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Mandatory Internet Censorship in Australia?

Introduction

In December 2009, the Australian Federal Government released the results of a trial of Internet filtering technology and announced its intention to proceed with a controversial plan to introduce mandatory Internet filtering in Australia.

The proposed amendments to the *Broadcasting Services Act* ("the Act"), which are expected to be introduced into Parliament in the Autumn 2010 session (February – March), will make it mandatory for all Internet Service Providers ("ISPs") to block Refused Classification ("RC") material hosted on overseas servers. A recent *Sydney Morning Herald* poll of over 20,000 participants resulted in 96 per cent indicating they were opposed to the introduction of a mandatory filter.

Current Regime

Currently in Australia, the following categories of online content are *prohibited content* under the Act:

1. content which is classified RC;
2. content which is classified X 18+;
3. content which is classified R 18+ and not subject to a restricted access system that prevents access by children;
4. content which is classified MA 15+, provided by a mobile premium service or a service that provides audio or video content upon payment of a fee and that is not subject to a restricted access system that prevents access by children.

In Australia, content is classified by the Australian Classification Board ("Board"); however, the Act provides the Australian Communications and Media Authority ("ACMA") with the power to act in relation to *potentially prohibited content*, that is content which has not been classified by the Classification Board but would, in the view of the ACMA, be likely to be classified as prohibited were such classification to take place.

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Under the present system, the ACMA refers material to the Board (or makes its own determination) upon receiving a complaint from a member of the public. If the content is either prohibited content or potentially prohibited content, the ACMA can:

1. in the case of content hosted on a server located in Australia, issue a take down notice to the server owner; or
2. in the case of content hosted on a server located outside Australia, add the content to a "Black List".

The Black List is provided to software filter vendors so they may add it to their list of blocked sites. Internet users can then voluntarily install such a filter on their home computer.

Proposed Regime

The proposed regime is intended to supplement the above. It is intended that a new RC Content List will be established (separately from the continuing Black List). Australian ISPs will be required to block all of the content on the new RC Content List on overseas sites. Accordingly, the proposed amendments to the Act will, in respect of overseas sites at least, take the decision of whether or not to access RC Content List material out of the hands of Internet users and make it the responsibility of ISPs to block this content.

The Australian Government has described the plan as a measure to "bring Australia in line with other Western countries."¹ Although other countries do have forms of Internet filtering, they are not on the same scale as what is proposed, are normally opt-in and/or voluntary. Australia it seems will actually be out of sync with other Western democracies if the introduction of a mandatory ISP-level Internet filter proceeds, and other countries are sure to monitor closely the results of any implementation.

While most commentators have focused on the impact the proposed filter will have on civil liberties, there also exists important consequences for businesses, internet users and ISPs.

What is likely to be included on the Refused Classification Content List?

Currently, RC material encompasses a broad category of material that has been refused classification in Australia by the Board. The Board is guided in its decisions by the National Classification Code, which defines RC material as pieces of material that:

1. *Describe, 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*
2. *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*
3. *Promote, incite or instruct in matters of crime or violence.*

¹ Senator Stephen Conroy, 'Measures to Improve Safety of the Internet for Families', Treasury Place, Melbourne, Victoria, 15 December 2009, <http://www.minister.dbcde.gov.au/media/speeches/2009/075>

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The Australian Government has indicated that the new RC Content List will remain separate from the current ACMA Black List of overseas hosted content. It has been suggested that the new RC Content List will be developed in two ways:

- (a) A public complaint mechanism whereby the ACMA will:
 - (i) review all content that is the subject of a new public complaint; and
 - (ii) add material to the RC Content List that it believes the Board would be *likely* to classify as RC.

Although it has not yet been confirmed, presumably all material previously determined as RC content by the ACMA (and forming the current ACMA Black List) will also be added to the new RC Content List.

- (b) Through sharing of information and arrangements with "highly credible" overseas agencies to share lists of child sexual abuse content.

The ACMA will be responsible for maintaining the new RC Content List. It is not clear to what degree the RC Content List will be made public or be open to scrutiny or review. It has been predicted by some commentators that the amended Act may make it an offence to publicise the content of the new RC Content List.

What material will be included on the RC Content List has been central to the debate thus far. This has included apparent leaked versions of the current ACMA Black List. The Black List has reportedly included adult entertainment sites (not related to child pornography), euthanasia sites, some religious cult or fetish sites and apparently a website of a Queensland dentist who previously was the subject of a "hacker" attack on his website. One can immediately see that the make up of the RC Content List will be a political hot potato and will require decisions being made as to what is "acceptable" Internet Content by a small cross section of the community for very broad application.

A majority of businesses may feel relatively confident that their content will not be classified as RC under the current proposal. However, the fear remains that once implemented, there is significant potential for "scope creep" in what material is included in the RC Content List. Sydney University Associate Professor Bjorn Landfeldt has highlighted the fact that the lack of a very clear definition of RC material may, over time, result in the definition of what content is prohibited broadening significantly.

In a study published in the March 2009 *Internet Law Bulletin*,² University of New South Wales researchers analysed comparative filtering systems in the United Kingdom, Canada and China. The study observed that, in all jurisdictions, material beyond that initially proposed for the blacklist had been added and suggested that scope creep is "inevitable" in Australia.

In addition to the mandatory ISP-level filter, the Government will also encourage ISPs to offer additional filtering services for Internet users wishing to have a wider range of material filtered, including X18+ material, R18+ material and MA15+ material. Several lobby groups

² Renee Watt and Alana Maurushat, 'Clean Feed: Australia's Internet Filtering Proposal' [2009] UNSWLRS 7

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have already commenced a campaign to have such material added to the new RC Content List.

How Will Material Be Classified?

The Australian Government has released a Consultation Paper on the mandatory filter which outlines several options for administering the proposed RC Content List, which include the following:

- All ACMA decisions to add content to the RC Content List being the subject of a compulsory review by the Board, following which ACMA will be bound by the view of the Board as to the classification of the content;
- A notification procedure to the owner of overseas hosted content, informing the owner of content being added to the RC Content List. This would allow voluntary removal of content or a review of the ACMA's decision to the Board;
- The introduction of a notification webpage which will appear and notify Internet users that the content they are trying to access has been blocked and is on the RC Content List, and a possible appeal or review mechanism as to the classification;
- Annual review measures as to classification of content, to be conducted by an independent expert or industry group.

It seems that in respect of all the proposed options canvassed above, material would be listed and remains on the RC Content List until determination of its classification. It is unclear how long the procedures proposed would take to review and determine a classification issue and their cost to administer. There is currently little detail available on any of the proposed schemes.

Public comment on the Consultation Paper is invited and submissions are due by **12 February 2010**.

How Will the Filter Impact on Internet Users?

As part of its planning the Australian Government has conducted an independent trial of ISP-level Internet filters³ ("Pilot Report") which found (among other matters) that "blocking a list of banned URLs can be done with 100 per cent accuracy and with negligible impact on Internet speed."⁴

A number of critics have pointed out that the trial conducted for the Pilot Report was designed from the beginning to pass. Among other issues, critics have noted that the Pilot used a limited number of ISPs, a small group of Internet users, and a modest list of 1,000 URLs.

If the Australian Government's proposal proceeds, the new RC Content List could grow to include hundreds of thousands of blocked web pages. As all ISPs will be required to filter content, it is also unclear what effect there will be on Internet speeds. For a business

³ Internet Service Provider ("ISP") Content Filtering Pilot Report – October 2009

⁴ Senator Stephen Conroy, Media Release: 'Measures to Improve Safety of the Internet for Families', 15 December 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/115

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operating online, every second counts and the frustration an Internet user has with a slow page loading could mean the difference between a customer clicking "Buy" and clicking "Back". Inevitably, even businesses not conducting business wholly or substantially online will nevertheless be relying on the Internet and their website to advertise and promote their business in the future. Disruption to Internet speeds could be equally damaging.

The Pilot Report also noted that circumventing the mandatory filter would be relatively straightforward for motivated Internet users, calling into question the effectiveness of the filter and raising concerns that, after its introduction, a more invasive system will be "required". The new mandatory filter may well be, as retired High Court Justice Michael Kirby has suggested, "the thin end of the wedge of the Government moving in to regulate the Internet itself."⁵

The initial impact of these proposals will be felt by ISPs. It will be their responsibility to filter content in accordance with any ultimate filtering scheme adopted. Although larger ISPs may be able to more readily implement the proposal, smaller ISPs could struggle. The implementation may involve increased hardware maintenance costs, subscription fees, service provider and support maintenance as well as the inevitable administration headache which is likely to arise if issues as to why content is blocked or removed are raised directly with an ISP. At this stage, the Australian Government has not explained what penalties will apply to ISPs that fail to filter content on the RC Content List.

The reception to the mandatory filtering proposal across business and lobby groups has been mixed. Proponents of the scheme point to the intent of the filtering, to prevent child pornography and other material which the community as a whole is likely to deem inappropriate. Critics point to the as yet unanswered questions as to its implementation rather than its intended purpose. Namely, what will be blocked? Who decides? And are there better ways to achieve the purported aim of the scheme?

What Next?

After submissions responding to the Australian Government's Consultation Paper have been received, it is not anticipated that any additional scope for public comment will be provided before the proposed amendments to the Act are introduced into Parliament.

Anti-censorship campaigns against the mandatory filter have already commenced; however, without strong political opposition, it may be expected that the amendments to the Act will successfully pass through Parliament. At this point in time, the centre-right Opposition Party has not indicated that it will fight the Australian Government on the issue.

There will no doubt be much more to discuss once further information on the specific details of the policy, including its implementation and administration, are made public.

Watch this (uncensored) space.

⁵ Asher Moses, "Net Filters 'thin end of the wedge': Kirby", *Sydney Morning Herald*, 17 December 2009, <http://www.smh.com.au/technology/technology-news/net-filters-thin-end-of-the-wedge-kirby-20091217-kyeu.html>.



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