

DIGITAL ECONOMY FUTURE DIRECTIONS

Submission from Sensis Pty Ltd

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1 SUMMARY

Sensis welcomes the opportunity to respond to the Digital Economy Future Directions Consultation on the strategies to be adopted for the optimal development of the digital economy in Australia.

As Australia's leading information resource provider, Sensis has embraced digital technologies and they have played a central role in its growth from a telephone book company to become one of the world's most advanced information providers.

Our information network has grown to include iconic brands such as Yellow™, White Pages®, Trading Post®, Citysearch® and Whereis® and we are committed to continuing to develop our products using technology to create better information solutions for the Australian public. Sensis publishes and manages the Yellow™ and White Pages® directories on behalf of Telstra Corporation Limited.

Sensis takes its role supporting the growth and prosperity of Australia's small and medium business sector very seriously. A long term contribution for Sensis has been its publication of economic research reports into small businesses, the Australian economy and the impact of technology. This includes our flagship publication, the Sensis® Business Index, which has been tracking the confidence and performance of Australia's SMEs since 1993, and the associated Sensis® e-Business Report, which has been tracking the online journey of SMEs since 1995. These reports continue to make a major contribution into the understanding of the role of SMEs in the Australian economy and community, and are used extensively by all levels of government in Australia.

Overall the Sensis® e-Business Report has found that the introduction of successive technologies into Australian businesses has had a very positive impact, allowing the business community to increase productivity, operate efficiently and expand their markets.

In this response we address the Government's questions on the digital economy relevant to our business based on our own unique experiences in the Australian digital marketplace.

2 DIGITAL CONFIDENCE

2.1 **Are there possible barriers preventing a strong online retail experience in Australia? What can industry and other stakeholders do to address this?**

(a) Sensis operates the Trading Post® website, allowing registered users to buy, sell and offer for sale various goods by way of classified advertisements, auctions or using a Buy Now function. Many of Sensis' customers using this service are SMEs and Sensis is committed to promoting their use of online resources to benefit Australian consumers. Sensis notes that online retail spending in Australia is growing strongly recording an increase of approximately 20% during 2008/2009 with a total turnover of \$18.9bn. There are however areas that Sensis has identified which would support this growth further.

Increasing confidence in online auction sites

(b) A number of recent court cases in Europe and the United States of America have illustrated the risk for providers of such services of being held liable for the illegal conduct of their customers, such as the offering for sale of counterfeit goods.

The eBay cases

eBay, an online auction and retail site similar to Trading Post, has recently been subject to a number of international actions brought by well-established luxury brand owners, including Louis Vuitton, Tiffany & Co and Rolex. International courts have come to differing conclusions about the liability of online service providers such as eBay. Naturally, the decisions have depended heavily on the jurisdiction's applicable law.

US and Belgian courts have recently rejected eBay's liability for the sale of counterfeit goods. The Belgian decision emphasised the passive role played by eBay as a mere host of online services, whereas the US decision focused on eBay's lack of specific knowledge of infringing conduct by sellers.

However, French and German courts have held eBay has been held liable for the sale of counterfeit goods:

(a) in France, on the basis of a negligence-style tort; and

(b) in Germany, on the basis of being a "contributor" to or "intermediary" in trade mark infringement.

(c) In order to clarify the position of operators and users of online auction sites in Australia, Sensis would welcome the introduction of a safe harbour scheme to protect operators of online auction sites from liability in respect of counterfeit or pirated goods similar to the existing *Copyright Act 1968* (Cth) safe harbours which give Internet Service Providers a safe harbour from copyright infringement.

(d) Operators of online sites such as Trading Post® online are mere conduits providing a service to customers in a similar way that internet service providers supply the internet to their customers. Currently it is not clear whether online retailers and auction sites are obliged to monitor their customers or pre-approve all goods offered. The introduction of a safe harbour scheme to protect this type of online service provider would enable online retailers, many of whom are SMEs, to operate with more confidence and certainty. Certainty in such a regime would also bolster consumer confidence in transacting online.

(e) Conditions for entry into such a safe harbour could include measures designed to protect rights holders such as a take down requirement for website owners when notified of counterfeit or pirated goods offered for sale. This would allow rights owners to operate within a pre-agreed framework when seeking to enforce their rights.

Enhancing Offline support services

(f) Other barriers to the successful development of online retail in Australia are the costs of distributing goods to customers and the average delivery times for goods, which can be longer and more variable than consumers expect. Large commercial providers in other jurisdictions have extensive "off the shelf" logistics integration packages (ie. Fed-Ex,

UPS etc) to many different sizes of merchant, but in Australia these solutions (Aus Post, Toll etc) tend to be targeted at larger players only and are expensive for SMEs to integrate into their business models.

2.2 What more can industry and other stakeholders do to address concerns about consumer privacy and online safety?

(a) Sensis submits that the Commonwealth Government should introduce a prohibition on the publication of a reverse search residential number directory, in print or electronic form. Our reasons are set out below.

(b) The rise of the Internet has vastly transformed the distribution and enjoyment of traditional printed information. For example, all major Australian and international newspaper publishers now also command an extensive online presence, enabling readers to enjoy up-to-the-minute news content on their own terms. In Sensis' own experience, the making available of electronic versions of Sensis' traditional directory products, such as *Yellow*TM and *White Pages*[®], via the Internet has improved the way that Australians access business and community services and connect with each other.

(c) However, despite best efforts by many service providers in adopting the latest available digital technology to prevent the unauthorised collection and manipulation of online digital information, there is a real consumer privacy risk associated with emerging technologies and techniques that enable the scouring of personal information on the Internet - particularly from online directory services such as the *White Pages*[®] directory - for the publication of reverse search directories that include data about residential consumers.

(d) A reverse search directory allows users to search by a telephone number to ascertain the name and address of the subscriber for the relevant telephone service. Traditional telephone directory services only allow users to ascertain the telephone number or address of a residential listing by searching for their surname and initial (in the case of *White Pages*[®]). Reverse search directories which allow an individual's name and address to be derived from his/her telephone number can raise clear consumer privacy and surveillance concerns. Such directories allow residential customers to be identified and contacted for a variety of purposes, including for marketing purposes, which is often seen by them as an invasion of their privacy.

(e) Sensis has experience of numerous third parties who attempt to scrape the online version of Sensis' *White Pages*[®] directory for purposes which we believe include the publication of residential reverse search directories. In the recent *For Your Information: Australian Privacy Law and Practice* Report, the Australian Law Reform Commission (ALRC) noted that the Australian Communications and Media Authority (ACMA) routinely receives complaints from the community about the existence of reverse search directories.¹

(f) The existing Australian regulatory framework provides limited protections from reverse search directories which enable the reverse search of residential telephone

¹ Australian Law Reform Commission, *Report 109 - For Your Information: Australian Privacy Law and Practice* (May 2008), Volume 3, para 72.223.

numbers. The only relevant provision of Australian law in this respect is s 285(1A) of the *Telecommunications Act 1997* (Cth), which restricts the use or disclosure of customer data derived from Integrated Public Number Database (IPND) to several limited authorised purposes,² which expressly exclude the publication of a reverse search directory.

(g) ACMA has submitted to the ALRC that ACMA is currently unable to take action to shut down a reverse search directory where the data comes from a source other than the IPND, or if it cannot establish that IPND customer data is the source used.³

(h) Accordingly, in light of the consumer privacy concerns set out above, Sensis submits that the Commonwealth Government should prohibit the publication of a reverse search public number directory, in print or electronic form, which enables the reverse search of residential telephone numbers. Sensis does not consider that there is any need to extend the prohibition to classified services directories.

2.3 What more can be done to increase trust and confidence in online transactions?

Industry Cooperation

(a) In Sensis' experience, a significant challenge facing sites such as Trading Post® includes the successful delivery of an enhanced 'safe browsing' message to consumers and the establishment of common and efficient processes for managing and dealing with frauds or scams. While consumers have received much information about safe browsing and ecommerce techniques, the evidence suggests that they continue to fall prey to familiar scams.

(b) Sensis also notes that over the last 10 years the major participants in active user education and the promotion of 'safe browsing' habits have been financial services firms, who represented a key point of concern about consumer privacy, the primary target of fraudulent activity and the largest single point of risk around real financial losses.

(c) The gradual increase in consumer awareness, and a steady improvement in fraud detection processes by the financial services firms themselves has seen the increasing focus of both perpetrators and prevention activities shift towards other areas of the online economy. In parallel an emerging generation of younger online users are showing substantially lower levels of concern about sharing their personal and financial details with a wide online audience.

(d) Sensis considers that there are opportunities to streamline case handling and investigation processes by industry players and law enforcement agencies, in some cases with government support and promotion. For example, the financial services industry has

² They include the provision of directory assistance services, the maintenance of a public number directory, dealing with matters raised by a call to an emergency service number, and the conduct of certain authorised research activities.

³ Australian Communications and Media Authority, *Submission PR 268, 26 March 2007*, as cited in footnote 208 of Australian Law Reform Commission, *Report 109 - For Your Information: Australian Privacy Law and Practice* (May 2008), Volume 3, para 72.223.

harmonised processes to pool fraud outcome data and ensure efficient passage of information (with suitable protections for personal information). There are numerous opportunities to extend this approach to other industries.

(e) Sensis submits that the Government should also develop and publicise services such as the ACCC's Scamwatch website, to provide Australian consumers with an authoritative resource where they can gain information about online security issues. It could also involve other agencies such as ACMA in establishing guidelines for consumers transacting online. Sensis believes this will help raise consumer confidence, address issues related to privacy and safety, and support the development of the digital economy in Australia.

3 ENSURING AUSTRALIA'S REGULATORY FRAMEWORK ENABLES THE DIGITAL ECONOMY

3.1 Should the existing Copyright safe harbour scheme for carriage service providers be broadened?

(a) Sensis supports the proposal to widen the existing Copyright safe harbour scheme to include websites such as social networking sites and user generated content sites, and, as set out in section 2.1 above, online auction sites such as Trading Post.

(b) The safe harbour scheme was introduced as a result of Australia entering into the Australia-USA Free Trade Agreement in 2004 and led to the amendment of the *Copyright Act* to include a safe harbour regime⁴ limiting the liability of 'Carriage Service Providers' (as defined in section 87 of the *Telecommunications Act 1997*), when carrying out certain proscribed activities. These are:

- Transmitting (Category A)
- Caching (Category B)
- Hosting (Category C)
- Providing a link to material (Category D)⁵

(c) The effect of the safe harbours is that ISPs have limited liability for damages for copyright infringement arising out of the relevant proscribed activities. However, they can still be subject to Australian Court orders (for example, an injunction to stop providing services to a person or requiring them to terminate an end user's account).

(d) An internet content platform (such as YouTube, MySpace or Facebook) hosts content created and uploaded by users of the service (such as photographs, music or video files). Site users may also elect to use the site facilities to exchange information by way of email-like messages, post links to their favourite web content, or forward content to other users. Such content platforms are now play a key role in the global digital economy. For example, Sensis has embraced User Generated Content by allowing advertisers to upload their own marketing videos to the YellowTM website, and by incorporating such content on the Citysearch® website.

(e) Although internet content platforms host, cache or transmit content, the safe harbour scheme does not currently apply to them under Australian law. Without these protections, Australian online service providers are unwilling to risk incorporating innovative user generated content into their online offerings. This is because there is a risk that user generated content may include copyright material for example in background music or audio visual footage.

⁴ Set out in *Division 2AA of Part V of the Copyright Act*.

⁵ Section 116AC to section 116AF of the *Copyright Act*.

(f) Extending the existing safe harbour scheme to all providers of online services would benefit both copyright owners and online service providers. It would provide copyright owners with a simple and effective means to address alleged infringements of their rights, provide consumers with a counter-notice regime, and allow internet content platforms to experiment, innovate and provide cutting edge social network platforms for Australians.

(g) Without these protections, Australian online content platforms will not be able to offer the same type of offerings as those developed in the United States where all content providers are subject to the United States take down regime and fall within the safe harbour protections.

(h) We consider that this amendment is essential to allow Australian online business to be competitive in the global digital economy and is appropriate given that the Australian safe harbour scheme was founded on that set out in the *Digital Millennium Copyright Act* 1998.