



Electronic Frontiers
AUSTRALIA

Mandatory ISP filtering and the rule of law

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Many concerns with Labor's proposal

- Technical feasibility and efficacy
- Uncertain definition and application
- Constraints on freedom of speech
- Economic efficiency
- Lack of clarity, transparency and due process



The rule of law

... an essentially contested concept ...



The rule of law: A legal restraint upon the exercise of power

- Government is bound by the law as it stands
- The law ought only to be changed through legitimate means



A legal restraint upon the exercise of power

- Labor does not have a majority in the upper house
 - Needs the support of the opposition or the crossbenchers



A legal restraint upon the exercise of power

“the Minister is still looking into whether the filter would require legislation, or could be **implemented through other means.**”

- ABC News, “Senate poses tough hurdle for internet filtering plan”
<http://www.abc.net.au/news/stories/2009/02/27/2503830.ht>



Non-legislated filtering: 'voluntary' filtering schemes

Voluntary does not mean 'opt-in'.



Non-legislated filtering: 'voluntary' filtering schemes

- Over 90% users blocked in UK (IWF blacklist)
- 99% in Denmark (DNS blacklisting)
- Finland (DNS blacklisting)
- All major Canadian ISPs (URL blacklisting)
- Some implementation Norway, Sweden, Netherlands, Switzerland, Italy
 - Irene Graham, "ISP 'Voluntary' / Mandatory filtering"
<http://libertus.net/censor/ispfiltering-gl.html>



A voluntary scheme in Australia?

- Would require support from Internet Industry Association (IIA)
- Or a replacement of the IIA Code of Conduct with an 'industry standard'
 - Legally difficult; disallowable; requires 'deficiency'
- Or judicial action
 - Unlikely given current law



'Voluntary' schemes

- Bypasses democratic legislative process
- Same result, less transparency and oversight
- Conflicts with values of the rule of law:
 - **laws ought to be legitimately made and enforced**



The rule of law: A requirement of formal legality

“public, prospective laws, with the quality of generality, equality of application, and certainty”

– Brian Tamanaha, *On the Rule of Law*, p 119



Formal legality and the blacklist

Unlike classification of books and broadcast media, the ACMA blacklist is secret.



Formal legality and the blacklist

Blacklists leak.



Formal legality and the blacklist

Senator Conroy threatened Australians who were caught distributing the leaked blacklist with criminal prosecution:

“ACMA is investigating this matter and is considering a range of possible actions it may take including referral to the Australian Federal Police. Any Australian involved in making this content publicly available would be at serious risk of criminal prosecution.”



Formal legality and the blacklist

We are not allowed to examine the blacklist.



Formal legality and the blacklist

We are not allowed to link to URLs on the blacklist.



Formal legality and the blacklist

**The ideal of rule of law involves clear,
published, understandable laws.**



The rule of law: “a rule of law,
not man” (sic)

government “shielded from the
familiar human weaknesses of bias,
passion, prejudice, error, ignorance,
cupidity, or whim.”

– Tamanaha, *On the Rule of Law*, 122.



The rule of law and the need for transparency and oversight

- We should expect certain standards of accountability
- The blacklist is developed and enforced in (relative) secrecy.



Formal legality and the blacklist

Unlike print and broadcast classification regimes,
there are no methods of review and no oversight
provisions.



Formal legality and the blacklist

These problems are compounded where responsibility for creating and maintaining the blacklist is outsourced.



Formal legality and the blacklist

Democracy requires public scrutiny.



The rule of law

- A formal process for implementing laws.
- Clear, published, understandable laws.
- Accountable and responsible enforcement.