In brief
Australia has responded to the terror attack in Christchurch, New Zealand, by, without any public consultation, passing new laws within a day. The new laws criminalise the hosting and streaming of abhorrent violent content. The new *The Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) of Australia (the *Act*) was enacted on 4 April 2019 and commenced two days later. The new laws have wide ramifications and broad reach.

Robyn Chatwood, Partner, in our Privacy/Cybersecurity and Technology practice explains their impact.

What is outlawed?

- The new Act introduces new Commonwealth offences into the *Criminal Code Act 1995* (Cth) (*Criminal Code*) which will apply to anyone that provides an internet, hosting or content service who fails to refer details to the Australian Federal Police of ‘abhorrent violent material’ that records or streams conduct which has occurred (or is occurring) within a ‘reasonable time’ after becoming aware of the existence of the material. ¹

- The Act also introduce new offences which will apply to anyone who provides content or hosting services who fails to remove from their services any ‘abhorrent violent material’ which is capable of being accessed within Australia. ²

- The eSafety Commissioner is granted new powers to issue a notice to a content service provider or hosting service stating that, at the time of the notice, the ‘abhorrent violent material’ could be accessed using, or was hosted, on their service. ³

What is captured in the definition of ‘abhorrent violent material’?

A new definition has been inserted into the Criminal Code which defines the term ‘abhorrent violent conduct’. This sets out that a person engages in abhorrent violent conduct if the person does any of the following things:

- engages in a terrorist act (involving serious physical harm or death, and otherwise as per the Criminal Code);
- murders another person or attempts to do so; or
- tortures, rapes or kidnaps another person.

Under the Act, abhorrent violent material includes audio, visual, or audio visual material that records or streams that conduct or which is material that a reasonable person would regard as being, in all the circumstances, offensive and was produced by someone engaging in that conduct (or conspiring to do so).

The location of the abhorrent violent conduct is irrelevant. To be caught by the law, it will not be necessary to prove that the abhorrent violent conduct actually constituted an offence. Rather it is enough that the conduct met one of the definitions.
The explanatory document for the enacting legislation notes that the common theme in the categories of conduct is that the recording or streaming of the violent acts could be used to publicise violent propaganda, promote terror, incite further violence, or cause harm or distress to the community. The stated aim is to ensure that internet, hosting and content service providers are clear about the threshold to be achieved to report or remove the material.

Who is caught by the new laws?
One of the concerns with the legislation is that it has very broad application. The drafting is not always clear. For example, it is not clear if material stored in a user’s storage account (such as Drop Box account) or email which is not published might be caught. The Act refers to the relevant services being used to ‘access’ the abhorrent violent material only and so users, as well as service providers could be caught. The new laws also apply to the following:

- content service providers where a content service means:
  - a social media service; or
  - a designated internet service; and

- hosting service providers where a hosting service means the provider provides a social media service or provides an electronic or designated internet service on which the hosted material is provided.

Helpfully the Act clarifies that a person does not provide a content service merely because they supply a carriage service which enables material to be accessed or they provide a billing or fee collection service for a content service.

Much of the commentary about the new laws leaves the impression that the new laws are limited to social media but they are not. Any internet site which enables users to interact with other users and any electronic services where users can communicate with each (such as instant messaging and email services) will be caught. This means that the laws apply to internet service providers (ISPs) and a large range of content and hosting service providers such as Facebook, YouTube, Twitter, Gmail, entities such as Telstra and Optus and providers like Drop Box.

An issue with the new Act is that a lot of service providers have no or little visibility over the content that is being stored or communicated via their service platform and their users prefer it that way.

Penalties for breach

- Penalties for failure to notify the Australian Federal Police of the details of the abhorrent violent material are fines of up to AUD$168,000.

- Penalties for failure to remove the abhorrent violent material are fines of up to AUD$2.1 million / 3 years imprisonment for individuals or the greater of AUD$10.5 million and 10% of annual turnover for companies.

The Act requires the abhorrent violent material to be removed ‘expeditiously’ although this term is not defined. Deciding what exactly is expeditious removal in the circumstances will be left to the judicial process.

Defences available

Some defences have been enacted for material that can be accessed using a service if access is necessary for a range of reasons. These include for enforcing or complying with a law, if the material is required for proceedings in a court or tribunal or conducting scientific, medical, academic or historical research, news or current affairs reporting that is ‘in the public interest’ and is made by a person working in a professional capacity as a journalist, it is needed for a public official’s duties or accessibility relates to the development, performance, exhibition or distribution in good faith of an artistic work. Defendants bear the evidential burden to establish the defence.

The Act also includes a section called ‘Implied freedom of political communication’ which sets out that the new offences do not apply to the extent (if any) that they would infringe any constitutional doctrine of implied freedom of
Conclusion

It will be interesting to see how effective the new law is in getting abhorrent violent material taken down more quickly and by more providers. It is not certain that, if the laws had already been in place, it would have prevented the crimes of the nature involved in the Christchurch attack. It is also uncertain if access to that sort of content does encourage further crimes of the same nature.

In any event the enacting legislation requires that, after the end of a 2 year period after commencement, the Attorney-General will review the operation of the new law. ¹⁶

The Australian Government has been criticised heavily for the rush in which the legislation was brought on before Parliament and enacted and for a lack of public consultation. These new laws follow in the wake of Australia enacting world first decryption legislation ¹⁷ - also with speed and with little time for public consultation. Both laws have been drafted very broadly and much of the criticism has focussed on the unintended consequences that arise from that approach. The trend does indicate that Australia has an increasing appetite to regulate for some form of internet censorship.

We will keep you updated as to these and other legislative developments dealing with internet censorship and privacy.

Please contact Robyn Chatwood, Partner, in the Dentons Australian Privacy and Technology practice group, or your usual Dentons contact if you need further information or wish to be added to our list to receive updates on the developments.

¹¹. Section 474.33 of the Criminal Code. ↩
². Section 474.34 of the Criminal Code. ↩
³. Sections 474.35 to 474.36 of the Criminal Code. ↩
⁴. Explanatory Memorandum to The Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019 (Cth). ↩
⁵. See for example sections 474.33(a)(b), 474.34(1)(b) and 474.34(3), (5) and (7) of the Criminal Code. ↩
⁶. This is defined by reference to its meaning in the Enhancing Online Safety Act 2015 (Cth) of Australia – which essentially means an electronic service that satisfies the following conditions: (i) the sole or primary purpose of the service is to enable online social interaction between 2 or more end-users; (ii) the service allows end-users to link to, or interact with, some or all of the other end-users; (iii) the service allows end-users to post material on the service; (iv) such other conditions (if any) as are set out in the legislative rules; or (b) an electronic service specified in the legislative rules; but does not include certain exempt services (as defined by subsection (4) or (5) of that Act). ↩
⁷. This is also defined by reference to its meaning in the Enhancing Online Safety Act 2015 (Cth) of Australia – which means (a) a service that allows end-users to access material using an internet carriage service; or (b) a service that delivers material to persons having equipment appropriate for receiving that material, where the delivery of the service is by means of an internet carriage service; but does not include a social media service; or some other services such as an on-demand program service. ↩
⁸. As defined by reference to its meaning in the Enhancing Online Safety Act 2015 (Cth) of Australia. ↩
⁹. Section 474.39 of the Criminal Code. ↩
¹⁰. Section 474.33 of the Criminal Code. ↩
¹¹. Section 474.34 of the Criminal Code. ↩
¹². As above. ↩
¹³. Section 474.37 of the Criminal Code. ↩
¹⁴. Section 474.37(1)(e) of the Criminal Code. ↩
¹⁵. Section 474.38 of the Criminal Code. ↩
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