Toothless Tiger, Sleeping Dragon: Implied Freedoms, Internet Filters and the Growing Culture of Internet Censorship in Australia.

J. Duffy*

The internet by its very nature challenges an individual's notions of propriety, moral acuity and social correctness. A tension will always exist between the censorship of obscene and sensitive information and the freedom to publish and/or access such information. Freedom of expression and communication on the internet is not a static concept: 'Its continual regeneration is the product of particular combinations of political, legal, cultural and philosophical conditions'.[1]

1 Introduction

The recurring theme present in 'internet content regulation' literature is the difficulty of regulating the internet. Broadly expressed, concerns have been raised about the political motivations of government in tackling internet content regulation, the technological difficulties (or impossibilities) of regulating internet content and the potential 'chilling effects' that such regulation will have on freedom of speech/communication.[2]

This paper will deal briefly with the political and technical aspects of internet content regulation, with a focus on internet regulation and its impact upon the freedom of communication. Special focus will be placed upon the Australian federal government's present plan to implement a mandatory internet filter in Australia. This paper will argue that Australian law does not possess a developed legal framework to deal with violations of freedom of communication, and there is danger in implementing mandatory internet content regulation in an environment that does not adequately protect the freedom of speech and communication.

This paper will further argue that if the Australian federal government is purporting to act as a moral compass in terms of internet content regulation, protections and balances must exist to ensure that web censorship does not spiral out of control. This paper will suggest that the government's proposed internet filter (whether it proceeds or not) has highlighted an endemic flaw in the Australian legal system. If the government wishes to censor the internet in Australia, there is little that can be done to stop it within the current Australian legal framework.

2 Setting the Scene

2.1 Internet Content Regulation in Australia

* Associate Lecturer, Queensland University of Technology, 2 George Street Brisbane, james.duffy@qut.edu.au.

[1] Lawrence McNamara, 'Free Speech' in Des Butler and Sharon Rodrick, *Australian Media Law* (3rd ed, Sydney: Lawbook Co. 2007) 24.

[2] See for example Carolyn Penfold, 'The Content Control that Wasn't: Two Years of the Online Services Amendment.' (UK) (2002) 11(2) *Information and Communications Technology Law* 141.

On 1 January 2000, Schedule 5 of the *Broadcasting Services Act 1992* (Cth)[3] came into force. The effect of this schedule is to prohibit Internet Content Hosts ('ICHs')[4] and Internet Service Providers ('ISPs')[5] from providing end-user access to 'prohibited content'.

'Prohibited content' means:[6]

- RC (Refused Classification, ie child sexual abuse imagery, bestiality, sexual violence, detailed instruction in crime); or
- X18+ (non violent sexually explicit material depicting consenting adults); or
- R18+ ('unsuitable for a minor [person under 18 years] to see'), and the content is not subject to an ACMA approved adult verification system; or
- MA 15+**,** where the content does not consist of text and/or one or more still visual images and the content is provided by a commercial service, or the content is provided by means of a mobile premium service and is not subject to an ACMA approved adult verification system.

ISPs and ICHs are not required to monitor internet content. Instead, they must respond to 'take down' notices issued by the Australian Communications and Media Authority ('ACMA'), requiring them to delete 'prohibited content' from their servers.[7] The power of ACMA to issue 'take down' notices is dependent on whether the content is hosted in Australia or whether it is hosted overseas. Overseas hosted content is not subject to a 'take down' notice.

After nearly ten years in operation, reaction to Schedule 5 of the *Broadcasting Services Act 1992* (Cth) has been mixed. Proponents of the Act have welcomed the moral standpoint that permeates through the legislation.[8] They argue that the *Broadcasting Services Act 1992* (Cth) represents an attempt to confront the advancement of the internet head on, to ensure 'that valued principles are rethought in light of the technology'.[9] In essence, internet content should reflect society's values, rather than the values of society being informed, and even dictated to, by internet content.[10] It has even been suggested that 'the technical effectiveness of the legislation is therefore somewhat extraneous to any assessment of its value.'[11] Whilst not entirely practical, statements like this acknowledge that legislation can represent powerful moral ideals – certain internet content is simply unsuitable for consumption and the government/legislature should attempt to do something (rather than nothing) to address its prevalence.

[3] As implemented by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth).
[4] According to the *Broadcasting Services Act 1992* (Cth), 'Internet Content Host' means a person who hosts internet content in Australia. For example, if you want to create a website and put it onto the World Wide Web, you will often have to pay an internet content host to 'host' that content.
[5] An ISP is a business that provides an individual with access to the internet. Some methods of providing this service are through dial-up telephone, cable, or high-speed DSL circuit. Examples include Telstra, Optus and 3.
[6] *Broadcasting Services Act 1992* (Cth) Sch 7 Cl 20.
[7] Electronic Frontiers Australia, *Labor's Mandatory ISP Internet Blocking Plan* (2006) http://www.efa.org.au/Issues/Censor/cens1.html at 20 March 2009.
[8] See for example, Melinda Jones, 'Free Speech and the "Village Idiot"' (2000) *University of New South Wales Law Journal Forum, (Internet Content Control)* 43.
[9] Jones, above n 8, 43.
[10] Jones, above n 8, 43.
[11] Elizabeth Handsley and Barbara Biggins, 'The Sheriff Rides into Town: A Day of Rejoicing for Innocent Westerners' (2000) 6(1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 35, 36.

Critics of the legislation have suggested that Schedule 5 of the *Broadcasting Services Act 1992* (Cth) is unable to achieve the 'internet content regulation' aims that the Act espouses.[12] The objects of the Act (relevant to internet content) are:

- to ensure designated content/hosting service providers respect community standards in relation to content;[13] and
- to provide a means for addressing complaints about certain internet content;[14] and
- to restrict access to certain internet content that is likely to cause offence to a reasonable adult;[15] and
- to protect children from exposure to internet content that is unsuitable for children.[16]

Due to the global nature and impossibly large scope of the internet, Australia has been labelled the 'idiot of the global village'[17] for even attempting to regulate online content. There is no such thing as 'an Australian internet' – the World Wide Web is not a misnomer and the best legislative attempts to regulate internet content will continue to be frustrated by jurisdictional issues.

The jurisdictional issues raised by the internet are evident in the way the *Broadcasting Services Act 1992* (Cth) deals with overseas hosted content. If 'prohibited content' is hosted overseas, ACMA will notify ISPs who must take action consistent with industry codes of practice.[18] This is an example of the co-regulatory nature of Schedule 5 of the *Broadcasting Services Act 1992* (Cth), which highlights, 'industry self-regulation within a legislated framework'.[19] There are currently several internet codes of practice (developed by the Internet Industry Association (IIA) and registered by the ACMA) that deal with internet content unsuitable for children or potentially offensive to reasonable adults.[20] The second IIA code for ISPs 'provides that where the ACMA has notified ISPs of prohibited content hosted overseas, ISPs must provide to each of its [sic] subscribers an approved filter software service'.[21] Prohibited overseas content is not therefore blocked or subject to a 'take down notice'. Peter Coroneos describes this process as one of user empowerment, where

> empowerment assumes the right to use the internet in an unfiltered form, both for performance reasons and for reasons of choice. However, in accordance with the spirit of the legislation, adults who find certain content offensive and parents who are worried about what their children might view will now have the means of control.[22]

[12] See for example, Peter Chen, 'Pornography, Protection, Prevarication: The Politics of Internet Censorship,' (2000) 6(1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 18.
[13] *Broadcasting Services Act 1992* (Cth) s 3(1)(ha).
[14] *Broadcasting Services Act 1992* (Cth) s 3(1)(k).
[15] *Broadcasting Services Act 1992* (Cth) s 3(1)(l).
[16] *Broadcasting Services Act 1992* (Cth) s 3(1)(m).
[17] Nadine Strossen, President of the American Civil Liberties Union (ACLU), in "Australia Urged to Repeal Law," *Sydney Morning Herald* (24 August 1999) 24.
[18] *Broadcasting Services Act 1992* (Cth) Schedule 5, cl 40.
[19] Senator the Hon Richard Alston, 'The Government's Regulatory Framework for Internet Content' (2000) 6 (1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 4, 4.
[20] John Corker, Stephen Nugent and Jon Porter, 'Regulating Internet Content: A Co-regulatory Approach (2000) 6(1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 7, 8.
[21] Niranjan Arasaratnam, 'Brave New (Online) World' (2000) 6 (1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 10, 11.
[22] Peter Coroneos, 'Internet Content Control in Australia: Attempting the Impossible?' (2000) 6 (1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 26, 28.

Despite the obligation of ISPs to provide filtering software that combats prohibited overseas-hosted content, this content still exists. To be perfectly clear, webpages containing pornography, hosted by American companies, still exist and are accessible from any Australian personal computer ('PC'). This is why critics have suggested that 'while the legislation is jurisdictionally benign, a price may have been paid for this outcome in terms of the effectiveness of the legislation'.[23] The internet simply does not recognise national boundaries, leading Philip Argy to conclude:[24]

> The suggestion that the legislation will successfully prevent objectionable material being available to Australian citizens is a fantasy that should not be promulgated. People will always be able to dial overseas to access material that is unavailable locally.

2.1 Freedom of Communication under the Australian Constitution

It was not until 1992 that the High Court of Australia formally recognised that the Constitution protected freedom of communication in Australia. The decisions in *Nationwide News Pty Ltd v Wills*[25] and *Australian Capital Television Pty Ltd v Commonwealth*[26] both found that the Constitution contained an *implied* freedom of communication in matters of politics and government. The implied right of communication under the Constitution was interpreted both widely and narrowly by different judges. The existence of this constitutional protection raised questions as to 'its rationale, scope and boundaries, and its potential for expansion in the future, both within political speech and outside that sphere'.[27]

The 1997 High Court decision of *Lange v Australian Broadcasting Corporation*[28] represented an attempt to settle the scope of the implied freedom of communication in the Constitution. The case involved the former Prime Minister of New Zealand bringing an action in defamation against the Australian Broadcasting Corporation. The High Court delivered a unanimous verdict that re-evaluated its previous decision in *Theophanous v Herald & Weekly Times Ltd.*[29] The Court stated that the implied freedom of communication does not create a constitutional defence to a defamation action (where that defamation concerned political or government matters).[30]

The Court in *Lange* appeared to favour the reasoning of Brennan J in *Theophanous* when his Honour stated (in dissent):

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[23] Richard Garnett, 'Regulating Foreign-Based Internet Content: A Jurisdictional Perspective' (2000) 6 (1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 21, 22.
[24] Philip N Argy, 'Internet Content Regulation: An Australian Computer Society Perspective' (2000) 6(1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 38, 39.
[25] (1992) 177 CLR 1.
[26] (1992) 177 CLR 106.
[27] Lawbook Company, *Laws of Australia*, vol 21 (at 20 March 2009) 21 Human Rights, '21.4 Civil and Political Rights' at [74].
[28] (1997) 189 CLR 520.
[29] (1994) 182 CLR 104.
[30] The decision in *Theophanous* had suggested that the implied freedom 'applies to the actions of private individuals and not merely against government, and that it will operate to limit common law principles where necessary, and not merely as a bar to legislative action'. See Lawbook Company, *Laws of Australia*, vol 21 (at 20 March 2009) 21 Human Rights, '21.4 Civil and Political Rights' at [74].

> It is one thing to be entitled, in common with others, to act freely in an area to which a law cannot or does not apply; it is another to possess a personal right or a personal immunity from the application of a general law…The freedom which flows from the implied limitation on power…is not a personal freedom. It is not a sanctuary with defined borders from which the operation of the general law is excluded…the implication limits legislative and executive power.[31]

The implications flowing from the decision in *Lange* are pronounced. Firstly, the High Court unanimously recognized the implied freedom of communication under the Constitution. This is not something the High Court will easily be able to retract.

Secondly, the implied freedom does not confer personal rights upon an individual. The High Court approved the reasoning of Brennan J in *Cunliffe v Commonwealth*[32] where his Honour stated, 'the [constitutional] implication is negative: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control'.[33] This was restated in *Lange* when the Court concluded that '[t]he provisions of the Constitution that protect freedom of communication on political or government matters do not confer personal rights on individuals, but preclude the curtailment of the protected freedom by the exercise of legislative or executive power'.[34]

Thirdly, the Court confirmed the basis on which the implied freedom of communication is derived:

> Freedom of communication on matters of government and politics is an indispensible incident of that system of representative government which the Constitution creates…ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.[35]

Fourthly, even if legislation is deemed to infringe upon the implied right of freedom of communication, it will not be ruled unconstitutional if 'the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the law is reasonably appropriate and adapted to achieving a legitimate end'.[36] The cases of *Levy v Victoria*[37] and *Brown & Ors v Members of the Classification Review Board of the Office of Film and Literature Classification*[38] both discussed the application of this test. In *Levy*, Victorian regulation[39] prevented an animal rights protester from entering a duck hunting area, to protest against the cruelty of duck

[31] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 521, as quoted in G Winterton et al, *Australian Federal Constitutional Law* (2nd ed, Sydney: Lawbook Co. 2007).
[32] (1994) 182 CLR 272.
[33] Above n 32, 326.
[34] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 521.
[35] Above n 34, 559.
[36] Above n 34, 562.
[37] (1997) 189 CLR 579.
[38] (1998) 82 FCR 225. It was decided in this case that material instructing in matters of crime (ie shoplifting) was not political discussion and therefore not covered by the implied freedom. Even where material instructing in matters of crime could be classed as political communication, the Court held that laws restricting such communication would be valid as appropriate and adapted to achieving a legitimate end – the prohibition of crime.
[39] *Wildlife (Game)(Hunting Season) Regulations 1994* (Vic).

shooting. The High Court ruled that such a restriction did impinge upon the freedom of political communication, but the restriction was reasonably appropriate and adapted to achieving a legitimate end – keeping people safe in an area where guns were being fired. The case of *Levy* is also significant in finding that the freedom of communication is not limited to verbal communication. 'Signs, symbols, gestures and images are perceived by all and used by many to communicate information, ideas and opinions. Indeed, in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it.'[40] In the context of internet content regulation, such a statement would presumably capture webpages and other multimedia that can be accessed via the internet.

By combining to give a unanimous judgment in *Lange*, the High Court has attempted to settle the source from which an implied freedom of communication is drawn. The Court has also attempted to outline the scope of the implied freedom. Due to the narrow scope that has been given to the implied freedom of communication, it would be difficult to argue that the mandatory blacklisting of most internet websites is unconstitutional. In theory, a mandatory filter could block any website that does not involve communication regarding matters of politics and government.

3 Australia and a Mandatory Internet Filter

3.1 Introduction to the Mandatory Internet Filter

> Opponents don't dispute the worth of this goal, but take issue with the expense, side-effects and ineffectiveness of the scheme. Those criticising the filter include ISPs concerned about the technical problems and costs, civil-libertarians worried about the process of censoring internet content, and analysts concerned at the expense and ill-defined policy goals.[41]

In the lead up to the November 2007 federal election, the then opposition government (Rudd Labor) announced a policy that would require all ISPs to implement a mandatory internet filter system. After Labor was successful in the federal election, it was confirmed by the new Minister for Telecommunications, Senator Stephen Conroy, that anyone wanting uncensored access to the internet would have to opt out of the government's internet filtering scheme.[42] This statement provided brief reassurance to civil libertarians – whilst it was mandatory for ISPs to implement a filtering system, this system would not be mandatorily imposed upon all Australians. The Senator, in the same announcement, stated that, 'Labor makes no apologies to those that argue that any regulation of the internet is like going down the Chinese road...If people equate freedom of speech with watching child pornography, then the Rudd-Labor Government is going to disagree'.[43] Unwittingly, he had attracted the ire (and close attention) of freedom of speech advocates and civil libertarians alike.

In October 2008, there appeared to be a shift in government policy, whereby Australians would be unable to opt-out of the government's internet content filtering scheme. A two-

[40] *Levy v Victoria* (1997) 189 CLR 579 at 622-623.
[41] Electronic Frontiers Australia, 'EFA Fact Sheet: 2009: Filtering Overview (Press Release, 2009) , 1.
[42] ABC News, *Conroy announces mandatory internet filters to protect children* (2007). <http://www.abc.net.au/news/stories/2007/12/31/2129471.htm> at 30 April 2009.
[43] Above n 42.

tiered filtering policy was introduced, where filtering of 'prohibited content' (tier one) was mandatory and not opt-out and a clean feed filter (tier two), designed to keep the internet safe for *children*, would be opt-out.[44] For the first time in Australia, a policy had been announced that would mandatorily restrict the right of every Australian to access certain websites on the World Wide Web.

Fast forward to 2009 and feasibility studies are being conducted as to the potential effectiveness of a mandatory internet filter system in Australia.[45] This paper argues that mandatory internet content filtering in Australia is a mistake. The evidence of a growing culture of internet content regulation in Australia has manifested itself in a draconian attempt to control access to web content. Before the introduction of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) on 1 January 2000, internet content regulation in Australia was virtually non-existent. There are highly persuasive political, technical and ideological reasons that militate against the implementation of mandatory internet content regulation. When viewed together, these criticisms present a complimentary, cogent rejection of *government* intervention in internet content control.

3.2 The Politics of a Mandatory Internet Filter

> Politicians assume that parents are ignorant about the Internet because politicians are ignorant. Yet parents came to grips with it years ago; the last remaining social group in our country who expresses difficulty with the Internet appears to be baby-boomer federal politicians, whose child-rearing days are mostly well behind them.[46]

The November 2007 promise of the Labor government to implement a mandatory internet filter in Australia was a public, vote-gathering, difficult-to-retract promise. It was an election promise. From a political point of view, the Rudd Labor government must either push ahead with the mandatory filter and sway the court of public opinion, or break the election promise and have a good reason for doing so.

Due to the amount of money that the Labor government has injected into the ISP filter trials, the government would lose much face if it abandoned its mandatory filter plan on matters of principle alone. The ISP filter trials however, do offer the government a 'politically digestible' out. If the results of these trials suggest that content blocking is not technically feasible, or that internet speeds would drastically decline as a result of mandatory filtering, the government could sensibly back away from its promise. Despite the best intentions of government to provide a stimulating, yet safe, internet environment, the technology does not currently exist to make mandatory internet filtering a feasible solution.

Issues of technology aside, in February 2009 the Shadow Communications Minister Nick Minchin obtained independent legal advice, confirming that the implementation of a mandatory internet filter would require legislative action of some sort.[47] Such legislation

[44] Irene Graham, *AU Gov't Mandatory ISP Filtering / Censorship Plan*, Libertus.net <http://libertus.net/> at 18 April 2009.
[45] Department of Broadband, Communications and the Digital Economy, *Internet Service Provider (ISP) Filtering 'Live' Pilot* <http://www.dbcde.gov.au> at 20 May 2009.
[46] Stilgherrian, *Conroy thoroughly tangled in his own rabbit-proof firewall* (2008) <http://stilgherrian.com/politics/conroy-thoroughly-tangled-in-his-own-rabbit-proof-firewall/> at May 30 2009.
[47] Moses, Asher, Web censorship plan heads towards a dead end (2009) The Sydney Morning Herald <http://www.smh.com.au/news/technology/biztech> at 3 April 2009.

could currently pass through the House of Representatives, but it is unlikely that it would be passed by the Senate. The Labor party holds 32 senate seats, the Liberal National Coalition 37 seats, the Greens 5 seats, Family First 1 seat and Senator Nick Xenophon sits as an Independent. The Coalition, the Greens and Senator Xenophon have stated their opposition to mandatory internet filtering in Australia.[48]

3.3 The Technical Aspect of a Mandatory Internet Filter

The implementation of a mandatory internet filter in Australia has been justified by the government as a means to keep the internet safe for children. Labor's plan for Cyber-safety,[49] 'will prevent Australian children from accessing any content that has been identified as prohibited by ACMA, including sites such as those containing child pornography and X-rated material'.[50] A mandatory internet filter cannot possibly achieve this goal.

There are a number of different filtering techniques that can be used to block access to internet content. The Commonwealth Department of Broadband, Communications and the Digital Economy website states that:

> The Government's election commitment was that filtering would block content using a blacklist of prohibited sites maintained by the Australian Communications and Media Authority (ACMA) in accordance with legislation. The ACMA blacklist is a list of internet web sites, predominantly comprising images of the sexual abuse of children, which are defined as 'prohibited' under Australian legislation which has been in place since 2000.[51]

This seems to suggest that an Australian internet filter would mandatorily block access to all of the websites included on the ACMA blacklist. This method of filtering is known as URL (Uniform Resource Locator) filtering. URL filtering is a type of index based filtering which involves the process of:

> permitting or blocking access to webpages on the basis of their inclusion on a list (or index) of web resources. Such Filtering can be based on 'whitelists' (exclusively permitting specific content while blocking all other content) or 'blacklists' (exclusively denying specific content while permitting all other content).[52]

A URL is the address of a website on the World Wide Web. The URL for the Google homepage is http://www.google.com.au/. Therefore, mandatory filtering would require the ACMA to firstly compile a list of websites that contained 'prohibited content' and then pass that list on to ISPs. ISPs are then charged with the task of ensuring that no Australian citizen can access a website with a URL that has been blacklisted.

A simple numbers game will highlight the disingenuous nature of the government's claim that mandatory internet filtering will *effectively* prevent access to material that would offend

[48] Moses, above n 47.
[49] Stephen Conroy, 'Labor's Plan for Cyber-safety' (Press Release, 2007).
[50] Conroy, above n 49, 5.
[51] Department of Broadband, Communications and the Digital Economy, *Internet Service Provider (ISP) filtering* <http://www.dbcde.gov.au> at 20 May 2009.
[52] Australian Communications and Media Authority, *Closed Environment Testing of ISP-Level Internet Content Filtering*, Report to the Minister for Broadband, Communications and the Digital Economy (June 2008) 13.

children or reasonably minded adults. As at July 2008, Google reported that there was over one trillion (1,000,000,000,000) unique URL's on the web.[53] If one assumes that one percent of these URLs contain 'prohibited content' as defined by the *Broadcasting Services Act 1992* (Cth),[54] this would mean that 10 billion (10,000,000,000) URLs contain prohibited content. As at 30 April 2009, there were 977 URLs on the ACMA blacklist.[55]

The problem with blacklists and URL filtering is immediately obvious – 'unrated sites are presumed to be innocent and access to all sites is therefore allowed unless they are specifically excluded'.[56] A complaints-driven ACMA blacklist simply cannot keep pace with the exponential growth of new webpages on the World Wide Web. URL filtering blocks access to a particular URL and it does not prevent content being relocated and reproduced on a different website. Hypothetically, if the URL www.pornography.com was added to the ACMA blacklist, the creator of this website could simply recreate the content on www.notpornography.com and elude the URL filter.

One of the highly publicised side effects of a mandatory internet filter is a reduction in internet speed. A June 2008 report to the Minister for Broadband, Communications and the Digital Economy entitled *Closed Environment Testing of ISP-Level Internet Content Filtering*[57]required the testing of filtering products 'to distinguish between illegal, inappropriate and innocuous content'.[58] Of the six filtering products tested, two filters caused internet network performance to drop by more than 75 percent. Three filters caused network performance to drop by 22-30 percent. One filter saw network performance drop by only two percent. This filter however, was one of the least accurate at identifying illegal and inappropriate sites.[59] The results of these tests indicate that at present, the *accurate* filtering of web content cannot occur without a significant reduction in internet speed.

The strongest government argument in favour of a mandatory internet filter suggests that mandatory filtering will be effective in preventing access to child pornography. The powerful rhetoric of the government battle against paedophilia and child sex offending can be strongly persuasive. Unfortunately, URL filtering based on a 'blacklist' of websites does not constitute a technically effective way to fight online child pornography. To understand the flaws in the government's plan, some technical speak is required.

Whilst we use the terms 'internet' and 'World Wide Web' interchangeably, they actually mean two different things. The internet is a worldwide network of interconnected computers. It is the *infrastructure* that allows one computer to communicate with another computer. 'Information that travels over the Internet does so via a variety of languages known as

[53] Jesse Alpert & Nissan Hajaj, *We Knew the Web was Big* (2008) The Official Google Blog <http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html> at 2 June 2009.
[54] This estimate, whilst not overly reliable, is probably quite cautious. Internet sources have suggested that pornography alone accounts for one percent of all webpages on the World Wide Web: <http://news.cnet.com/8301-10784_3-6135662-7.html>.
[55] Commonwealth, Standing Committee on Environment, Communications and the Arts Legislation Committee (Estimates), Senate, 25 May 2009, ECA 101 (Ms Nerida O'Loughlin).
[56] P Greenfield, P McRea, S Ran, CSIRO, Access Prevention Techniques for Internet Content Filtering, prepared for the National Office of the Information Economy p6, as referred to in Carolyn Penfold, 'The Online Services Amendment, Internet Content Filters, and User Empowerment.' (2000) *National Law Review* 7,15.
[57] Above, n 52.
[58] Above n 52, 11.
[59] Michael Meloni, *Why the Tasmanian Filtering Trial is a Failure* (2008) Somebody Think of the Children <http://www.somebodythinkofthechildren.com/why-the-tasmanian-filtering-trial-is-a-failure/> at 20 May 2009.

protocols.'[60] The World Wide Web is a combination of all of the websites in the world and 'is a way of accessing information over the medium of the Internet'.[61] Websites use HTTP (Hyper Text Transfer Protocol) to transmit data over the internet. The problem with a mandatory internet filter that utilises URL filtering is that it will only block access to content that is transmitted using the HTTP protocol – it will only block access to particular websites.

The majority of child pornography is not accessed through websites. It is exchanged through emails, file transferring platforms (for file downloading) and peer-to-peer networks (for file trading).[62] Whilst emailing, file downloading and file sharing is all conducted over the internet, each involves the use of a different protocol. The Federal government's proposed internet filter cannot effectively block prohibited content transferred by email, file downloading or file sharing. The *Closed Environment Testing of ISP-Level Internet Content Filtering* report concludes that:

> Despite the general nature of advances in ISP-level filtering technology ...most filters are not presently able to identify illegal content and content that may be regarded as inappropriate that is carried via the majority of non-web protocols.[63]

3.4 A Mandatory Internet Filter and the Freedom of Communication

> While media laws are predicated on a range of public interests – including the importance of privacy, the administration of justice, economic development and security, and moral or community standards – no public interest has the rhetorical, political or legal force of 'freedom of speech'.[64]

Australian law does not possess a developed legal framework to deal with violations of freedom of communication. Australia does not have a bill of rights that protects the freedom of communication. Australia does not have an express constitutional provision that protects the freedom of communication. The Australian Constitution *does* contain an implied freedom of communication on matters of politics and government. The High Court decision of *Lange* represented a reasonably narrow and conservative interpretation of the implied freedom of communication – especially in light of previous High Court decisions. It has been argued in this paper that there are strong practical reasons for keeping the internet free from unnecessary content regulation. It is however acknowledged that some online-regulation must occur to protect the rights of *all* internet users. When this regulation does occur, it should not be driven by the government and it should not take the form of a mandatory internet filter.

There is danger in mandatory internet content regulation in an environment that does not adequately protect the freedom of speech and communication. When the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) came into force as Schedule 5 of the *Broadcasting Services Act 1992* (Cth), there was an outcry as to the potential freedom of

[60] Internet.com, *The Difference Between the Internet and the World Wide Web* (2008) <http://www.webopedia.com/didyouknow/internet/2002/web_vs_internet.asp> at 3 June 2009.
[61] Above n 60.
[62] Irene Graham, *AU Gov't Mandatory ISP Filtering / Censorship Plan - Would ISP-level blocking prevent access to child pornography?*, Libertus.net <http://libertus.net/> at 18 April 2009.
[63] Above n 52, 7.
[64] McNamara, Above n 1, 3.

communication repercussions of the Act. In 2000, it was argued that net censorship would stifle internet development, would introduce political censorship through the implementation of politicised filtering software and would lead to over censorship or collateral damage of information exchange.[65] Whilst the *Broadcasting Services Act 1992* (Cth) (as it deals with internet content) has proven in many ways to be a 'toothless tiger', in retrospect it has established a dangerous legacy. This legacy lies in the path it has created for more intrusionist, government-led internet content regulation. If the *Broadcasting Services Act 1992* (Cth) is a 'toothless tiger', the mandatory internet filter is a 'sleeping dragon'. The *Broadcasting Services Act 1992* (Cth) has created a culture of internet censorship and the potential adoption of a mandatory internet filter is a nasty example of what can be spawned by this culture.

At present, the federal government has identified two levels (or tiers) of internet filtering in Australia. As mentioned above, filtering of 'prohibited content' (tier one) would be mandatory and Australian citizens cannot choose to opt in, or opt out of this service. The second level of filtering (tier two) has been referred to as the 'clean feed' filter which would be designed to keep the internet safe for children. The filter would shield all Australian citizens from online content deemed inappropriate for a child to access. This clean feed filter would automatically apply to all Australian internet users; however there is an ability to opt-out of this level of filtering.

From a freedom of communication perspective, the opt-out nature of the clean feed filter does not represent a blanket denial of communication rights. What is concerning, is that the default level of internet censorship in Australia may become based on content that is appropriate for a child. In order to deny a child's access to potentially harmful internet content, a clean feed filter must suppress communication and content that every Australian adult has a right to receive and view. The Federal government has a strong interest (and certainly should have a role to play) in protecting children from harmful online content. However, 'regardless of the strength of the government's interest in protecting children, the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox'.[66]

Any form of internet filtering that has the ability to impact upon the implied freedom of communication in our constitution, must be able to achieve its desired aims and must be considered in light of other less restrictive alternatives. Creating a safe environment for children to surf the web is a laudable objective, but a default filtering position based upon age- appropriate online content is not a sensible solution. This paper suggests that if a clean feed ever becomes technically feasible, it should be a service that Australians can opt-in to, rather than opt-out of. It is also suggested that individual PC based filtering software can achieve all of the goals a nationwide clean feed filter is designed to achieve.

The demographics of Australian households are diverse, and a one-stop clean feed filter does not acknowledge this diversity. The online content that might be appropriate for a 17 year old to view may be inappropriate for a nine year old. The content that a mature 13 year old can sensibly digest will be different to that of a less mature 13 year old. These examples pre-suppose that an Australian household even contains children. Notions of 'end user

[65] Carolyn Penfold, 'Censorship Legislation – Wrecking the Internet?' (2000) *National Law Review* 5 at [3].
[66] *Reno v American Civil Liberties Union* 117 S Ct 2329 (1997) at 2346.

empowerment'[67] that apparently flow from the co-regulatory nature of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) are given little credence under a mandatory internet filter. Even if a clean feed filter contains an ability to opt-out, end user empowerment assumes the initial right 'to use the internet in an unfiltered form, both for performance reasons and for reasons of choice'.[68] The government's Cyber –Safety policy assumes that the internet 'by default' should be filtered. The fact that the clean feed filter would represent the government's default position (i.e. – this is what you get if you don't opt out) is strong evidence of a growing culture of internet censorship in Australia.

Australia's freedom of communication protections really come under the microscope when compulsory filtering without an opt-out provision is discussed. There is currently some confusion as to the breadth of material that will be mandatorily blocked. Statements made by the Department of Broadband, Communications and the Digital Economy [69] seem to suggest that material classified as 'prohibited content' under the *Broadcasting Services Act* Schedule 7, appearing on the ACMA blacklist, will be mandatorily blocked. The alternative conclusion is that the Labor government's policy is only to compulsorily block content that has been refused classification (RC). In March 2009, a spokesman for Senator Conroy stated that the assumption the federal government was intending to filter the entire ACMA blacklist, and extend its scope, was a myth.[70] Senator Conroy himself has been quoted as saying that the government will only block access to the refused classification category on the blacklist.[71] Whilst a final policy decision on this issue may not be announced until the completion of the live pilot[72] ISP trials, this paper assumes that only refused classification material[73] will be mandatorily blocked.

The federal government walks a dangerous tightrope in attempting to implement a mandatory tier of filtering, when the scope of the implied freedom of political communication remains relatively untested. Would the mandatory blocking of pornography websites impinge upon the implied freedom of communication? Would the mandatory blocking of abortion or euthanasia websites be unconstitutional? These categories of webpages (amongst others) represent the difficult and borderline censorship decisions that internet filtering creates.

A mandatory internet filter could restrict Australian citizens from viewing a range of webpages which are deemed to be inappropriate. This arguably represents a denial of public

[67] Coroneos, above n 22, 28.
[68] Coroneos, above n 22, 28.
[69] Department of Broadband, Communications and the Digital Economy, *Internet Service Provider (ISP) filtering* <http://www.dbcde.gov.au> at 20 May 2009.
[70] Brett Winterford, Optus Remains Conroy's Last Big Filtering Hope (2009) ITnews <http://www.itnews.com.au/News/99567> at 4 June 2009.
[71] Graham, Irene, *AU Gov't Mandatory ISP Filtering / Censorship Plan*, Libertus.net <http://libertus.net/censor/ispfiltering-au-govplan-timeline.html#dbcdepage> at 18 April 2009, referencing *Interview of Senator Stephen Conroy*, Kate O'Toole, Triple J radio's *Hack* programme, 7 Apr 2009.
[72] For further details on this live pilot, see http://www.dbcde.gov.au/all_funding_programs_and_support/cybersafety_plan/internet_service_provider_isp_filtering.
[73] See *National Classification Code 2005* (Cth) s 3(1). RC classification will be given to films that:
(a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
(b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be , a child under 18 (whether the person is engaged in sexual activity or not); or
(c) promote, incite or instruct in matters of crime or violence.

discussion and a weakened ability to question the government's political stance on these issues. Further, although the implied freedom of political communication does not confer personal rights upon an individual, it does preclude the curtailment of the protected freedom by the exercise of legislative or executive power.[74] If the legal advice received from Senator Nick Minchin is correct, the mandatory internet filter must be brought into existence through the exercise of legislative power.

Finally, even if mandatory internet filter legislation is deemed to infringe upon the implied freedom of communication, it would not be ruled unconstitutional if 'the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the law is reasonably appropriate and adapted to achieving a legitimate end'.[75] The purpose of upholding the standards of morality, decency and propriety (generally accepted by reasonable adults) on the internet would be a legitimate object or end of the legislation. Whether mandatory internet filtering is reasonably appropriate and adapted to achieving that legitimate end is questionable. Internet users 'who wish to limit their own exposure to unwanted material have a variety of self help resources'[76] available to them online. It could be strongly argued that the potential harm of somebody accessing a confronting euthanasia or abortion website would be far outweighed by the detrimental effect that mandatory internet filtering would have on the ability to engage in informed debate about contentious social issues.[77]

Whilst analysis of 'fringe' censorship cases is an interesting topic, in the context of a mandatory internet filter, it may not be the most important one. With the implied protection of freedom of communication limited only to matters of politics and government, *in theory* a mandatory filter could lead to some heavy handed internet censorship. Despite the best of government intentions (to fight the online scourge of child sexual abuse, sexual violence, detailed instruction in crime etc), 'once a mechanism exists whereby content can be blocked by Government fiat, it will be tempting to expand the list beyond its original scope'.[78] In Australia, we look at regimes such as China, Burma and Iran and wonder how internet censorship could ever become so intrusive and so pronounced. These are examples of regimes that have implemented mandatory internet filtering in an environment that does not contain adequate freedom of speech and communication protections.

It may well be that comparing Australia's proposed internet filtering plan to regimes such as China, borders on the dramatic. Critics of such a comparison might suggest that heavy internet censorship in Australia is just not a reality. They may be right. Australia has a strong system of representative government, enshrined in our Constitution, and underpinned by notions of parliamentary sovereignty. The reality may be that given the unpopularity of internet content regulation, legislative restraint in this area would mean that over-censorship of the internet in Australia is just not conceivable. The internet is not a new phenomenon – and it has not been overly-censored in this country to date. The scrutiny and criticism that accompanied the enactment of the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) is good evidence that potential intrusions into our freedom of communication are

[74] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 521.
[75] Above n 74, 562.
[76] Kimberley Heitman, 'Vapours and Mirrors' (2000) 6(1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 30, 33.
[77] Electronic Frontiers Australia, *Labor's Mandatory ISP Internet Blocking Plan* (2006) <http://www.efa.org.au/2009/05/05/links_removal_free_speech/#more-503> at 20 March 2009.
[78] Electronic Frontiers Australia, above n 41, 6.

closely analysed. The fact that legislation needed to adopt a mandatory internet filter would not currently pass a Senate vote, is again strong indication that over-censorship of the Web is not a reality.

Despite these persuasive arguments, the risk of over-censorship cannot be discarded. In 1990, internet content regulation in Australia was virtually non-existent. In 2000, Schedule 5 of the *Broadcasting Services Act 1992* (Cth) brought into existence new measures to control 'prohibited' internet content in Australia. In 2009 the federal government is promoting a plan where the default level of internet censorship in Australia is based on content that is appropriate for a child. The 21st century has seen Australia trend towards a culture of internet censorship, with our freedom of speech and communication protections stuck in the 1990's. If we cannot point to the obvious harm in strengthening our legal freedom of speech/communication protections, then surely it is something that must be considered, no matter the likelihood of a mandatory internet filter coming into existence.

4 Freedom of Communication Jurisprudence

Theoretical argument in opposition to internet content regulation falls neatly into an established body of freedom of speech/communication jurisprudence. Whilst the majority of this jurisprudence is critical of executive and legislative attempts to curtail these freedoms, it must be acknowledged that the right to freedom of communication is not absolute - it is a matter of context and degree. Freedom of communication theories that promote democracy and the autonomy of the individual are particularly relevant to internet usage.

4.1 Freedom of Communication and Democracy

Freedom of communication theories that focus on democracy, 'stress the fact that free speech and communication on public and political matters are essential to informed political participation'.[79] The internet is an amazing example of a participatory model of democracy, where online websites, chat rooms, and videos represent a multi-directional flow of information (between individuals and between the government and the people). The internet is different to conventional media (television, radio, newspapers, film) because 'recipients of information are not solely recipients; they can be participants also'.[80] When the government decides to regulate internet content, it is not filtering a one way communication. It is filtering a multi-directional dialogue. 'The highly participatory nature of publishing material to the internet invites a different treatment to that accorded to commercial media, as the material tends to be of the nature of personal expression rather than commercial [content].'[81] Less intrusive internet content regulation leads to a greater flow of online speech, providing a wider choice of political views and ethical alternatives to Australian citizens.[82]

4.2 Freedom of Communication and the Autonomy of the Individual

Individualist rationales for freedom of communication are underpinned by theories of liberalism. Such theories highlight the priority of the individual, suggesting that personal autonomy can best be achieved when government interference in the free flow of information is minimal. Proponents of these theories argue that because autonomous human beings have

[79] Above n 27, [57].
[80] Penfold, above n 65, [39].
[81] Heitman, above n 76, 33.
[82] McNamara, above n 1, 3.

a right to make up their own minds they also have a right to all the information that is necessary for them to do that.[83] A mandatory internet filter would impact upon the flow of information available to Australian citizens. The internet can shape an individual's views and visions. It can provide a 'voice' to a person who otherwise might not be afforded an opportunity to speak. If we over regulate this medium, in theory we surrender to notions of paternalism and as a consequence, we reduce our own autonomy – our own right to think and speak.

5 Conclusion

Politically, a mandatory internet filter will not currently be approved by the Senate. Technically, a mandatory internet filter cannot achieve the government's aims and will result in slower internet speeds and higher internet costs. Legally, there is a real danger that mandatory internet filtering will impinge upon the implied constitutional freedom of political communication. Socially, the potential for 'scope creep' of censored online material may *subtly* impact upon the fullness of Australia's democracy and the self-development and autonomy of its people.

There are strong reasons to keep the internet free from unnecessary regulation. It is however acknowledged that some regulation must occur to protect the rights of all internet users. When this regulation does occur, it should not be dominated by the government and it should not take the form of a mandatory internet filter. There is no doubt that Australia is 'a tolerant, pluralistic society' and the potential implementation of a mandatory internet filter 'fails to respect the notion of an intellectually vigorous Australian society in which issues can be debated freely'.[84] Freedom of communication protections must constantly be re-analysed in light of new technology that increases our ability to communicate. In Australia, we are incredibly fortunate – 'To be free enough to reassess the objectives of freedom of speech is a luxury that a western democracy can afford'.[85] We should continuously indulge in this luxury by questioning the potential danger of mandatory internet content regulation in a legal environment that does not adequately protect the freedom of speech and communication.

[83] T Scanlon, 'A theory of freedom of expression' (1972) 1 *Philosophy and Public Affairs* 204, 221-222.
[84] Kate Gilchrist, 'Millennium Multiplex: Art, the Internet, and Censorship' (2000) 6(1) *University of New South Wales Law Journal Forum, (Internet Content Control)* 40, 42.
[85] Jones, above n 8, 44.