



Submission to

Standing Committee on Infrastructure and Communications
Senate Committee

Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997
by government agencies to disrupt the operation of
illegal online services

August 2014

Executive Summary

The AIMIA Digital Policy Group welcomes the opportunity to make this submission to the Standing Committee on Infrastructure and Communications Senate Committee (**the Committee**) in relation to its inquiry on the use of subsection 313(3) of the *Telecommunications Act 1997* (**s 313**) by government agencies to disrupt the operation of illegal online services.

The AIMIA Digital Policy Group believes that maintaining a free and innovative internet is critical to the success of the global economy and will ultimately lead to global economic success, technological innovation and democratic discourse. The uniquely free and innovative nature of the internet has developed as a result of a bottom-up, decentralised and multi-stakeholder model rather than an internet that is overly regulated by the various arms of government.

Although imperfect, the openness and decentralisation makes the internet a profound forum for expression and an engine of economic growth available to everyone.

From an in principle perspective laws that allow the blocking of websites should:

- only apply in limited, narrowly defined situations
- be subject to the same safeguards as those that apply in the *Telecommunications Interception and Access Act 1979* (**TIA Act**)
- be transparent; and
- be subject to freedom of speech considerations.

In this context we welcome the Australian government taking the initiative to inquire into the use of s 313. We submit that the Australian government should use the opportunity to investigate whether the appropriate checks and balances are currently in place in relation to the use of s 313 and what if any additional checks and balances should apply.

The Benefits of the Internet

Platform for Freedom of Expression

Not every country provides its citizens with the levels of freedom of expression that are enjoyed here in Australia. The internet provides the citizens of countries where freedom of expression cannot be taken for granted with the ability to voice their views and access information and opinion that would otherwise not be available.

Global platforms facilitate the communications of dissidents including in the recent uprisings of Egypt and Tunisia despite efforts by governments to regulate traditional media.

Within this context the AIMIA Digital Policy Group submits that great care should be taken with respect to any legal process, whether it be in a liberal democracy or not, that involves the blocking of access to websites.

Economic Contributions of the Digital Industry

The Organisation for Economic Cooperation and Development (OECD) recently acknowledged in its *Internet Economy Outlook 2012*:

“What is clear is that the Internet is becoming a key economic infrastructure, revolutionising businesses and serving as a platform for innovation.”¹

The OECD also notes

“[a]t the company level, the restructuring of business models in association with Internet use has led to improved efficiency and the rapid growth of new online businesses” and for households “[t]he Internet is reshaping the way individuals live, bringing a larger variety of digital goods and services, lower prices, improved information gathering, more distribution channels and so forth. In addition, individuals benefit from a more efficient labour market and, at a broader level, from positive impacts to the environment (OECD, 2009, 2010; Prasad, 2010) and in education. For example, the Internet has become a vital tool for helping match available workers with jobs requiring a certain set of skills.

At the company level, the restructuring of business models in association with Internet use has led to improved efficiencies.... Its impact is also visible in the rapid growth of new online businesses. The Internet’s enhanced communication capabilities are affecting nearly all sectors of the economy in ways both subtle and profound, from making available online previously hard-to-find data to transforming entire markets, as is occurring with music, video, software, books and news.

For governments, Internet development enables better communications with citizens, industry and other organisations and also promotes more efficient governance through

¹ Page 8, Executive Summary (<http://www.oecd.org/sti/Internetconomy/ieoutlook.htm>)

improved information sharing, increased transparency and the automation of various resource-intensive services."²

Why Access to the Internet is Important

The internet is providing growth and opportunity to Australian consumers and business.

As noted above, Deloitte Access Economics has estimated that the direct contribution of the internet to the Australian economy was worth approximately \$50 billion or 3.6 per cent of GDP in 2010. That is expected to increase by at least \$20 billion over the next five years to \$70 billion³.

To put this in context, Australia's education and training sector, and retail sector, each contribute \$53 billion to the Australian economy.

Why Access to the Internet is Important for Households and Consumers

The quantitative benefits to consumers are substantial as outlined in the table that follows.

² *Id.*, pages 3-4.

³ The Connected Continent: How the internet is transforming the Australian economy, Deloitte Access Economics, August 2011
https://www.deloitteaccess economics.com.au/uploads/File/DAE_Google%20Report_FINAL_V3.pdf, pages 1 and 2

Table 1: How the internet benefits households⁴

Benefit	Description	Annual Value
Search	The internet is a far more efficient search tool than anything available prior to its development. Although Australians do not devote a large proportion of their time on the internet to searching the amount of time saved in acquiring information is significant.	\$7bn
Variety	Prior to the availability of the internet, consumer purchases were largely restricted by physical location. The internet opens markets up to consumers that were not previously available. The increased variety available to consumers from the internet holds significant value in itself, while the increased competition also reduces prices in a number of markets.	\$16bn
Convenience	This category captures the reduction in time it takes to perform various household chores, for example the added convenience of online banking and using the internet to pay bills, and submit forms and other government communications.	\$8bn
Recreation	Consumers spend a considerable amount of their leisure time on the internet. This category places a value on the time Australians spend on recreational activities on the internet, such as browsing, using social media, and other forms of communication with friends and relatives.	\$22bn

In short, the internet provides savings and efficiencies for individuals.

At a macro level these efficiencies translate to greater income in real terms for consumers and have significant potential to drive further economic growth through productivity gains.

⁴ The Connected Continent: How the internet is transforming the Australian economy, Deloitte Access Economics, August 2011
https://www.deloitteaccessconomics.com.au/uploads/File/DAE_Google%20Report_FINAL_V3.pdf, page 24

Why Access to the Internet is Important for Businesses

The internet also provides significant potential benefit to business and has the potential to continue to do this.

The Australian Bureau of Statistics recently reported in ***Measures of Australia's Progress Aspirations for our nation: A conversation with Australians about progress*** that Australian's views on prosperity are:

"Australians aspire to a prosperous and efficient economy.

- Efficient workforce
- Efficient use of resources
- Access to resources
- Innovation for efficiency
- Competition
- Effective regulation

An aspiration that recurred during the consultation was that the Australian economy continues to thrive and function well. This included having an economy that uses both labour and other resources efficiently, that is able to access the right resources needed for production purposes at the right time without impediment, that can improve the productivity of work processes (for example by harnessing new technology) and can compete in an increasingly globalised marketplace."⁵

McKinsey Global Institute also issued a report in July 2012 that provides some insight into the value that the internet can provide to business. McKinsey found that:

Improved communication and collaboration through social technologies could raise productivity of interaction workers – high skill knowledge workers, including managers and professionals – by 20 to 25 per cent.⁶

Many businesses are exploiting the opportunities that are available online. The ACMA reported that as at June 2012, 2.44 million domain names were registered under .au (excluding .gov.au), an increase of 15 per cent since June 2011⁷.

Digital platforms allow merchants of all sizes to bring products and services to world markets efficiently and to establish trust despite geographical distance and other trade barriers⁸. What this means is that global trade is no longer the preserve of the privileged few or the

⁵ Australian Bureau of Statistics, 1370.0.00.002, *Measure's of Australia's Progress Aspirations of our nation: a conversation with Australians about progress*, November 2012

⁶ McKinsey Global Institute, *The social economy: Unlocking value and productivity through social technology*, July 2012

http://www.mckinsey.com/insights/mgi/research/technology_and_innovation/the_social_economy

⁷ Australian Communications and Media Authority, *Communications Report 2011 -2012 series, Report 2 – Australia's progress in the digital economy, Participation trust and confidence*, November 2012, page 7

⁸ eBay Inc. *Towards Commerce 3.0 Roadmap for Building Sustainable Growth into Commerce*, page 4

largest firms. More importantly, export opportunities on digital platforms are less limited by the distance of the merchant from the consumer.

This important finding is confirmed in the *Commerce 3.0 Enabling Australian Export Opportunities Report* that reports that 78% of eBay.com.au commercial sellers export, increasing to 97% when they reach sales of \$100 000 and that eBay commercial exporters sell to an average of 28 overseas destinations.

Digital Policy Group members also provide platforms that support Australian innovators and entrepreneurs, who are able to build and improve their own businesses utilizing the services we offer.

Examples of just some of the many Australian innovators and entrepreneurs that have built and expanded their businesses using the services that we provide include:

- i) Founded in Sydney, Freelancer.com is the world's largest outsourcing and crowd sourcing marketplace for small business. Freelancer.com connects over 4,188,506 employers and freelancers globally from over 234 countries & regions. Through the website, employers can hire freelancers to do work in areas such as software, writing, data entry and design right through to engineering and the sciences, sales and marketing, and accounting & legal services.
- ii) The online wine retailer Wine Market Australia that is earning around \$20,000 in revenue a month via its Facebook eCommerce shop. It commits a growing amount to banner ads to engage with fans, acquire new customers and creating strong brand credibility. It has now built a program that integrates its Facebook shop with back-end systems, simplifying the order-filling process and uses the Facebook platform to push different types of offers not suitable to email marketing⁹.
- iii) Yahoo7 identified the growing trend both in Australia and globally for Social TV. In response Yahoo7 developed and launched Australia's first Social TV app - FANGO. The audience and commercial insights which drove the innovation process allowed Yahoo7's team to align technical and sales requirements to develop a product that best fits the audience and advertisers' needs. FANGO launched the new product category of Social TV in Australia and is now widely considered to be leading this growing segment.
- iv) The DealsDirect Group started back in 2000, when Paul Greenberg and Mike Rosenbaum launched an online auction business called Auctionbrokers.com.au. Hosted on eBay, Auctionbrokers provided a service to businesses looking to deliver surplus stock through the auction format. Today, the DealsDirect Group continues to be one of the leading brands in online retail purchasing.

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<http://www.smartcompany.com.au/internet/051372-is-social-media-advertising-really-worth-the-time-and-money.html>

- v) OzHut, which had its beginnings on the eBay platform, is a multi niche Australian retailer specialising in a wide variety of niche lifestyle products. Ozhut enjoyed a 900% increase in revenue in its first three years, growing to \$2.6 million. OzHut was announced as a *BRW* fast starter and featured on another list of 50 fastest growing start-ups, and its company founder was named StartupSmart's best young entrepreneur.

Specific Comments in relation to Section 313

Technology changes since 1997

Section 313 of the *Telecommunications Act 1997* in its current form was included in the major reform to telecommunications laws in 1997. It had its origin in a predecessor provision, section 47 of the *Telecommunications Act 1991*, which provided immunity for carriers that acted in good faith to disconnect a telephone service "on the grounds that the police have evidence that it is being used for illegal bookmaking purposes"¹⁰.

It is instructive to consider how the technological landscape has changed since 1991 and 1997 when s 313 and its predecessor provision were first conceived:

- in 1991, HTML had yet to be invented, let alone major internet services.
- by 1997, the AltaVista search engines had come online, but search was in its very early days, and Google had not yet been invented. Websites were out there, but finding them was a bit hit and miss. Social media services were still several years away.
- in 2014, the landscape is utterly unrecognisable from that which existed in 1991 or 1997. From social media services, to content streaming services, to file hosting services; the communications landscape has been completely transformed.

Use of Section 313 is beyond original policy contemplations

The original intention behind the predecessor provision to s 313, section 47 of the *Telecommunications Act 1991*, was to facilitate disconnection of a phone service that was in use for an illegal purpose by providing immunity if a carrier acted in good faith to disconnect a service "on the grounds that the police have **evidence** that it is being used for **illegal** bookmaking purposes" (our emphasis).¹¹

In more recent times, s 313 was considered by the previous Labor Government to provide a suitable mechanism for implementing a trial voluntary filter scheme. This scheme, which commenced in June 2011 and relied on s 313 'requests' being made to ISPs, utilised the Interpol blacklist. In other words, it was limited to the '*worst of the worst*' child abuse material. This is material that is universally considered criminal. The criminal nature of the content being blocked by this scheme was apparent on the face of the material itself.

¹⁰ Explanatory Memorandum to the *Telecommunications Bill 1991*

¹¹ Explanatory Memorandum to the Telecommunications Bill 1991

Section 313 is now being used not just for voluntary filtering of child abuse content and similar universally condemned material, but also to mandate blocking of access to a much broader range of internet sites that are not readily criminal on their face. This is a matter of great concern. In effect, s 313 is being used as a *de facto* internet filter, without any procedural safeguards or oversight.

Our industry is concerned that there is no natural limit to the apparently continuing expansion of use of this provision. The scope of s 313 is extremely broad: a 'request' to block websites may be made in any form by any officer of any law enforcement agency of the Commonwealth or any State or Territory. The only limitation is that the 'request' can only be made for such help as is 'reasonably necessary' for the purposes of:

- enforcing the criminal law and laws imposing pecuniary penalties;
- assisting the enforcement of the criminal laws in force in a foreign country;
- protecting the public revenue; or
- safeguarding national security.

The operation of section 313 is highly problematic

The AIMIA Digital Policy Group has significant concerns about the breadth of s 313 and its expanded use. These concerns can be categorised as follows:

1. The overbroad scope of this provision
2. The lack of oversight and procedural safeguards
3. The lack of transparency
4. Free speech implications
5. General concerns with using section 313 for site blocking.

1. The application of section 313 is overly broad.

Section 313 is unacceptably broad in its current form. The AIMIA Digital Policy Group has two main concerns with the breadth of s 313.

Firstly, there is nothing on the face of s 313 that limits its application to requests to block *illegal* content. This has enabled the use of the provision to block content in ways that would appear to stray well beyond what was intended when the predecessor to s 313 was introduced. The most recent example that has come to public attention is the Australian Securities and Investments Commission's use of s 313 to request that ISPs block access to websites that ASIC suspected of having provided fraudulent investment information. That request led to 1200 legitimate websites being inadvertently blocked.¹²

Secondly, there is nothing on the face of s 313 that restricts its use to requests made by officers of a particular seniority or rank. Potentially *any* officer, of any Federal, State or

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<http://www.smh.com.au/digital-life/digital-life-news/government-accused-of-sneaking-in-web-filter-20130517-2jq3p.html>

Territory department or law enforcement agency, can make a request in reliance on this provision.

The AIMIA Digital Policy Group respectfully submits that it is inappropriate for s 313 be used for anything other than blocking the Interpol blacklist of 'worst of the worst' illegal content and that an appropriately senior law enforcement or regulatory official should be required to authorise any such request.

2. Lack of oversight and procedural safeguards

The lack of procedural safeguards or transparency requirements that apply to requests made in reliance on s 313 are also of great concern. There is no requirement for the person making the request to provide reasonable grounds that the blocked site is engaged in fraudulent, malicious or criminal activities, let alone a requirement to obtain a warrant. Nor is there any requirement on the part of an ISP receiving the request to form a view as to the jurisdictional basis of the request. On its face, s 313 is an unconstrained power which any officer or authority of the Commonwealth or of the State and Territory may exercise wherever it is determined to be 'reasonably necessary' for any of the specified purposes, and without there being any requirement as to validation, or even specification, of purpose or any other protection.

The lack of procedural safeguards in relation to s 313 is in marked contrast to the procedural safeguards that apply in relation to the interception of the content of a communication, and to the provision of telecommunications data about communications. Under the *Telecommunications Interception and Access Act 1979 (TIA Act)*, interception of a communication in its passage over the Australian telecommunications network can only be done under a warrant, which generally requires a court order. Similarly, telecommunications data can only be disclosed under an authorisation in accordance with the TIA Act, which contains significant safeguards, including:

- the authorisation must end at a specified time no longer than 45 days from the day that it is made, unless it is revoked earlier; and
- the disclosure of telecommunications data can only be approved by an "authorised officer" of the relevant enforcement agency (generally the head or deputy head of the relevant agency).

The AIMIA Digital Policy Group submits that there is a dangerous and unacceptable misalignment between the procedural safeguards that apply to the interception of and disclosure of telecommunications data, and those that apply to requests made in reliance on s 313. At a minimum, the procedural safeguards that are contained in the TIA must also apply to s313.

3. Lack of transparency

The lack of transparency with respect to s 313 was squarely highlighted last year when the convenors of the Melbourne Free University - an organisation that hosts free public lectures - became aware that their website had been blocked by Telstra, Optus and Vodafone and

were unable to obtain any information as to what agency had requested that the site be blocked, and on what basis.¹³ If not for this incident, and the publicity that it generated, it may never have come to public attention that ASIC had, for many months, been requesting ISPs to block websites, and that it had inadvertently blocked 1200 innocent sites that shared the same IP address as Melbourne Free University. This is extremely concerning.

In our submission, the following are the minimum transparency requirements that should apply to use of s 313:

- The relevant agency should be required to inform website owners when their site has been blocked, and on what grounds.
- ISPs should be required to provide a notice that informs any person seeking to visit a blocked site as to why a site isn't loading. Protections should be in place to ensure that there is no unwarranted reputational damage caused as a result of a notice stating that a site has been blocked due to illegal activity. The incident referred to above with respect to Melbourne Free University underscores the importance of this.
- There should be a body charged with overseeing/auditing the use of s 313, and reporting to Parliament on its use on an annual basis.

4. Free speech implications

In its current form, s 313 has the potential to be used to unduly fetter freedom of speech. There is nothing on the face of this provision that requires a person making a site-blocking request to consider - before making the request - whether any likely interference with freedom of speech is outweighed by the public interest in enforcement of the criminal law, protection of public revenue or safeguarding of national security.

By way of illustration, in 2008, world-renowned photographer, Bill Henson, faced accusations that his works amounted to "indecent articles" in breach of NSW Criminal law. Charges were laid against him, but were later dropped when the photographs in question were declared "mild and justified" and given a PG rating by the Australian Classification Board. The Henson controversy generated a heated public discussion regarding art and censorship. Clearly, NSW authorities took the view, at least initially, that the works breached the law. What would have happened had they relied on s 313 to request ISPs to block sites containing Henson photographs on the ground that this was "reasonably necessary" to enforce NSW Criminal law?

We think that this example clearly illustrates that in absence of clear guidelines and constraints to ensure that the public interest in freedom of speech is taken into account when s 313 is used to prevent the public having access to content, the provision runs a real risk of unduly infringing on freedom of speech. When the speech in question amounts to political speech, this lack of constraint may also - in the event of a legal challenge - lead to the provision being found to fall foul of the implied Constitutional guarantee of political discourse in Australia.

¹³ <http://delimiter.com.au/2013/05/16/asic-blocked-numerous-sites-over-9-months/>
<http://www.abc.net.au/news/2013-05-16/westendorf-and-atahan---internet-filter/4694252>

5. Concerns about site blocking as a regulatory tool

There is a great deal of evidence to suggest that site blocking is ineffective as a means of preventing internet users from accessing prohibited content and services.¹⁴ Site blocking also has several other weaknesses that make it an unsuitable strategy for addressing concerns regarding illegal website content. These include:

- Site blocking has the potential to jeopardise the security and integrity of the Internet. This has been demonstrated by prominent security experts¹⁵. These experts have warned that the use of mandated DNS filtering to combat online infringement raises serious technical and security concerns, and that it would promote development of techniques and software that circumvent use of the DNS, thereby threatening the DNS's ability to provide universal naming.
- Site blocking is an inherently blunt instrument: it carries a high risk of blocking legitimate content if it is hosted on the same domain name or IP address as infringing content. Again, the Melbourne Free University incident is a case in point. The potential for collateral damage to the wider economy is likely to greatly outweigh any benefits.

About the AIMIA Digital Policy Group

The Digital Policy Group is the policy voice of the digital industry in Australia.

Founded in 2012 the Digital Policy Group is a special interest group of AIMIA that represents 460 digital players in the Australian digital industry. We represent large and small, local and global players that provide digital content services, applications and platforms.

Our members and supporters include Selz, eBay, Facebook, Freelancer, Google, Pandora and Yahoo7.

¹⁴ See [this paper](#), "Clickonomics: Determining the Effect of Anti-Piracy Measures for One-Click Hosting," Northeastern et al., 2013, which finds follow-the-money to be successful, particularly in fighting 'one-click hosting' sites (sites like Megaupload and Rapidshare, which allow for the simple uploading and downloading of large files).

¹⁵ Crocker et al, [Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the PROTECT IP Bill](#), May 2011