'Won't Somebody Please Think of the Children': Would a Mandatory ISP-level Filter of Internet Content Raise Freedom of Communication Issues?

Chris Govey considers whether Federal Government plans to impose mandatory ISP-level filtering could conflict with the implied freedom of political communication in the Australian Constitution.

In May 2008, the Australian Federal Government committed $125.8 million over four years to a range of cyber-safety measures, including a mandatory Internet service provider (**ISP**) level filter of unacceptable Internet content.[1] The Government intends to introduce legislative amendments to require all ISPs in Australia to filter certain overseas hosted material in 2010.[2]

The Government contends that an ISP-level filter would protect all Australians, particularly young children, from that "internet content which is not acceptable in any civilised society".[3] The Government's motivation for an ISP-level filter of the Internet is powerful, but does it justify censoring the Internet?

Senator the Hon Stephen Conroy, Australia's Minister for Broadband, Communications and the Digital Economy,[4] has commented that, "while we acknowledge there are technical issues to be tested, the Government does not view this debate as an argument about freedom of speech".[5] This paper examines Minister Conroy's assertion through a discussion of:

1. the nature of the Internet;
2. the Government's proposal; and
3. the constitutionally implied right to freedom of political communication in Australia, including the two limbs of the test applied by the High Court of Australia in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**):
   (a) whether an ISP-level filter would effectively burden political communication; and
   (b) whether an ISP-level filter would be reasonably appropriate and adapted to serving a legitimate end.

The safety of Australian children in the online environment is extremely important. However, a mandatory ISP-level filter will not materially enhance online safety and could impede freedom of communication — and perhaps freedom of political communication — in Australia. Even if legislation implementing a mandatory ISP-level filter of the Internet is constitutionally valid, a discussion of the constitutional principles underpinning the implied right to freedom of political communication suggests that such a filter, as a matter of policy, would not be reasonably appropriate and adapted to the Government's objective.

1. The nature of the Internet

One key benefit of the Internet is that it empowers individuals. It enables anyone with access to a computer and a connection to the Internet to communicate freely[6] on a global scale and to rally public opinion around a cause, be it personal, financial[7] or political.[8] There are innumerable examples of the Internet facilitating the discussion of government or political matters.[9]

The ability of the Internet to facilitate individuals' communications recently prompted Bill Gates to comment that "[t]he role of the internet in every country has been very positive, letting people speak out in new ways".[10] Similarly, the US Secretary of State, Hilary Clinton, commented on 21 January 2010 that:

> *During his visit to China in November, for example, President Obama held a town hall meeting with an online component to highlight the importance of the internet. In response to a*

1 Department of Broadband Communications and the Digital Economy (**DBCDE**), *Cyber-safety plan*, http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan, last accessed 19 March 2010.

2 DBCDE, *Internet Service Provider (ISP) filtering*, http://www.dbcde.gov.au/funding_and_programs/cybersafety_plan/internet_service_provider_isp_filtering, last accessed 19 March 2010.

3 Minister Conroy, *Measures to improve safety of the internet for families*, http://www.minister.dbcde.gov.au/media/speeches/2009/075, last accessed 19 March 2010; see also DBCDE, *Cyber-safety plan*, above, note 1.

4 According to the British Internet Industry, Minister Conroy was the 'Internet Villain of the Year 2009': Adam Turner (13 July 2009), 'Conroy named Internet Villain of the Year', *The Sydney Morning Herald*, http://www.smh.com.au/technology/technology-news/conroy-named-internet-villain-of-the-year-20090713-di8q.html, last accessed 19 March 2010.

5 Minister Conroy (20 January 2009), *Address to ALIA Information Online Conference and Exhibition*, http://www.minister.dbcde.gov.au/media/speeches/2009/001, last accessed 19 March 2010.

6 The term 'free' is used in this context to mean uninhibited. However, such communication is often also free in a financial sense. Websites can be created and hosted for no or minimal additional cost.

7 Barack Obama reportedly raised half a billion dollars online in his campaign for the White House leading up to the 2008 US elections: Jose Antonio Vargas (20 November 2008), Obama Raised Half a Billion Online', *The Washington Post*, http://voices.washingtonpost.com/44/2008/11/20/obama_raised_half_a_billion_on.html, last accessed 19 March 2010.

8 http://www.alp.org.au/.

9 For example, see http://www.aph.gov.au/, http://domain.nationalforum.com.au/ and http://www.theaustralian.com.au/politics.

10 AFP (27 January 2010), 'Gates weighs in on Google-China spat', *The Australian*, http://www.theaustralian.com.au/australian-it/gates-weighs-in-on-google-china-spat/story-e6frgakx-1225823849258, last accessed 19 March 2010.

question that was sent in over the internet, he defended the right of people to freely access information, and said that the more freely information flows, the stronger societies become. He spoke about how access to information helps citizens hold their own governments accountable, generates new ideas, encourages creativity and entrepreneurship.[11]

The Constitutional Council of France has gone so far as to characterise access to the Internet as akin to a 'human right'.[12]

Web 2.0 — that is, the world wide web today, comprising significant volumes of user-generated content — particularly empowers individuals. Not only has Web 2.0 exponentially increased the quantity and diversity of available Internet content; it also enables individuals to verify the information they find online against any number of independent sources and to publish effortlessly their own opinions.

Critically, the power of the Internet to facilitate free discussion of government or political matters is directly correlated with Internet users' ability to verify, trust and comment freely on the information they find online. If users' ability to gain access or contribute to information in relation to particular topics is curtailed, or if users' perceptions of the accuracy or completeness of the information they access are negatively impacted, the value of the Internet as a medium for political communication will deteriorate.

The Internet is extraordinary because it is essentially limitless. Any attempt to impose unreasonable limits on Internet content risks undermining the nature of the Internet. As Australian Labor Party Senator Kate Lundy expressed on 16 February 2010: "[t]he bottom line is that for many people a (generally silently applied) mandatory filter with a secret blacklist would always be concerning regardless of the filter scope."[13]

2. The Government's proposal

Accompanying the many opportunities provided by the Internet are the gritty back-alleys to the information superhighway. It is not disputed that some content may be harmful and undesirable and should be subject to reasonably appropriate and adapted regulation.

In Australia today, Internet content which is 'prohibited content' or 'potential prohibited content' is subject to regulation under Schedule 7 to the *Broadcasting Services Act 1992* (Cth) (**Broadcasting Services Act**).[14] In general,[15] prohibited content is content that has been classified by the Classification Board:[16]

- Refused Classification (**RC**);
- X 18+;
- R 18+, and which is not subject to a restricted access system (that is, a system to verify the age of the user); or
- MA 15+, and which is not subject to a restricted access system, and which is provided on payment of a fee or by means of a mobile premium service.[17]

The Government intends to introduce legislative amendments to require all ISPs in Australia to filter certain overseas hosted material

In general, if content has not been classified, but there is a substantial likelihood that content would be prohibited content if it were classified, then the content is potential prohibited content.[18]

Currently, if a website hosted in Australia hosts, streams or links to prohibited content or potential prohibited content, the Australian Communications and Media Authority (**ACMA**) may issue a take-down notice to the owner of the website requiring they remove or restrict access to that website.[19] Prohibited content hosted outside of Australia is added to an 'ACMA blacklist', which is provided to accredited PC filter vendors so they can distribute software that filters content against the blacklist.[20] An ISP-level filter would enable the ACMA itself to take direct action in relation to Internet content hosted overseas.

The precise details of the Government's proposed ISP-level filter are unknown. The Government has announced however, in the context of consulting on options to increase the transparency of the content which it will filter, that it will introduce legislation some time in 2010:

- enabling the creation of an 'RC content list'; and
- requiring all ISPs to filter the RC content list.[21]

The Government proposes that the existing take-down notice arrangements for Australian-hosted prohibited content and potential prohibited content will remain in place.[22] It is not clear whether Australian-hosted content will therefore not be filtered.

At this stage it appears that the proposed RC content list will be a list of websites that are either:

- the subject of a complaint to the ACMA and:
  - classified as RC content by the Classification Board; or
  - assessed against the guidelines of the National Classification Scheme to be RC content by trained officers within the ACMA;[23] or

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11 Hilary Clinton (21 January 2010), *Remarks on Internet Freedom*, http://www.state.gov/secretary/rm/2010/01/135519.htm, last accessed 19 March 2010.

12 See the comment made by Justice Cowdroy in *Roadshow Films Pty Ltd v iiNet Limited* (No 3) [2010] FCA 24, at [411].

13 Senator Kate Lundy (16 February 2010), *My thoughts on the Safer Internet Group statement*, http://www.katelundy.com.au/2010/02/16/my-thoughts-on-the-safer-internet-group-statement/, last accessed 19 March 2010.

14 It is worth noting that Schedule 7 of the Broadcasting Services Act is expressed to not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication: see clause 121 of that Schedule.

15 Eligible electronic publications are treated slightly differently; see clause 11 of Schedule 7 of the Broadcasting Services Act.

16 Classified in accordance with the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), the National Classification Code and any classification guidelines, including the Guidelines for the Classification of Publications 2005, made in accordance with section 12 of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

17 Clause 20 of Schedule 7 of the Broadcasting Services Act.

18 Clause 21 of Schedule 7 of the Broadcasting Services Act.

19 Part 3 of Schedule 7 to the Broadcasting Services Act.

20 DBCDE (December 2009), *Measures to increase accountability and transparency for Refused Classification material*, http://www.dbcde.gov.au/__data/assets/pdf_file/0020/123833/TransparencyAccountabilityPaper.pdf, last accessed 19 March 2010 (***Consultation Paper***), page 3.

21 DBCDE, Consultation Paper, December 2009, page 3.

22 DBCDE, Consultation Paper, December 2009, page 3.

23 DBCDE, Consultation Paper, December 2009, page 2.

- added through arrangements with 'highly credible overseas agencies'.[24]

Content which might be classified as RC and therefore added to an RC content list includes:

- publications, films or computer games that advocate the doing of a terrorist act;[25]
- publications, films or computer games that:
  - depict, express or otherwise deal with (and publications that describe) 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;
  - 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
  - promote, incite or instruct in matters of crime or violence;[26]
- computer games that are unsuitable for a minor to see or play.[27]

Clearly, the RC content list will go beyond the explicit content with which the Government is most concerned. There have been significant calls from the Internet industry for the scope of the filter to be reduced from RC content to child pornography.[28] Senator Lundy has echoed the Internet industry's concerns.[29] The content that is ultimately subject to the Government's proposed ISP-level filter will depend on the substance of the legislation passed by the Australian Parliament.

3. Freedom of political communication

There is no general right to freedom of communication under current Australian law.[30] However, an implied freedom of communication about government or political matters has been identified in the Australian Constitution.[31] This section discusses the Government's proposal to introduce an ISP-level filter of Internet content in the light of the principles enunciated by the High Court of Australia in such cases as *Lange*.

The purpose of this discussion is not merely to suggest that the Government's proposal might be unconstitutional; it is to highlight the freedom of communication issues inherent in the Government's proposal. These issues deserve to be debated and not dismissed as irrelevant.[32] Even if the Government's proposal is constitutionally valid, there remains the possibility that it raises such significant freedom of communication and technical issues that, as a matter of policy, it should not be implemented.

Minister Conroy has himself commented that "[f]reedom of speech is fundamentally important in a democratic society".[33] Indeed, freedom of communication is so fundamental to Australia's constitutional democracy that the High Court of Australia has determined that the combined operation of sections 7, 24, 64 and 128 of the Australian Constitution prevents Australian legislatures from unduly burdening communications about government or political matters.[34] This is because:

> *Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively…*
>
> *Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.*[35]

Communications concerning political or government matters remain central to Australia's system of government today. Following the unanimous judgment of the High Court of Australia in Lange, a law of a State or Federal Parliament or a Territory legislature will be invalid if it:

- effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and
- is not reasonably appropriate and adapted to serve a legitimate end [in a manner][36] which is compatible with the

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24 DBCDE, Consultation Paper, December 2009, page 3.

25 Section 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). The concept of publications, films or computer games that advocate the doing of a terrorist act is potentially broad. Advocating a terrorist act includes directly or indirectly counselling or urging the doing of a terrorist act; directly or indirectly providing instruction on the doing of a terrorist act; or directly praising the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person to engage in a terrorist act. A terrorist act is defined in clause 100.1 of the Schedule to the *Criminal Code Act 1995* (Cth) and includes, for example, a threat of action where would seriously interfere with an electronic system with the intention of advancing a political, religious or ideological cause and intimidating the public or a section of the public.

26 National Classification Code: available at ComLaw http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200508203?OpenDocument, last accessed 20 March 2010.

27 National Classification Code. On a related point, the The Minister for Home Affairs is currently consulting with the Australian public as to whether the Australian National Classification Scheme should include an R18+ classification for computer games: Australian Attorney-General's Department, *An R18+ Classification for Computer Games – Public Consultation*, http://www.ag.gov.au/gamesclassification. Approximately 55,000 submissions have been received: Fran Foo (4 March 2010), 'Games rating call gets 55,000 submissions', *The Australian*, http://www.theaustralian.com.au/australian-it/games-classification-call-gets-55000-submissions/story-e6frgakx-1225837084356, last accessed 19 March 2010. An R18+ classification for games would see computer games that are unsuitable for a minor to see or play moved from an RC classification to an R18+ classification.

28 The Australian Library and Information Association, Google, Inspire Foundation and Yahoo! (February 2010), *Core Principles for Effective Action for a Safer Internet*, http://www.alia.org.au/internetfiltering/core.principles.html, last accessed 20 March 2010.

29 Senator Kate Lundy, Above, note 14.

30 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 133 per Mason CJ, at 149 per Brennan J, at 182-183 per Dawson J. See also the National Human Rights Consultation's recommendation that Australia adopt a Human Rights Act including a freedom of expression: *National Human Rights Consultation Report*, recommendation 25: http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads, last accessed 19 March 2010.

31 See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

32 Cf, for example, Senator Conroy (20 January 2009), *Address to ALIA Information Online Conference and Exhibition*, http://www.minister.dbcde.gov.au/media/speeches/2009/001, last accessed 19 March 2010.

33 Senator Conroy (20 January 2009), *Address to ALIA Information Online Conference and Exhibition*, http://www.minister.dbcde.gov.au/media/speeches/2009/001, last accessed 19 March 2010.

34 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

36 The insertion of the phrase 'in a manner' in the test formulated in *Lange* was supported by the majority of judges in *Coleman v Power* (2004) 220 CLR 1 at [92]-[96], [196]; followed, for example, in *McClure v Mayor And Councillors of City of Stirling [No 2]*, [2008] WASC 286 at 78.

maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people.[37]

The following parts of this paper apply the two limbs of this test to a hypothetical law passed in furtherance of the Government's proposal to introduce an ISP-level filter of Internet content.

Would an ISP-level filter effectively burden political communication?

Communications about government or political matters include, for example:

> *discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices. Barendt states that:*
>
> > *''political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.'*[38]

In determining whether political communication is burdened by a particular law, the authorities draw a distinction between those laws which expressly restrict communications about government or political matters and those with respect to some other subject and whose effect on political communications is unrelated to their nature as political communications.[39] Similarly, a distinction is drawn between restrictions on communications which target ideas or information about government or political matters and those which restrict a particular activity or mode of communication by which such ideas or information are transmitted.[40] In both distinctions, the first mentioned restriction is more likely to burden communications about government or political matters.

The Government's proposed ISP-level filter is intended to protect children from exposure to RC content.[41] Obviously, such content is unlikely to be content about government or political matters.[42] The Government does not intend to filter communications about government or political matters. It is clear, therefore, that a law implementing the Government's proposal could only be a law of the second kind; one which impacts only incidentally on communications about government or political matters. Of itself, preventing communication of RC content to minors can not burden communications about government or political matters.

This does not mean that a law implementing an ISP-level filter could not effectively burden communications about government or political matters. In Lange, for example, the High Court held that although:

> *[t]he law of defamation does not contain any rule that prohibits an elector from communicating with other electors concerning government or political matters… in so far as the law of defamation requires electors and others to pay damages for the publication of communications concerning those matters or leads to the grant on injunctions against such publications, it effectively burdens the freedom of communication about those matters.*[43]

once an ISP-level filter has been established, there must be the potential for 'scope creep'.

That is, even though the law of defamation does not expressly burden communications about government or political matters, it was held in Lange that the law of defamation could nonetheless effectively burden such communications. Similarly, in *Coleman v Power* (2004) 220 CLR 1, the Attorney-General of Queensland conceded in argument that, in some cases, the impugned law could burden communications about government or political matters because the law could "apply whether or not the prohibited language relates to matters of governmental or political interest so that… its practical operation and effect may, in some cases, burden communication about government or political matters".[44]

It is possible that a law implementing an ISP-level filter could, in its operation and effect, burden political communications. The question of whether a law burdens a communication about government or political matters imposes a relatively low threshold. It may be that a law which imposes only a 'light' burden on political communication is more likely to be reasonably appropriate and adapted to serve a legitimate end;[45] however, this does not prevent the first limb of the test in Lange being met.

In the circumstances of the Government's proposal, a law implementing an ISP-level filter might burden communications about government or political matters in four ways. First, there is a risk that communications about government or political matters — such as content hosted on an individual's political blog, the importance of which is discussed in Part 1 of this paper — could be inadvertently filtered and therefore directly burdened. From this perspective, any ISP-level filter at all, regardless of the scope of the deliberately filtered content, would be objectionable.

The *Sydney Morning Herald* has reported that only about half of the sites on the precursor to the RC content list, the ACMA blacklist, are links to the Government's stated target-content, child pornography. The rest of the sites on the ACMA blacklist are reportedly "online poker sites, YouTube links… Wikipedia entries, euthanasia sites, websites of fringe religions such as satanic sites, fetish sites, Christian sites, the website of a tour operator and even a Queensland dentist".[46] Some of these topics are clearly political. No matter which technology is used, if it is possible for content which is not prohibited content or potential

37 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-568.

38 *Theophanous v The Herald & Weekly Times Limited* (1993) 182 CLR 104 at 124 (footnotes omitted); see also *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 at 231.

39 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 at 169.

40 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 at 143.

41 DBCDE, *Cyber-safety plan*, http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan, last accessed 15 July 2009.

42 Note, however, that the definition of RC content is broader than the explicit content to which the Government's proposal is directed: see discussion in Part 1 of this paper above.

43 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

44 *Coleman v Power* (2004) 220 CLR 1 at 120.

45 *Coleman v Power* (2004) 220 CLR 1 at 120.

46 Asher Moses (19 March 2009), 'Leaked Australian Blacklist reveals banned sites', *The Sydney Morning Herald*.

prohibited content to find its way on to the ACMA blacklist then it will likely also be possible for content pertaining to government or political matters to find its way on to an RC content list.

In addition, the Government's *ISP Content Filtering Pilot Report*[47] indicates that during a test of whether certain filtering technologies could block material in addition to that on a prescribed list, the filters blocked up to 3.37 per cent of content on an innocuous content list (that is, content which should not be blocked by a filter).[48] The innocuous content test list expressly included 'Government' content.[49] There is clearly potential for political communications to be inadvertently blocked by an ISP-level filter.

there are some technical obstacles inherent in the introduction of an ISP-level filter which will be difficult to overcome.

Second, once an ISP-level filter has been established, there must be the potential for 'scope creep'.[50] An ISP-level filter might be deliberately used in the future to block communications about government or political matters. Indeed, the very fact that the Government's pilot tested whether a filter could accurately block material not on a specified list indicates that the Government might be considering expanding the scope of its proposed filter. Regardless of the purpose to which an ISP-level filter is initially directed, it is possible that future governments will expand on that purpose, either through regulations or legislative amendment. This is not to suggest that there exists in Australia some grand conspiracy to filter government or political content at some point in the future; it is merely to point out that it would be relatively easy, once an ISP-level filter is in place and tolerated by Australian society, to expand the scope of the filter to material beyond that originally contemplated. Communications about government or political matters might therefore be directly burdened in the future. Of course, deliberate filtering of political communications could of itself only give rise to a constitutional claim at the time such filtering was introduced.

The risk of deliberate filtering does, however, immediately contribute to the third way in which a law implementing an ISP-level filter might burden political communications. That is, the risk that communications about government or political matters could be inadvertently or deliberately filtered (now or at an unknown point in the future) of itself effectively burdens other Internet-based communications about government or political matters, even if such communications are not themselves filtered. This argument is closely linked to the nature of the Internet, as outlined in this paper. As discussed, if individuals' ability to gain access or contribute to political communications is curtailed, or if individuals' perceptions of the accuracy or completeness of the political communications they access are negatively impacted, the value of the Internet as a medium for political communication in general will deteriorate. It is not to the point that society has effectively engaged in political communication without the Internet in the past; the fact is that today the unimpeded flow of online information contributes to the discussion in Australia of such things as the conduct, policies or fitness for office of government of those seeking public office. Such discussion might be effectively burdened by the change in attitude to online communication, including online communication about government or political matters, inherent in the introduction of an ISP-level filter of Internet content. This is particularly the case insofar as the introduction of an ISP-level filter of Internet content must be accompanied by general unease at the concept of the Government sifting through all online communications and blocking those which it considers undesirable.

The fourth reason that a law implementing an ISP-level filter might burden political communications is that communications about what amounts to prohibited content may also be communications about government or political matters. As is clear from the public comments made by politicians regarding abortion, euthanasia, and Bill Henson's photography, the question of what material should be available for viewing by the public is often a deeply political issue. The Government's proposal to maintain the strict confidentiality of its RC content list would effectively burden communications about the composition of the RC content list; potentially communications made by or about candidates for political office. The ACMA has in the past threatened to impose $11,000-a-day fines on individuals who own websites that publish hyperlinks to a leaked copy of the ACMA blacklist.[51] So long as the RC content list is not public, it will be difficult to know what information individuals are being prevented from viewing.

The Government's consultation on six proposed measures to increase the accountability and the transparency of the material that would be filtered under its proposal,[52] goes some, but not all, of the way to addressing this concern. It is likely that, at least taken in isolation, a law maintaining the confidentiality of the RC content list will be reasonably appropriate and adapted the legitimate purpose of preventing the dissemination of RC content.

Nonetheless, given the low threshold that needs to be met to satisfy the first limb of the test in Lange, it seems possible that a law implementing an ISP-level filter of Internet content might impose some effective burden on communications about government or political matters. The existence and extent of that burden is likely to turn on the precise drafting of the impugned law. In particular, if the publisher of online political communications is easily able to overturn an incorrect decision to filter their content, the burden imposed by an ISP-level filter is likely to be extremely light. As the next part of this paper demonstrates, however, even a 'light' burden on communications about government or political matters is unlikely to be justifiable in the context of a mandatory ISP-level filter of Internet content.

Would an ISP-level filter be reasonably appropriate and adapted to serving a legitimate end?

The Government's stated motivation for imposing an ISP-level filter is to protect children from exposure to RC content.[53] One related purpose appears to be to restrict the dissemination of child pornography. Such purposes are consistent with the objects

47 On 15 December 2009, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, released the results of the Government's pilot trial of ISP-level filter technologies: Enex Pty Ltd (October 2009), *Internet Service Provider (ISP) Content Filtering Pilot Report*, http://www.dbcde.gov.au/__data/assets/pdf_file/0004/123862/Enex_Testlab_report_into_ISP-level_filtering_-_Full_report_-_Low_res.pdf, last accessed 19 March 2010 (***ISP Content Filtering Pilot Report***).

48 Enex, *ISP Content Filtering Pilot Report*, page 13.

49 Enex, *ISP Content Filtering Pilot Report*, page 13.

50 See Alana Maurushat and Renee Watt (April 2009), 'Australia's internet filtering proposal in the international context', *Internet Law Bulletin*, page 18.

51 Asher Moses (17 March 2009), 'Banned hyperlinks could cost you $11,000 a day', *The Sydney Morning Herald*.

52 DBCDE, Consultation Paper. The DBCDE published the 174 public submissions in response to the Consultation Paper on 23 May 2010, after this paper was written: http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan/transparency_measures/submissions.

53 DBCDE, *Cyber-safety plan*, http://www.dbcde.gov.au/online_safety_and_security/cybersafety_plan, last accessed 19 March 2010.

of the Broadcasting Services Act, which is intended, among other things:

- to restrict access to certain Internet content that is likely to cause offence to a reasonable adult; and
- to protect children from exposure to Internet content that is unsuitable for children.[54]

While these are certainly legitimate purposes for legislation, a mandatory ISP-level filter would not be a reasonably appropriate and adapted means to serving this end. As Kirby J expresses the test: the means selected are not proportional to the intended aim.[55] This is for three main reasons.

First, a mandatory ISP-level filter would provide no better protection to minors than the currently available, non-government-owned, optional content filters. Such filters were available for free to members of the public under the Howard Government.[56] To the extent there is concern that technologically uninformed parents might neglect to implement such an optional filter on the family computer, Senator Lundy's suggestion that subscribers to ISPs be obliged to determine whether or not their account is subject to an optional filter is supremely reasonable.[57] Such 'mandatory optional' filtering could have the additional benefit of being better tailored to each household's particular requirements. In this way, families, as well as individuals with low tolerance for offensive material, would be protected from inadvertent or inquisitive exposure to RC content.[58] Communications about government or political matters among the balance of Australia's population could then continue without potential impediment. In essence, the Government's proposal goes considerably further than what is needed to achieve its aim.[59]

Second, the typical means by which illegal content is disseminated online would not be impacted by the types of ISP-level filter proposed by the Government, mandatory or optional. An ISP-level filter of certain uniform resource locaters (***URLs***) would not be able to keep up with the ever-changing online environment and would have no impact on online transmissions made, for example, via:

- peer-to-peer systems (for example, BitTorrent);
- encrypted channels;
- chatrooms;
- Usenet groups; and
- instant messaging programs.[60]

During the pilot of filtering technologies commission by the Government, the tested filters only blocked between 8.1 per cent and 16.2 per cent of attempts to circumvent the filter and access blacklisted URLs.[61] Determined distributors of child pornography will remain the exclusive jurisdiction of targeted police operations.

Third, a mandatory ISP-level filter must confront certain technical obstacles. Enex Pty Ltd (**Enex**), the authors of the *ISP Content Filtering Pilot Report*, comments, in the context of testing the filters' ability to block content not on a specific list, that:

> *Enex considers it unlikely that any filter vendor would achieve 100 percent blocking of the URLs inappropriate for children without significant over-blocking of the innocuous URLs because the content on different commercial lists varies and there is a high rate at which new content is created on the internet. Enex has also noted, through previous testing, that the higher the accuracy the higher the over-blocking.*[62]

In addition, some impact on performance (that is upload/download speed) was seen during the performance degradation tests, although this impact was generally within the stated +/ 10 per cent margin for error.[63] One of the four ISPs involved in the testing, using a particular technical setup, experienced a 'noticeable' (> 20 per cent) impact on file uploads and a 'minimal' (10 per cent to 20 per cent) impact on file downloads when filtering the ACMA blacklist only. Significantly more performance degradation was evident for all ISPs when the ACMA blacklist as well as additional content was filtered. Given the Government's separate emphasis on the need for fast broadband in Australia,[64] significant performance degradation is difficult to justify.

Due to the potential for performance degradation when filtering high traffic volume sites, Minister Conroy has been exploring the option of using deep packet filtering to regulate content hosted on such websites as YouTube; a feat which would not be technically practical with an ISP-level filter.[65] Such approaches are beyond the scope of this paper and raise their own freedom of communication issues. Suffice to say, it is apparent that there are some technical obstacles inherent in the introduction of an ISP-level filter which will be difficult to overcome.

4. Conclusion

It is clear that a mandatory ISP-level filter of Internet content would raise significant freedom of communication — and perhaps freedom of political communication — issues if implemented in Australia. Even if legislation implementing a mandatory ISP-level filter of Internet content is not an effective burden to communications about government or political matters, and is therefore constitutionally valid, it is clear that such a filter would not, as a matter of policy, be reasonably appropriate and adapted to the Government's stated policy objective. The portion of the Government's $125.8 million cyber-safety budget allotted to studying and implementing a mandatory ISP-level filter would be better spent on optional filters, educating Australians on cyber-safety and enforcing existing laws in an online environment.

Chris Govey is a Lawyer at Allens Arthur Robinson in Sydney.

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54 Section 3 of the Broadcasting Services Act.

55 *Coleman v Power* (2004) 220 CLR 1 at 82.

56 Fran Foo (5 August 2008), 'Net censorship to cost users', *The Australian*, http://www.theaustralian.com.au/australian-it/net-censorship-to-cost-users/story-e6frgamf-1111117107910, last accessed 19 March 2010.

57 Senator Kate Lundy, above, note 14.

58 It should be noted that the Internet is generally an interactive tool; it is generally difficult to access material inadvertently. Individuals with low tolerance thresholds should not click on obviously offensive links.

59 Cf the High Court's comments about the law of defamation in NSW: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575.

60 See Alana Maurushat and Renee Watt (April 2009), 'Australia's internet filtering proposal in the international context', *Internet Law Bulletin*, page 19.

61 Enex, *ISP Content Filtering Pilot Report*, page 25.

62 Enex, *ISP Content Filtering Pilot Report*, page 13.

63 Enex, *ISP Content Filtering Pilot Report*, page 21.

64 DBCDE, *National Broadband Network: 21st century broadband*, http://www.dbcde.gov.au/broadband/national_broadband_network, last accessed 19 March 2010.

65 Ry Crozier (8 February 2010), 'Conroy meets with Google for YouTube filtering', *ITNews for Australian Business*, http://www.itnews.com.au/News/166677,conroy-meets-with-google-for-youtube-filtering.aspx, last accessed 19 March 2010.