

Arved von Brasch
113 Thynne Street
Bruce ACT 2617

January 19, 2010

Mr Bob McMullan MP
Unit 8/1
Torrens St
Braddon ACT 2612

Dear Mr McMullan,

This letter is intended as a companion to our meeting regarding the Labor Party's plan to make Australia the first Western democracy to censor legal material. This issue is extremely important to me, and I will be working hard to see it defeated; hopefully also making some progress towards restoring the Classification Board to its intended purpose along the way. I would be happy to provide you with any additional material you require, or answer any further questions you may have.

History of Internet Filtering in Australia

The idea of filtering has been around for almost as long as the Internet. The first serious attempt was proposed by Senator Alston in 1999. This proposal was dropped on technological grounds, when it was clear the technology could not deliver on the intended outcomes.

In 2003, the Australian Institute's Clive Hamilton and Michael Flood publicised a report advocating moral panic about children's exposure to online pornography. Senator Lundy was particularly vocal against mandatory filtering at this time. However, within Labor, this report caused considerable unrest within the left-wing of the party. It effectively collapsed complete opposition to ISP level filtering, and it became shadow Labor policy under Beazley.

Five days before the previous election, Labor quietly announced a policy to make ISP level filtering mandatory for any computer accessible by children. What was intended to be censored was not well defined at that time.

Since the previous election, the scope of what was intended to be filtered has changed every time Senator Conroy opened his mouth. The Senator finally clarified the Government's position in December last year. The intention is for the Australian Media and Communications Authority to produce a second blacklist that contains only Refused Classification material.

The ACMA currently maintains a list containing prohibited and potentially prohibited

content. These terms are defined in the Broadcasting Services Act, and includes unrated material that the ACMA ‘guesses’, if the Classification Board saw it, would be rated as low as MA15+. Such material cannot be hosted in Australia, much to the detriment of Australian business. This list is provided to censorware providers interested in selling their products in Australia.

It should be noted that the 2003 Australian Institute’s report has been widely discredited. The report’s own numbers indicate that inadvertent exposure to pornography is actually quite rare, which is in line with similar reports produced in other countries¹. Michael Flood, the co-author, has also changed his position recently², and now agrees that censorship is the wrong approach and fraught with political dangers.

The Blacklist in Context

The Government has not made it clear exactly what problem it is trying to solve. The current line seems to be to reduce the incident of accidental exposure to material that is considered Refused Classification. Aside from the fact that most Refused Classification material is legal to view, no evidence has been provided that demonstrates that accidental exposure to such material is either common or deleterious. Should an ‘evidence based approach’ include such a poorly defined starting point?

The Internet has existed for three decades, and for almost two of those has been widely available to the public. Crime, particularly sex based crimes have been declining in absolute terms, even though reporting of sex based crimes has been increasing. Studies show that there is a correlation between reduction in sex crimes and access to the Internet³. *The Porn Report*, an Australian study released last year, showed that over one third of Australians regularly enjoy pornography. A large majority of Australians want the bans on X rated material overturned⁴. Society has clearly not collapsed.

Google recently indexed it’s 1 trillionth webpage. That is 1 with 12 zeros after it. The World Wide Web is large, and still growing exponentially. The web is only one part of the Internet, however. Email, Peer-To-Peer, Voice Over IP and many more additional protocols operate over the Internet. The Government only intends to filter the web, because the others are currently technologically impossible.

It is a logistical impossibility for any Government agency to attempt to rate something of this scale. That which we do try to rate is extremely expensive for negligible benefit. It currently costs \$510 for the Classification Board to rate a particular website, more if there is a priority put on the rating. Given that any proposed censorship system will likely be based on a submission system, it will not take long before the Government is spending millions of dollars attempting to classify the Internet. Indeed, the ACMA apparently spent over \$400,000 doing just this last year alone.

¹<http://cyber.law.harvard.edu/pubrelease/isttf/>

²<http://newmatilda.com/2009/06/05/original-net-nanny-advocate-does-back-flip>

³<http://www.hawaii.edu/PCSS/biblio/articles/1961to1999/1999-effects-of-pornography.html>

⁴<http://www.xbiz.com/news/96980>

The current ACMA blacklist contains a little over 1000 websites. This is one millionth of a percent of the total websites available. The ACMA admitted in Senate estimates last year that it considered 32% of its blacklist to be child abuse material, and in total 51% to be considered Refused Classification. This means that almost half of the current blacklist is material that is legal to sell and view for any adult anywhere in Australia, and almost 70% is legal for an adult to view in the ACT, and indeed, most of Australia.

Child Abuse Material

Almost all produced child abuse material does not appear on the web. It is traded mainly over peer-to-peer. Where it does exist on the web, it is usually placed there nefariously by people taking advantage of vulnerabilities in legitimate websites. This is the source of the infamous ‘Russian Mob’ comment by Senator Conroy on the ABC’s Q&A last year. Hosting companies do not want to be associated with child abuse material. They delete it as soon as they are aware that it exists on their equipment. Blacklisting compromised websites is not as effective as notifying the company. The fact is that illegal material on the web has a very short life span.

Indeed, a German study demonstrated how unethical it is for Governments to keep lists, when an email to the hosting company can get the material taken down permanently within a few hours⁵. This study made use of leaked blacklists from around the world, including the ACMA blacklist. Note that they commented that the ACMA blacklist was of particularly poor quality, containing mostly legal material.

This has all been confirmed by the Australian Federal Police on numerous occasions. The AFP Acting Commissioner, Neil Gaughan, confirmed that most trading occurs over peer-to-peer, even going so far as saying that filters “don’t work at all”. Mick Keelty confirmed that you aren’t going to find such material from a Google search; you have to know where to look. It is not easy to accidentally stumble across real child abuse material, and the police rarely believe such excuses.

Child Pornography In Australia

It should be noted that Australia has some of the broadest child pornography laws in the first world. The term ‘child pornography’ can apply to legally produced pornography that includes only adults, if one of the adults appears to be under 18. This age was raised from 16 only recently. The term ‘child pornography’ can also apply to cartoons, and fictional textual descriptions, which endangers literary works such as *Lolita*.

There were two disturbing court cases last year which illustrate the results of having such a broad brush. The first is a man who was charged with being in possession of child pornography for having an image of the Simpsons characters engaged in sexual acts⁶. This is an image that caused no actual child any harm. Nonetheless, we apparently consider the Simpsons to be real people. Given this acceptance, why do we endorse a ‘real’ father actively strangling his son on prime time television? How is that not ‘real’ child abuse in

⁵<http://www.unpolitik.de/2009/05/28/delete-dont-block-it-works/>

⁶<http://www.abc.net.au/news/stories/2008/12/08/2441023.htm>

comparison?

The second case involved someone who posted a video clip of a toddler being swung in the air. Chris Illingworth was charged with distributing child abuse material and had his life destroyed by over zealous police⁷. The video in question was rated MA15+ by the Classification Board as part of the case. Subsequently the case was dropped.

Then, of course, there is the recent Bill Henson fiasco, and especially the Prime Minister's moral crusading on material he claims to have never seen. The Classification Board eventually rated all of that artwork no higher than PG.

Additionally, we have the rise of 'sexting'. There are now cases of young people, teenagers, sending naked pictures of themselves by mobile phone. In most of these cases the pictures are taken consensually, but there is now the very real possibility that one of the participants will be charged with producing child pornography, and the other with being in possession of it. Should we really be labelling these minors as sex offenders for the rest of their lives?

These hopefully illustrate the high level of moral panic on this matter; we are jumping at shadows and destroying innocent lives. What are the public to make of future cases where police claim thousands of child pornography pictures were uncovered? Are these of the Simpsons variety? Is it PG artwork? Are these adults in pigtails? These kinds of questions take away from the very real abuse that does occur, and that we rightly go after. This is particularly demeaning in a time when those who claimed the highest moral ground are routinely found to have either engaged in or covered up institutionalised child abuse of those in their care.

Free Speech in Australia

It is true that Australians do not have a guarantee to freedom of speech. There is limited scope for freedom to political speech, as the Constitution has been interpreted by the High Court. However, Australia has ratified the International Covenant on Civil and Political Rights. Any legislation that the Government proposes would probably fall afoul of Article 19 of this treaty⁸.

Political material already exists on the current ACMA blacklist. Detailed discussion of euthanasia, for example, often falls into 'detailed instruction to crime', and is thus considered Refused Classification and subject to blacklisting. This is a political topic, and indeed, one that has widespread public support. Other topics that could easily get into trouble include drug harm minimisation, the roots of fundamentalism leading to terrorism and cyber-security discussion.

If the list remains secret, how are we to trust that the Government of the day hasn't put embarrassing material onto the list? Anything less than the full publication of the

⁷<http://www.heraldsun.com.au/news/baby-swinging-video-charges-against-australian-dropped/story-e6frf7jo-1225771167432>

⁸<http://www2.ohchr.org/english/law/ccpr.htm>

decisions, which is currently the case with all other media, destroys the transparency of the classification process and will eventually be abused.

Much of this moral panic is based on many people believing they have a right to not be offended. This is an untenable position for a Government to hold. No two people will agree on where that line should be drawn. The fact is that almost all political issues have two extremes, and each extreme finds the other offensive. It can't all be blacklisted.

The Classification System

The point of classification is to allow adults to make informed decisions about what material they wish to expose themselves to. Indeed, the first principle of the Classification Code is that 'adults should be able to read, hear and see what they want'. Unfortunately, it seems the Classification Board has moved away from this principle over the last couple of decades.

There are numerous examples of the Classification Board unable to make up its mind. The three most well know film examples are *Ken Park*, *Salo* and *Caligula*. All have had ratings that allowed their legal sale at some time, and all are currently Refused Classification. This kind of schizophrenia is not limited to films. *The Peaceful Pill* was legal to distribute in Australia for quite some time before eventually being Refused Classification on review. More recently, the video game *Aliens vs Predator* was initially Refused Classification and then rated MA15+ on appeal with no modifications. Clearly, the Board itself is undecided about where the Refused Classification line lies.

The classification system is being used to suppress women and sexual minorities. While much mainstream pornography, albeit often with heavy edits, is granted an X18+ rating, much pornography that focuses on women's pleasure is considered sexual fetish material and thus banned. Indeed, there particularly seems to be a double standard between male and female bodily fluids. Other pornography that targets sexual minorities is immediately banned because the consensual acts they contain are considered sexual fetish or fantasy. This is disappointing in a society like Australia, where we aren't supposed to discriminate based on gender or sexual identity.

The Classification Board itself is not representative of the wider community. Appointments to the board has become politicised. The Labor Party, in particular, heavily criticised the Howard Government for the close ties many appointees had with the Liberal Party. What constitutes a 'reasonable adult' has recently been determined to not be the same as a majority opinion⁹. This means complaints from small segments of the community can readily see otherwise innocuous material banned. The upshot of all this, is that the Classification Board is far more conservative than the Australian public.

Even with the inherent bias in the current system, there is an important point that is missed. Refused Classification is not synonymous with illegal. Indeed, almost everything that is Refused Classification is legal to own and view by a majority of Australians. The notable exception being child pornography, which is illegal everywhere. The Government's

⁹<http://www.theaustralian.news.com.au/story/0,,23013963-7583,00.html>

proposal to block Refused Classification material on the Internet is thus an attempt to censor legal material.

The Internet is Different

Calls that the Internet needs to be brought in line with the rest of the classification system are also misinformed. The classification system is not consistent amongst itself. Radio, television, films and publications all have different systems. Television, indeed, has 3 different systems because the publicly funded stations were forgotten about when the new code was written. Which system is appropriate for the Internet?

The Internet is very much unlike television, films or publications. The Internet is far more analogous to the telephone or postal system. It is inherently a pull medium. Material is not broadcast on the Internet, rather users must actively instruct their computers to request information from a connected computer. The remote computer has the option of refusing the connection, or serving different material to different users. Like the phone system, the material that is communicated is highly varied. Phone sex services provide aural pornography, video conferencing can provide footage of all description, faxing allows all kinds of text to be sent, and of course the spoken word can provide any kind of information, from how to build a bomb to the weather. In many areas of Australia, Internet access is so poor that it is often faster to write the information to disk and to send it through the postal system.

The ACMA has conducted numerous studies^{10 11} over the years that show that parents are well aware of the dangers of the Internet and are happy to manage their children's access. There are currently ISPs in Australia that specialise in providing filtered content, such as WebShield. These companies have a filtered Internet service as a core component of their business model, rather than a bolt-on after thought. They do have low take up, despite the massive amount of free advertising the Government has just provided. The previous Government's NetAlert scheme similarly had low take up. It is clear that Australians understand the risks and deliberately choose to have unfiltered Internet.

There is a saying: 'The Internet treats censorship as damage and routes around it'. The whole concept of the Internet was to have redundant means of communication should any number of nodes be destroyed. Circumvention is thus not only possible but exceptionally easy. Both the Enx and Telstra reports made this very clear. Even WebShield was unable to prevent circumvention of their filters and this is their specialty. Thus, this proposal will do nothing to stop people seeking out objectionable material.

There is also the matter of privacy. Authorities require extenuating circumstances to eavesdrop on the telephone conversations of Australians. Intercepting mail also requires a very good reason. What the Government is proposing, however, is a system where every packet of information sent by Australians is opened and inspected before deciding if it should be allowed to reach its destination without consent.

¹⁰http://www.acma.gov.au/webwr/aba/about/recruitment/trust_and_confidence_aust_in_digital_economy.pdf

¹¹http://www.acma.gov.au/webwr/aba/about/recruitment/online_participation_aust_in_digital_economy.pdf

It is not enough to say that those with nothing to hide have nothing to fear. Most people close the door when they go to toilet. While they aren't doing anything illegal, that does not mean they particularly want to be observed while doing so. Privacy must be a fundamental right in a free society.

Consequences of Filtering

There are a number of negative side effects to introducing mandatory filtering. Most of these objections remain if the policy is reduced to an opt-out system. Indeed, most of these objections remain if the system is still compulsory for Internet Service Providers.

The first is the cost of the system. Censorware products are expensive to purchase and to run. Smaller ISPs will not be able to carry this cost, and will be forced to immediately pass the cost onto customers. Larger ISPs, with more capacity to temporarily absorb the cost, will be able to strongly compete on price for a short time. This will force competition out of the market. This will mean more expensive Internet for Australians in the long term, especially as the Government intends for ISPs to carry the entire cost of the proposal. Access to the Internet in Australia is already among the most expensive and poorest quality in the developed world.

While the technological issues are minor compared to the political and civil liberty issues, they are still enough by themselves to scuttle this proposal. The Internet is currently running on a backbone of IPv4. Every computer connected to the Internet has a unique number assigned to it. IPv4 only allows for 4 billion computers to be connected simultaneously, and this pool of available numbers is rapidly declining. IPv6 is already starting to take over, and within 2 years almost every ISP will be forced to support IPv6. The trouble is that most censorware is incapable of working with IPv6. The Government risks saddling ISPs with redundant lemons if this is introduced now.

The second technological issue is latency. The Government makes big claims about speed, but is confusing itself on the difference between speed and latency. While it may be true that the individual speed reduction by introducing censorware is negligible, the latency effects were not measured. Latency is particularly important in high bandwidth applications, such as video games, teleconferencing and film distribution. Minor reductions in speed have a cumulative effect on latency, and this could dramatically effect business and pleasure alike.

This is particularly important given the Government's proposed National Broadband Network. The maximum speed tested in the Enex trial was 8 Mbps, which is the maximum sync speed of ADSL. The NBNs speed is expected to be 100 Mbps. There is no reason to think that the trial results will scale. Additionally, at least one participant in the Enex trial reported they had less than 15 households in the trial. Telstra didn't even bother to test using any real people. There is no reason to think that their results will scale when applied to all the millions of connections in Australia.

High traffic sites cannot be blacklisted because the censorware does not have the capacity to deal with the number of requests for sites like YouTube from within Australia. There

is a lot of material on YouTube that would be considered Refused Classification because the rest of the world doesn't attempt to ban so much. This means that only sites that don't have such a loud voice will be blacklisted. This is inherently discriminatory.

The Government should also be aware of the Streisand Effect. On the Internet, attempting to censor something inherently brings more attention to it. A site that is considered low traffic at the time it is added to the blacklist may quickly become a high traffic site when the list is leaked. This could make connections to the Internet in Australia impossible as the censorware equipment falls over. 'Slashdotting' should also be considered. This is when an extremely popular site links to a little known site. The large number of people who then check out that low traffic site is often enough to bring it down. If a popular site links to a site that happens to be on the blacklist, this could also bring down the Internet in Australia.

There is no chance that the blacklist will not be leaked. Mandatory censorship of this scale will motivate large numbers of highly technical experts to uncover the list. If the list truly is the 'worst of the worst', creating such a list when it is guaranteed to be publicly available is unconscionable. If the list is as poor quality as the current ACMA blacklist, then leaks will do little more than be a continuous source of embarrassment to the Government as the edge cases are brought to light by the media.

The Government has also not provided any figures on how much of the total Refused Classification material on the Internet it expects to block. This is an important consideration. If the Government only ever expects to cover a small percentage, then there seems little point in the entire policy.

The social issues this unleashes are also concerning. This filter is being sold as a way to protect people, particularly children. There is no evidence of impending societal collapse from the current level of exposure to this material. The reality is that a list of a few thousand will have a negligible effect to protect anyone, but will mean that parents will become increasingly complacent about online dangers. This proposal will amplify children's exposure to age inappropriate material.

There is also the issue of the reaction of average users' encounters with material which is potentially Refused Classification. If it isn't blocked, are they to assume that the material is thus blessed by the Government? Is the Government happy to be seen endorsing access to X rated material, which isn't, and never could be covered by a blacklist?

The Government is also proposing outsourcing censorship decisions to foreign countries. Surely the Government is not proposing to combine such lists without reviewing its contents to see if it is indeed Refused Classification. Integrating foreign lists will turn into hugely expensive exercises.

Australia would be the first and only representative democracy to introduce such broad and far reaching censorship. Our actions thus far have already brought comfort to more authoritarian regimes. We will be used as an excuse to limit freedom of speech all over the world. How this poor reputation will effect trade, skilled migrant intake and our moral

authority to speak on human rights issues around the world remains to be seen. Already, respected human rights organisations are expressing concern about Australia.

Senator Conroy's Behaviour

Throughout this process, Senator Conroy has used emotional blackmail to try to silence his critics. He has twice referred to those who oppose the Government scheme as advocating child pornography. His office also attempted to have an outspoken, technically competent critic fired. This is not behaviour becoming of a Government Minister. He should have been disciplined.

Recommendations

The Government should abandon the idea of mandatory filtering for either end users or ISPs. If the Government feels the take up of filtering needs to be improved, then it can offer cost offsets to ISPs who wish to offer filtered services. This offset should be enough to remove the overhead of running the censorware and will allow participating ISPs to compete on service and quality on an equal footing with all other ISPs.

The money destined for this project should be diverted to law enforcement and victim support services where it can do real good.

Increased education initiatives could yield tremendous results. It is certainly not desirable for children to learn about sex and intimacy from pornography. Better sex education in schools is important, and we should also encourage parents to discuss these issues with their children.

The Refused Classification category should be abolished. Instead, it should be replaced with a Highly Confronting category that has no distribution restrictions across Australia, although perhaps with point of sale restrictions similar to cigarettes. This would return the Classification Board to its intended purpose of being a vehicle to inform rather than censor. More radically, mandatory classification before sale should be abolished. A voluntary classification system, similar to that in the United States is desirable.

Sincerely,

Arved von Brasch