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The Hon. Kate Ellis, MP
Minister for Youth and Sport
161a Main North Road,
Nailsworth, SA, 5083

RE: Internet Censorship

Dear Ms. Ellis,

A lot has happened since my last letter to you¹ on the subject of the ALP's proposed Internet censorship scheme. Since it's a fairly fast-moving area, I thought you might appreciate a recap.

“LIVE TRIALS” STILL APPEAR STILLBORN

In my letter of 10 February 2009, I recounted the fact that we had reached a point that was almost two months from the promised commencement date of Senator Conroy's "live trials" and they were yet to begin.

It's May 2009 now, over four months from the 24 December 2008 promised commencement date, and over three months from the rehashed "mid January" commencement date, and the trials *still* haven't started.

Rather than starting trials, Senator Conroy has been "full of sound and fury, signifying nothing." He announced six ISPs who would be initial trial participants on 11 February 2009, prompting me to remark on Triple J's "Hack" programme that "I think some people have more Facebook friends than some of these ISPs have customers."² On the following day the Minister quietly added a seventh ISP without telling anybody³. Most recently Optus has announced that they will be beginning trials on 22 May 2009, but they also said they'd be contacting trial candidate customers about a month before commencement, and we're now well into May and that doesn't appear to have happened yet.

At the time of writing the "live trials" are no more advanced than they were when I last wrote to you nearly two months ago. Is anyone actually in charge of them?

PUBLICATION OF THE ACMA BLACKLIST

On 18 March 2009, *wikileaks.org* published a list of URLs purporting to be an August 2008 copy of the ACMA blacklist⁴.

Senator Conroy emitted a press release⁵ in response which, hilariously, simultaneously said that it wasn't really the ACMA list *and* that law enforcement would be investigating its leakage anyway.

¹ <http://users.on.net/~newton/ellis-2009-02-10.pdf> Letter to the Hon. Kate Ellis, MP, 10 February 2009

² http://mpegmedia.abc.net.au/triplej/hack/daily/hack_thurs_2009_02_12.mp3 Hack, Triple J, 12 February 2009

³ http://www.dbcde.gov.au/_data/assets/pdf_file/0008/107747/Grant_Reporting_7_day_listing_3_March.pdf DBCDE grant report which showed "OGHMA trading as Nelson Bay Online" receiving a grant of \$11,275 for participating in an ISP level filtering trial on 12 February 2009. The PDF file has since been deleted from DBCDE's web site.

⁴ http://www.wikileaks.com/wiki/Australian_government_secret_ACMA_internet_censorship_blacklist%2C_6_Aug_2008 "Australian government secret ACMA internet censorship blacklist, 6 Aug 2008"

⁵ http://www.minister.dbcde.gov.au/media/media_releases/2009/014 Ministerial press release, 19 March 2009. "This is not the ACMA blacklist," and, "ACMA is investigating this matter and is considering a range of possible actions it may take including referral to the Australian Federal Police."

On the following day, *wikileaks.org* published two additional blacklists, one dated 11 March 2009⁶ and the other dated 18 March 2009⁷.

The lists were obtained from one of the Government-approved PC filtering packages, *Integard*. Using a variety of technical techniques, it is possible to fool the software into delivering a copy of the ACMA blacklist to its owner's web browser.

Of course, none of this was a surprise to anyone except Senator Conroy and ACMA. You may recall that in my first letter to you⁸ I wrote:

A moment of consideration of that state of affairs yields the unavoidable conclusion that the blacklist will be "leaked". Many sites on the Internet specialize in providing repositories of "sensitive" Government data for the purpose of providing public access to documents against Governments' wishes, and a Government blacklist is exactly the kind of content those sites exist to publish.

By way of example, I specifically cited *wikileaks.org* in an accompanying footnote. You can't say you weren't warned.

But then, neither can Minister Conroy. My letter to you on 10 February 2009 drew attention to an Internet Industry Association (IIA) report commissioned by the Minister's department, received by him in February 2008, and subsequently suppressed by the Minister until the Sydney Morning Herald exposed it on 23 December 2008. That report *specifically pointed out blacklist security risks*. The Minister had thirteen months to review ACMA's security measures between the receipt of that report and the leakage of the ACMA list, and not only did he take no action whatsoever, he even had the gall to point the finger at the IIA in his 19 March 2009 press release as if they carried some kind of responsibility for the leak.

In the weeks which have passed since the leakage of the ACMA list, it has undergone a "crowd sourced" analysis by anti-censorship advocates. The result: The Minister was being profoundly misleading on the numerous occasions when he asserted that the ACMA list was "mostly child pornography."⁹ In the six weeks that have passed since the exposure of ACMA's work product, there have been no media reports of any child pornography on it whatsoever. Instead the Minister has had to defend himself against revelations that the blacklist contained a Queensland dentist, a dog boarding kennel from Maroochydore, anti-abortion political material, a consultancy company offering products and advice to operators of school tuck shops, and a site containing copies of Bill Henson's G and PG rated artwork¹⁰.

SERIOUS POLICY CONFUSION

In an interview with Kate O'Toole on the Triple J "Hack" program on 7 April 2009¹¹, Minister Conroy debased himself by dishonestly claiming, in relation to the blacklisted content under his proposed censorship scheme, "We've never stated that we were going to do anything other than Refused Classification."

The only accurate way of describing that statement is to call it a lie.

We know it's a lie because the Minister has blazed a trail of on-the-record commentary saying that the Government's intention has been completely different, namely to block material which meets the definitions of "prohibited content" and "potential prohibited content" described in sections 20 and 21 of Schedule 7 to the *Broadcasting Services Act 1992*¹². I documented a selection of those on-the-record remarks in an

⁶ http://www.wikileaks.org/wiki/Australian_government_secret_ACMA_internet_censorship_blacklist%2C_11_Mar_2009

⁷ http://www.wikileaks.com/wiki/Australian_government_secret_ACMA_internet_censorship_blacklist%2C_18_Mar_2009

⁸ <http://users.on.net/~newton/ellis-2008-10-20.pdf> Letter to the Hon. Kate Ellis, MP, 20 October 2008

⁹ For example: <http://www.australianit.news.com.au/story/0,24897,24641171-15306,00.html> "Conroy coy on filtered web content", *AustralianIT*, 12 November 2008. Minister Conroy: "... the ACMA blacklist of internet prohibited content, which is mostly child pornography..."

¹⁰ My 20 October 2008 letter to you highlighted the idiocy of placing control of a blacklist of Internet content into the hands of the same class of bureaucrats who called for the destruction of Bill Henson's artwork. I intended those comments to be interpreted broadly, but now we know that the ACMA blacklist is, indeed, under the control of *exactly those bureaucrats*.

¹¹ http://mpegmedia.abc.net.au/triplej/hack/daily/hack_tues_2009_04_07.mp3 Hack, Triple J, 7 April 2009

¹² http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/sch7.html Schedule 7 to the *Broadcasting Services Act 1992*

article¹³ published by *New Matilda* on 14 April 2009, which cited nine separate examples of Minister Conroy's own words claiming that he intended to block ACMA prohibited content. He only changed his tune when public ridicule arising from examination of leaked blacklists made it politically untenable to continue to support the reprehensible notion that Australian adults should be prevented from accessing material cited on a blacklist that was originally designed to record URLs of material *unsuitable for children*.

Putting the Minister's honesty to one side, let us suspend disbelief for long enough to assume that the Government's *current* policy is to only blacklist Refused Classification (RC) content.

The first problem Senator Conroy will have is that his department currently has no lawful authority to maintain a list of RC content. The *Broadcasting Services Act 1992* authorizes ACMA to make judgements about "prohibited content" and "potential prohibited content", but does not empower them to single-out RC for special treatment. If they're going to take on that function, they'll have to answer questions in Estimates about why they're using taxpayers' money to fulfill a function that their enabling statute doesn't require.

One could envisage the Minister amending the legislation, but he's unlikely to find support in the current Senate to do so. In any case, the Minister has addressed the possibility in his current censorship policy form-letter¹⁴ by saying, "The scope of the definition of prohibited content in legislation cannot be expanded without changes to legislation being passed by Parliament, and the Government does not intend doing this."

Another problem the Minister will have is the increasing level of disrespect which the Australian public has towards the existing classification scheme in general, and RC in particular. RC includes a broad swath of political content¹⁵, along with any computer game which the Classification Board judges to be unsuitable for children. Thanks to increasingly questionable decisions made by the Classification Board¹⁶, coupled with South Australian Attorney-General Atkinson's absurd stance against an R18+ classification for computer games¹⁷, public support for the current definition of RC is at an all-time low.

The third problem the Minister will have is that the probability of blacklist leakage now isn't any lower than it was before 18 March 2009. While this issue has been "alive" blacklists have been leaked from Finland, Norway, Denmark (twice), Thailand (twice), Australia (three times), and China; and researchers at Cambridge University have published details of a technique which allows the BT Cleanfeed system promoted by the IWF in the UK to be used as a veritable search engine to help members of the public find banned material¹⁸. It takes a special kind of stupidity to observe that track record then say, "Hey! Great idea! Lets make a new blacklist that's exclusively comprised of the worst of the worst, and lets promise that this time it won't leak!" How many more examples of unintended consequences will the Government need before it understands what a terrible idea this is?

POLICY ALTERNATIVES

On the SBS *Insight* program, I said, "If Senator Conroy took the word 'mandatory' out of the proposal, I don't think anyone would have a problem with it ... If the Government took away that 'mandatory' word, we could all pack up, go home and the whole issue would be over."

That statement has been my consistent position ever since this issue was first raised. I've always maintained that ISPs should be free to choose whether or not to offer censored services, and end-users should be free to choose whether or not their services should be censored.

¹³ <http://newmatilda.com/polliegraph/?p=567> "Senator Conroy blacklists his own policy", Polliegraph, *New Matilda*, 14 April 2009

¹⁴ <http://users.on.net/~newton/formletter-2009-04-26.pdf> Form-letter response from Senator Conroy about Internet censorship

¹⁵ <http://www.abc.net.au/unleashed/stories/s2536879.htm> "Internet Censorship", *ABC Unleashed*, Mark Newton, 8 April 2009

¹⁶ Examples: <http://libertus.net/censor/banchall.html#kp> "Ken Park" RC, public ignores censors; <http://libertus.net/censor/banchall.html#pph> Philip Nitschke's "Peaceful Pill Handbook"; <http://www.aph.gov.au/hansard/senate/commtee/s11635.pdf> RC anti-abortion imagery discussed by Ms. Wright from ACMA on Hansard page 72

¹⁷ <http://www.somebodythinkofthechildren.com/michael-atkinson-explains-r18-game-block/> Report of an article from Michael Atkinson using the sensitivities of his 22 year old son to justify his censorious stance

¹⁸ <http://www.cl.cam.ac.uk/~rnc1/cleanfeed.pdf> "Failures in a Hybrid Content Blocking System", Richard Clayton, University of Cambridge Computer Laboratory

That statement is also fully consistent with Australia's offline censorship regime, which has always held that Australian adults have a right to read, hear and view any material they see fit¹⁹. Governments over the last 30-odd years have had ample opportunity to make consumption of Refused Classification material by adults illegal if they wished, and they've always chosen not to. In that context it's senseless to single-out RC material on the Internet for special treatment when adults can legally buy, read and view RC content in offline media with impunity.

If the Government wishes to claim a policy "win" by using the \$44.5m earmarked for this policy to persuade ISPs to offer optional filtering services to end users who want them, it would have my support.

But as long as the Government continues to maintain that censorship should be mandatory for ISPs to offer, or mandatory for end-users to adopt, it'll face continued opposition from a great many people who will continue to be inspired to show the ALP what a ridiculous idea this is by making the policy repeatedly blow up in the Government's face.

CONCLUSION

By now even the most fanatical ALP supporter must be aware of how fantastically wrong the Government's position on online censorship has been. In an article²⁰ last year, I said that Senator Conroy imbued "the kind of wrongness that comes with its own theme music and marching band." The situation hasn't improved in the six months since. Indeed, many of us who have been Minister Conroy's strongest critics have eagerly anticipated his comments on the issue, because we know that the words coming out of his own mouth inevitably weaken his position²¹.

While the Minister's policy has flapped in the breeze, lurching from position to position as its factual underpinnings have been successively dismantled, my view of the policy has remained constant²²:

- * There's no serious Internet content problem to solve;
- * Even if there was, the public hasn't demanded that the Government solve it;
- * Even if they had, the Government's censorship proposal can't solve it;
- * Even if it could, it's too expensive;
- * Even if it was affordable, it'll be implemented incompetently by ham-fisted regulators;
- * Even if it was implemented perfectly, the blacklist will leak; and
- * There's no possibility that the blacklist won't leak.

Over the last six months, empirical evidence has come to light which has indisputably vindicated each and every one of those points²³, and I'd be more than happy to go into any of them in greater detail if you desire. Each point stands alone as a compelling reason to abandon the Government's "clean feed" policy, but to date the Government has failed to address *any* of them.

Rather than continuing with its fatally flawed and profoundly unpopular proposal, perhaps it's about time for the Government to start listening to someone who has been right, and who has established a verifiable track record of knowing what he's talking about. When you become interested in having that conversation, you will find me at your service.

Sincerely yours,

Mark Newton

¹⁹ <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/frameLodgmentAttachments/6C888688A3BBD40ACA2574120004F72A> Principle (a) underpinning the Australian classification code is, "adults should be able to read, hear and see what they want."

²⁰ <http://www.abc.net.au/news/stories/2008/11/10/2414895.htm> "Filter advocates need to check their facts", Mark Newton, *ABC News Opinion*, 10 November 2008

²¹ Example: http://www.smarthouse.com.au/Wireless_And_Networking/Broadband/B8F2X5E5 At the ATUG conference on 19 March 2009, Minister Conroy appealed for critics to "have faith in elected politicians" and ridiculed suggestions that the Government was interested in censoring political dissent on exactly the same day that ACMA served a takedown notice on the Whirlpool broadband discussion forum to have a discussion critical of his censorship proposal censored. I'm not making this up.

²² <http://www.onlineopinion.com.au/view.asp?article=8098> "The perplexing Internet debate", Mark Newton, *Online Opinion*, 30 October 2008.

²³ http://www.itnews.com.au/News/99569_dump-the-botched-net-filter-sage.aspx "Dump the botched net filter - SAGE", Lilia Guan, *iTnews*, 26 March 2009