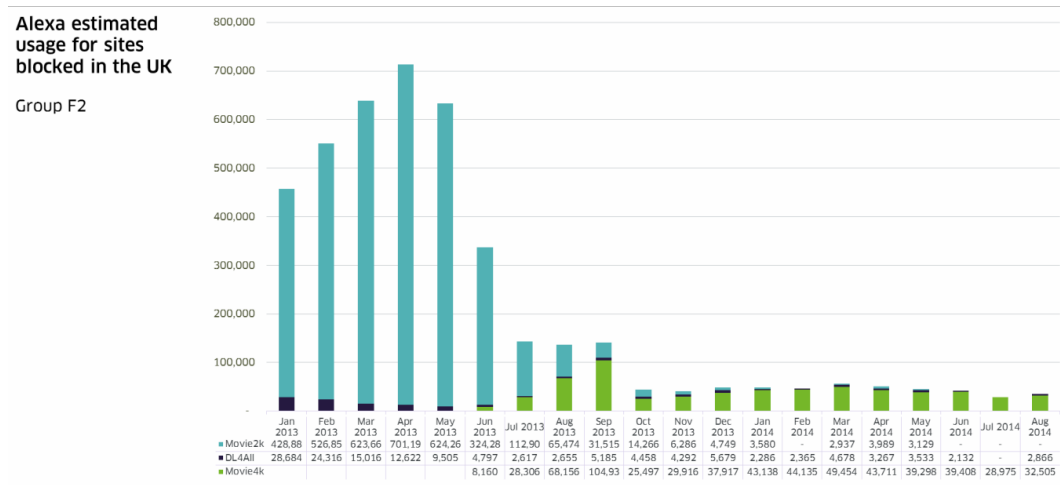
A 2014 report by Incopro into the efficacy of site blocking orders in the UK was publicly released on 22 January this year (**Incopro Report**).⁸ The Incopro Report found that on average, sites lose 73.2% of their estimated usage following a site

⁶ *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch).

⁷ NetNames, January 2013.

⁸ Incopro, *Site blocking efficacy study - United Kingdom*, 13 November 2014.

blocking order and maintain those levels consistently over time. This extract from the Incopro Report demonstrates the effectiveness of site blocking orders in respect of Movie2K and DL4ALL (implemented by ISPs in May 2013) and Movie4K (implemented by ISPs in August 2014):⁹



English Courts have also expressly accepted that site blocking injunctions are effective. In the recent 2014 proceeding *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* in which Justice Arnold ordered ISPs to block access to six websites selling counterfeit goods (the **Cartier case**), the Court considered evidence as to the efficacy of the site blocking orders made since the first order under section 97A in 2011. Justice Arnold found that:

Overall, the conclusion which I draw from the evidence is that, in the section 97A context, blocking of targeted websites has proved reasonably effective in reducing use of those websites in the UK. No doubt it is the casual, inexperienced or lazy users who stop visiting those websites, whereas the experienced and determined users circumvent the blocking measures; but that does not mean that it is not a worthwhile outcome.¹⁰

It is also worth noting that ISPs and rights holders are co-operating in relation to site blocking proceedings in the UK and that ISP defendants are not contesting applications. In the *Cartier* case, Justice Arnold noted that since the first orders were made under section 97A, *‘the ISPs have not opposed the making of the orders sought by the rightsholders, but have restricted themselves to negotiating the wording of the orders if the Court is minded to grant them... in consequence, most of the orders have been granted after consideration of the applications on paper’¹¹*. The result is that UK site blocking proceedings are fast, efficient and cost effective, qualities which Australia should aspire to for its injunction power.

⁹ Incopro, *Site blocking efficacy study - United Kingdom*, 13 November 2014, page 8.

¹⁰ *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* [2014] EWHC 3534 (Ch) at [236].

¹¹ *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* [2014] EWHC 3534 (Ch) at [4].

The Bill

Foxtel believes that with some minor amendments, the proposed injunction power under section 115A of the *Copyright Act 1968* (Cth) (the **Act**) could be a very positive step towards combatting online piracy in Australia.

Foxtel's proposed amendments to schedule 1 of the Bill are set out in the annexure to this letter. Foxtel submits that the proposed amendments will optimise the utility and effectiveness of the legislation, and the reasons for each of Foxtel's suggested amendments are explained below. In particular, Foxtel believes it is critical that the legislation is drafted to ensure that it will achieve its goals and is not the subject of many years of litigation. Foxtel urges the Parliament to avoid establishing legislative tests that will fail to provide the certainty required to achieve a real reduction in online copyright infringement.

Carriage Service Providers

As currently drafted, proposed section 115A applies only to "carriage service providers". Foxtel submits that the scope of the Bill should be broadened so as to apply to service providers and intermediaries (eg search engine providers), by deleting the word "carriage" from section 115A and 131A(2). This will ensure that the injunction power is technologically neutral and capable of broad application.

Section 115A(1)(c) – 'Primary Purpose'

Foxtel has a number of concerns in relation to the proposed threshold requirement under section 115A(1)(c) that rights holders must prove that the online location is for '*the primary purpose*' of infringing, or facilitating the infringement of, copyright.

While the term 'primary purpose' is used in the Singaporean legislation on which the Bill appears to have been modelled, it is not a pre-requisite to relief being granted, but rather a factor that Singaporean Courts must consider in determining whether an online location is a flagrantly infringing online location.

There is also no 'primary purpose' threshold requirement under the successful UK legislation, which may mean that the Courts cannot have regard to the many decisions under section 97A of the UK Act. As Foxtel has previously recommended to the Government, modelling the Australian regime on the successful UK provision would have the benefit of enabling Australian Courts to refer to the growing body of UK precedent with respect to orders blocking access to online location which infringe copyright.

As a threshold requirement to establish a primary purpose of copyright infringement would be unique to Australia, Foxtel is concerned that this will create practical difficulties in terms of the evidence required to satisfy the test and uncertainty as to how a Court will apply it. A threshold requirement of 'the primary purpose' may therefore undermine the intent of the Bill given the uncertainty as to how the test may be satisfied.

Foxtel's proposed approach is therefore that '*the primary purpose*' threshold is replaced with a threshold of '*a substantial purpose or effect*'. Substantial purpose or effect is a concept Australian Courts are familiar with given its use under the *Competition and Consumer Act 2010* (Cth). This would also enable rights holders to

lead evidence of effect where the purpose of overseas owner / operators cannot be readily established.

At a very minimum, Foxtel submits that the word '*the*' should be replaced with the word '*a*', given the multitude of purposes which may exist for an online location (for example, the many infringing sites which include pornographic material or advertising) and the difficulty with establishing a singular primary purpose in such circumstances.

Section 115A(5) – Matters to be considered by the Court

Foxtel has a number of suggested amendments in relation to section 115A(5), which stipulates the matters which must be considered by the Court in determining whether to grant an injunction.

Opening words

As noted above, it is clear that the Bill has been closely modelled on the Singaporean injunction powers which recently commenced operation under section 193DDA and section 252CDA of Singapore's Copyright Act. One important difference between the Bill and the Singaporean legislation however lies in the direction given to the Court with respect to the matters it must take into account when deciding whether to make an order blocking access to an online location.

Under the Singaporean provision, '*the High Court shall have regard to, and give such weight as the High Court considers appropriate to, all of [the matters listed in the relevant section]*'. However section 115A(5) of the Australian Bill directs that '*the Court is to take the following matters into account*'. In order to preserve the Court's flexibility and to avoid it weighting each of the factors in section 115A(5) equally, Foxtel recommends that the Singaporean approach is adopted. This may also enable use of Singaporean precedent in appropriate cases under Australian law.

Subsections which should be deleted

For the reasons explained below, Foxtel believes that the following factors should be deleted from proposed section 115A(5). Foxtel submits that the removal of these elements will significantly increase the likelihood of the injunction power operating effectively and efficiently, without unreasonably impacting consumers or service providers.

- **Sections 115A(5)(a) and 115A(5)(c) – Flagrancy and disregard for copyright**

With a threshold requirement of the primary purpose of infringing copyright or facilitating copyright infringement (or a substantial purpose or effect, as proposed by Foxtel), the Court must effectively be satisfied that the online location is capable of damaging rights holders. As noted in the Explanatory Memorandum, '*this is an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse*¹².

¹² Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015*, paragraph 38.

Foxtel submits that having met this high threshold, it is unnecessary and unreasonable for rights holders to then have to establish both the flagrancy of the infringement (section 115A(5)(a)) and whether the owner/operator of the relevant online location demonstrates a disregard for copyright generally (section 115A(5)(c)). Both of these matters are likely to be relevant to Court's determination under section 115A(1)(c) and in any event, should be presumed to have been established if the high threshold has been met.

Foxtel is also concerned that flagrancy is a concept that is used in other provisions under the Act in the context of actual infringement¹³ and damages¹⁴, whereas the Government's stated intention is that the injunction power should be a no-fault provision. Foxtel also notes that flagrancy is used differently in the Singaporean legislation, as flagrancy is a threshold requirement under the Singaporean regime and guidance as to the meaning of flagrancy is provided by way of the factors the Court must consider (as set out in sections 193DDA(2) and section 252CDA(2)).

For these reasons, section 115A(5)(a) and section 115A(5)(c) should be deleted. If the Parliament does not agree, Foxtel submits that section 115A(5)(a) should be amended by deleting the words '*as referred to in paragraph (1)(c)*', as this is obviously circular.

- **Section 115A(5)(g) – Public interest**

Foxtel also has concerns in relation to the proposed requirement that the Court consider whether '*it is in the public interest to disable access to the online location*'. 'Public interest' is not defined in the Act and Foxtel is concerned that this factor will potentially lead to ex parte applications intended to frustrate and delay the process of obtaining an order under section 115A of the Act. Foxtel also notes that 'public interest' is not a factor that the Court must take into account under the similar Singaporean regime. In any event, the public interest is a matter which is usually considered as part of the Court's inherent jurisdiction and may be expressly considered under section 115A(5)(k) ('any other relevant matter') if the need arises in an appropriate case.

- **Sections 115A(5)(j) and 115A(5)(i) – Other available remedies and other matters prescribed by regulation**

Lastly, Foxtel submits that section 115A(5)(j), which mandates a consideration of any other remedies available under the Act, and section 115A(5)(i), which directs the Court to consider any other matter prescribed by the regulation, should be deleted. Each provision is superfluous in light of the catch-all in section 115A(5)(k), which enables the Court to take into account '*any other relevant matter*'.

Foxtel is particularly concerned by proposed section 115A(5)(i) which would require the Court to consider '*any other remedies available under [the] Act*'. The Explanatory Memorandum acknowledges '*the difficulties in taking direct*

¹³ Section 115(4)(b)(i) of the Act.

¹⁴ For example, section 135AOE of the Act.

*enforcement action against entities operating outside Australia*¹⁵ and also that ‘*copyright owners need an efficient mechanism to disrupt the business models of online locations operated outside Australia that distribute infringing copyright material to Australian consumers*’¹⁶. Mandating a consideration of other possible remedies which, by the Government’s own admission, are unlikely to be available will therefore unnecessarily complicate and extend what is intended to be an efficient remedy.

Section 115A(9) - Costs

Foxtel believes that subsection (9) of proposed section 115A, which states that carriage service providers (**CSPs**) are not liable for any costs unless the CSP enters an appearance and takes part in the proceedings, should be deleted.

The text of the proposed section is somewhat ambiguous, as it could be read as requiring that CSPs are to be liable for costs where they enter an appearance and take part in the proceedings. This is confusing in the context of the Court’s discretion as to costs under Part 40 of the Federal Court Rules, which is referred to in the Explanatory Memorandum. Given that this section is not intended (according to the Explanatory Memorandum) to alter Part 40 of the Federal Court Rules, in Foxtel’s view the provision is unnecessary and should therefore be deleted.

With respect to compliance with any orders made under section 115A, it is also worth noting that English Courts have recognised that the costs to ISPs of compliance with an injunction order under the equivalent UK powers are modest. In *EMI Records Ltd & Ors v British Sky Broadcasting Limited & Ors*, Arnold J observed that:

*[s]o far as the cost of complying with a blocking order is concerned, this is a factor in the proportionality of the order as between the [rights holders] and the [ISPs]. The blocking orders which this Court has made require use by the [ISPs] of technical measures which they already have available, and therefore the cost of compliance is modest.*¹⁷

Moreover, under the proposed Australian provision, service providers will only be required to take steps that are “reasonable” to disable access to the online location.

Foxtel acknowledges that it has a part to play in reducing the incidence of online copyright infringement. Foxtel has and will continue to provide ways to access content quickly, conveniently and at reasonable prices. At the same time, it is critical that a stronger legislative framework to stem online piracy is put in place. With the suggested amendments outlined in this letter, Foxtel believes that the proposed injunctive powers under section 115A of the Act could play a very significant part in the fight against online piracy.

¹⁵ Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015*, paragraph 10.

¹⁶ Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015*, paragraph 9.

¹⁷ *EMI Records* at [102].

Yours sincerely

Lynette Ireland
Chief General Counsel

Annexure

Copyright Act 1968

1 After section 115

Insert:

115A Injunctions against carriage-service providers providing access to online locations outside Australia

- (1) The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:
 - a. a carriage-service provider provides access to an online location outside Australia; and
 - b. the online location infringes, or facilitates an infringement of, the copyright; and
 - c. ~~the primary~~ a substantial purpose or effect of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).
- (2) The injunction is to require the carriage-service provider to take reasonable steps to disable access to the online location.

Parties

- (3) The parties to an action under subsection (1) are:
 - a. the owner of the copyright; and
 - b. the carriage service provider; and
 - c. the person who operates the online location if, but only if, that person makes an application to be joined as a party to the proceedings.

Service

- (4) The owner of the copyright must notify:
 - a. the carriage-service provider; and
 - b. the person who operates the online location;of the making of an application under subsection (1), but the Court may dispense, on such terms as it sees fit, with the notice required to be sent under paragraph (b) if the Court is satisfied that the owner of the copyright is unable, despite reasonable efforts, to determine the identity or address of the person who operates the online location, or to send notices to that person.

Matters to be taken into account

- (5) In determining whether to grant the injunction, the Court can give such weight to the following matters as it considers appropriate ~~is to take the following matters into account~~:

- a. ~~the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement, as referred to in paragraph (1)(e);~~
- b. whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
- c. ~~whether the owner or operator of the online location demonstrates a disregard for copyright generally;~~
- d. whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
- e. whether disabling access to the online location is a proportionate response in the circumstances;
- f. the impact on any person, or class of persons, likely to be affected by the grant of the injunction;
- g. ~~whether it is in the public interest to disable access to the online location;~~
- h. whether the owner of the copyright complied with subsection (4);
- i. ~~any other remedies available under this Act;~~
- j. ~~any other matter prescribed by the regulations;~~
- k. any other relevant matter.

Affidavit evidence

- (6) For the purposes of the proceedings, section 134A (affidavit evidence) applies as if the reference in paragraph 134A(f) to a particular act included a reference to a class of acts.

Rescinding and varying injunctions

- (7) The Court may:
- a. limit the duration of; or
 - b. upon application, rescind or vary; an injunction granted under this section.
- (8) An application under subsection (7) may be made by:
- a. any of the persons referred to in subsection (3); or
 - b. any other person prescribed by the regulations.

Costs

- ~~(9) The carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings.~~

2 Paragraphs 119(a) and 120(1)(b)

After “115”, insert “or 115A”.

3 Section 131A

Before “The”, insert “(1)”.

4 At the end of section 131A

Add:

- (2) Despite subsection 39(2) of the *Judiciary Act 1903*, the Supreme Court of a State or Territory does not have jurisdiction in relation to applications under section 115A of this Act (injunctions against carriage service providers providing access to online locations outside Australia).

5 At the end of section 131D

Add “(other than section 115A)”