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8 November 2002

Manager, Broadcasting and Online Content
Department of Communications, Information Technology and the Arts
GPO Box 2154
CANBERRA ACT 2600

Email: online.review@dcita.gov.au

Dear Sir/Madam

Subject: Submission to Review of the operation of Schedule 5 to the Broadcasting Services Act 1992

We enclose herewith EFA's submission in response to DCITA's call for comments on the general operation of Schedule 5 to the *Broadcasting Services Act 1992* and the issues identified in the DCITA Issues Paper.

Yours faithfully

Irene Graham
Executive Director
Electronic Frontiers Australia Inc.

Electronic Frontiers Australia Inc. (EFA)
**Submission to Dept. of Communications, Information Technology and
the Arts**

**re Review of the Operation of Schedule 5 to the Broadcasting Services
Act 1992**

8 November 2002

This is a response to the Issues Paper entitled "*A review of the operation of Schedule 5 to the Broadcasting Services Act 1992*" issued by the Department of Communications, Information Technology and the Arts ("DCITA") on 27 September 2002 [1].

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Executive Summary

- There is no evidence or indication in Government reports to support the Minister's [claim \[2\]](#) on 21 August 2002 that the Internet has been made safer as a result of the Government's Internet censorship regime.
- The ABA spent 83% of its Internet censorship efforts investigating content on overseas-hosted websites over which it has no control.
- Approximately half of the prohibited items designated as hosted in Australia were found in world-wide Usenet newsgroups, most likely originated outside Australia, and were not taken down from the Internet.
- The ABA's refusal to provide the URLs or titles of taken-down Australian-hosted web pages, on the ground that such information would enable a person to access prohibited content on the Internet, indicates the ABA believes such content has not been taken down from the Internet.
- Ministerial statements trumpeting the success of the scheme have been, by the Minister's own admission, based on erroneous statistics.
- Misleading statements have been made by the government about the proportion of prohibited content that is actual child pornography.
- The scheme exaggerates the outcomes by claiming newsgroup postings removed from one Usenet newsgroup server as content that has been removed from the Internet.
- The referral of prohibited content to scheduled filter vendors is not followed up to ensure that the vendors add the content to their filter blacklist.
- The application of film classification guidelines to static images and text on the Internet is inappropriate and results in prohibition of content online that is legally available in magazines offline.
- OFLC fees for classification, and review of a classification, of a web page are exorbitant, costing approximately five times the fee for an entire offline magazine.
- Online publishers have less rights in relation to review and appeal of classification decisions than offline publishers.
- The effectiveness or otherwise of the complaints system would be clearer if the outcome of investigations resulting from legislatively valid complaints (i.e. from Australian residents), and information received from other entities such as overseas hotlines, was reported on separately.
- No information has been made available by the government about successful prosecutions, if any, resulting from the scheme.
- The estimated \$2.7M annual cost of the scheme is difficult to justify given the limited outcomes achieved.

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Introduction

Electronic Frontiers Australia Inc. ("EFA") is a non-profit national organisation representing Internet users concerned with on-line rights and freedoms. EFA was established in 1994, is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties.

In April 1999, EFA lodged a submission to the Senate Select Committee on Information

Technologies inquiry into the then proposed Online Services legislation and subsequently presented oral testimony before the Committee.

EFA's position on the merits and otherwise of the legislation has not changed since that time. While some improvements were made to the initially proposed legislation during its passage through Parliament, in EFA's view, these did not adequately address the many issues and problems raised by EFA and numerous other organisations and individuals. We believe DCITA and the government are already aware of these.

In this submission, we address a number of matters and issues that have become particularly apparent since the legislation commenced operation.

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Complaints process—performance

Comment is sought on the complaints process and outcomes, and the referrals of 'sufficiently serious' content to the relevant police authorities.

Comment is sought generally on the performance of the complaints process.

EFA read with interest the Minister for Communications, Senator Richard Alston's announcement, when releasing the fourth report on the government's Internet censorship regime on 21 August 2002, that "[Internet safety for Australians continues to grow](#)" [2].

EFA has conducted a comprehensive analysis of Government reports on the regime, in light of the Minister's admissions to the Senate that official reports contain statistical errors exaggerating the alleged effectiveness of the scheme, and reviewed the overall operation and effectiveness of the scheme. Our findings and comments are provided below.

We conclude there is no evidence to support the Minister's [claim](#) [2] that the Internet has been made safer as a result of the Government's Internet censorship regime.

Location of Prohibited Content

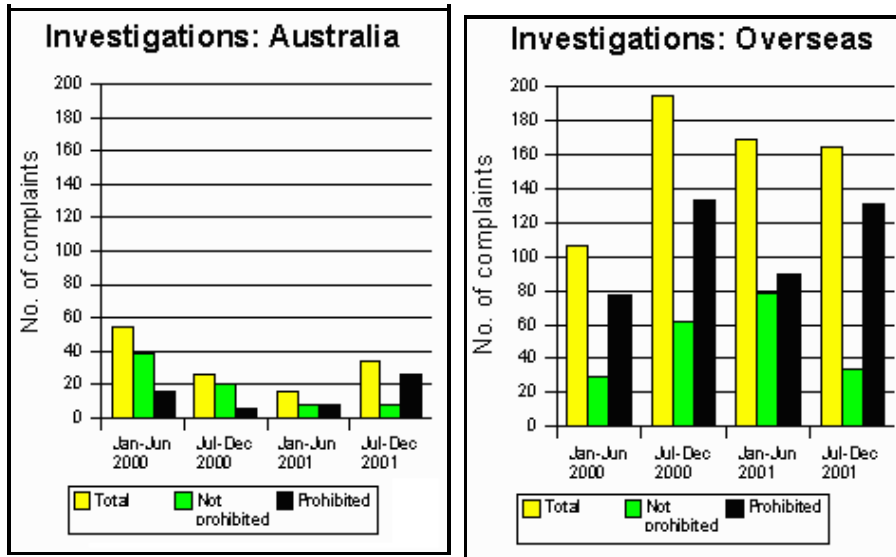
Australia –vs– Overseas

During the two years ended December 2001, the Australian Broadcasting Authority ("ABA") prohibited 756 items of Internet content. These items consisted of pages on the World Wide Web and messages posted to [Usenet newsgroups](#). The World Wide Web contained an estimated [800 million web pages](#) [3] in February 1999 and the growth rate has since been explosive. Today, the popular search engine Google provides Internet users with immediate access to over [3 billion Web documents](#) [3]. There are approximately 40,000 [Usenet newsgroups](#). As well, Google provides access to a 20 year Usenet archive consisting of more than 700 million messages [3].

The ABA spent 83% of its Internet censorship efforts investigating content on overseas-hosted websites over which it has no control.

The remaining 17% of the ABA's censorship efforts were directed to investigating content deemed "Australian". As defined by the relevant law, this includes not only content on Australian-hosted web sites, but also messages posted by people all over the world to the global [Usenet newsgroup](#) network.

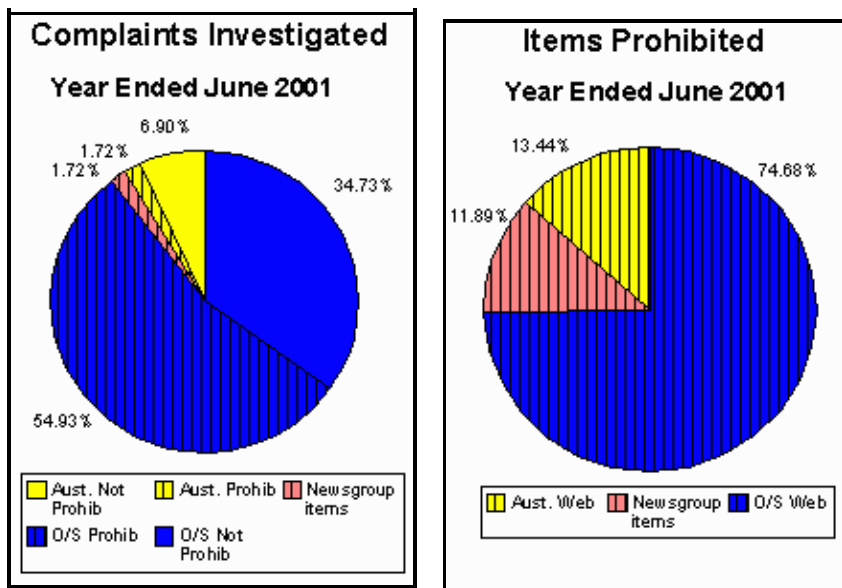
The graphs below illustrate the number and outcome of investigations concerning "Australian" and overseas content.



Content was prohibited as a result of 68% of the investigations into overseas-hosted content, and 43% of the investigations into Australian-hosted content.

Australian content: web sites -vs- global newsgroups

Approximately half of the "Australian" prohibited items were found in world-wide [Usenet newsgroups](#), quite probably distributed by persons outside Australia. This situation is illustrated in the graphs below for the year ended June 2001.



(Note: Information tabled in the Senate suggests the percentage of prohibited items found in

newsgroups may be higher than shown in the above graph. Newsgroup items may comprise around 15% and Australian Web content 10%).

As shown above, investigations into complaints about "Australian" content locate proportionally more prohibited items per complaint than investigations into overseas content. Although only 6% of the complaints about prohibited content concerned "Australian" content, these resulted in finding of 25% of the prohibited items. The reason for this is provided in the following section.

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The Exploding Statistics Phenomenon

In EFA's May 2001 analysis (*Regulatory Failure: Australia's Internet Censorship Regime* [4]) of the [second government report](#), we noted an exploding statistics phenomenon. Although the ABA's [Internet Content Complaint Form](#) states "Note: You can complain about only one item of Internet content in each complaint form", the ABA had reported 67 items of prohibited content from the 6 complaints about Australian-hosted content, in contrast to only 136 items from 133 complaints about overseas hosted content. We remarked that "it could be concluded that the ABA is ramping up the 'item count' in order to make the figures look respectable in relation to Australian content".

Subsequently, it has become clear that a significant part of the reason for this phenomenon is the treatment of [Usenet newsgroups](#) as Australian content, although the vast majority of messages in newsgroups are not posted by Australians.

Usenet is a world-wide network of public discussion and exchange forums called newsgroups. There are tens of thousands of newsgroups covering a huge range of topics, and hundreds of thousands of messages are posted to newsgroups each day. New newsgroups can be quickly created and are automatically disseminated around the world using ad hoc, peer to peer connections between computers, called Usenet servers. Many Internet Service Providers (ISPs) host Usenet servers and some web sites provide archived copies of messages distributed via Usenet servers. When a person somewhere in the world posts a message to a newsgroup, the message is automatically forwarded to and temporarily stored on Usenet servers all over the world, where it can be read and/or replied to by other people. The identity and origin of messages can be easily forged. Messages are periodically and automatically purged from Usenet servers to make room for new messages.

According to the Minister for Communications, Senator Richard Alston (in [answers to questions on notice](#) [5] asked by Senator Brian Greig):

"[W]here a complaint relates to an entire newsgroup, rather than a single posting on it, the ABA investigates a sample of the postings contained in the newsgroup... For the purpose of reporting, each of the postings sampled is then counted as an item in the statistics. Similarly, the ABA may investigate a sample of the content on a World Wide Web site...and each page would be counted as an item in the statistics. However, investigations relating to complaints about World Wide Web content are less likely to involve more than one item of content, as complaints relating to such content generally pertain to a specific page of content."

and

"Three of the six complaints [in the Jul–Dec 2000 period] about Australian hosted content related to Internet content in Usenet [newsgroups](#)...All complaints about content hosted outside Australia related to World Wide Web content."

Hence, the reported number of 'Australian–hosted' items investigated and/or prohibited is meaningless. The numbers can readily be manipulated as they depend on the amount of time that ABA staff choose to spend searching through the thousands of messages in [newsgroups](#).

For example, the [second government report \(Jul–Dec 2000\)](#) [6] stated that the ABA had referred 45 of 67 Australian–hosted prohibited items to State or Territory police. EFA's [analysis of the report](#) [4] remarked that "at least 14 of the 45 are likely to be newsgroup posts found in one newsgroup on one ISP's system".

The Minister has since revealed [statistics](#) [6] stating that 64 (not 67) items were prohibited and 28 of 44 (not 45) items referred to State or Territory police were newsgroup postings. Furthermore, the [statistics](#) show that approx. 14 of 22 prohibited items not referred to police would have been found by the ABA while sampling posts in [newsgroups](#). In summary, 28 of 44 'Australian–hosted' items referred to police were newsgroup postings and at least 42 (66%) of the total of 64 'Australian–hosted' prohibited items were newsgroup postings.

Similarly, in the [third six months Jan–Jun 2001](#) [7], 17 of 34 (50%) of the 'Australian–hosted' prohibited items were newsgroup postings [according to the Minister](#) [8]. Relevant statistics for the first and fourth six–month periods have not been made available by government agencies or the Minister to EFA's knowledge.

While the vast majority of messages posted to newsgroups contain innocuous information, there is no doubt that a considerable amount of highly illegal material is also disseminated via newsgroups. However, counting newsgroup postings as "Australian" content and referring these to State/Territory police is unlikely to be an effective means of reducing the amount of illegal content distributed via newsgroups, as State/Territory police powers are limited to their own jurisdictions and most newsgroup postings originate overseas. Government reports indicate only overseas–hosted web site content is referred to the Australian Federal Police (AFP) for referral to overseas law enforcement agencies.

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Type of Prohibited Content

Errors in Government Reported Statistics

The ABA and Minister have frequently claimed that the majority of items prohibited involve child pornography. While this might be so, the numbers concerning such material have been exaggerated in government reports. Moreover, a larger quantity of material that is legally available to adults offline has been prohibited online than reported. Some of this material has been counted and reported as child pornography although it is not. Furthermore, these false claims have in effect been used to support refusal to provide information under Freedom of Information law about the type of content being prohibited.

In EFA's [May 2001 analysis \[4\]](#), we questioned the accuracy of information in the [second government report](#) covering the six months ended December 2000.

Subsequently the Minister for Communications, Senator Richard Alston informed the Senate that numbers in the second (and third) government reports were wrong. Information in this regard is below.

Number of prohibited 'Australian-hosted' items

According to the Minister, **less** items of Australian-hosted content were prohibited than claimed in the [second](#) and [third](#) government reports and the numbers reported in each classification category were also wrong, as detailed below.

Table 2: Jan–Jun 2001 Number of items of 'Australian-hosted' prohibited content		
	Six-month Report issued Feb 2002	Minister's Answers tabled Jun 2002
R18	6	7
X18	3	10
RC	28	17
Total	37	34

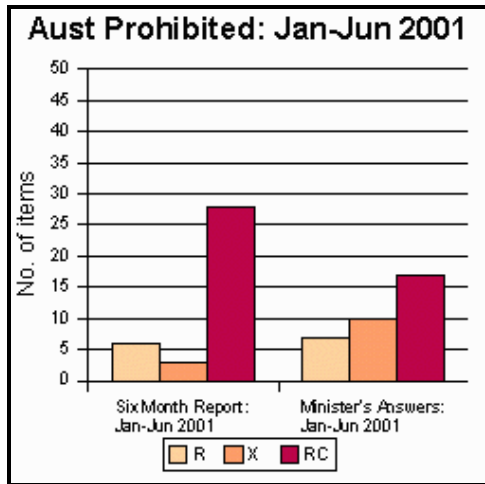
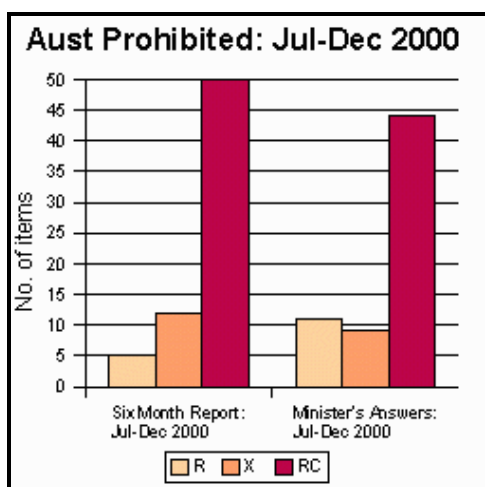


Table 3: Jul–Dec 2000 Number of items of 'Australian–hosted' prohibited content		
	Six–month Report issued Apr 2001	Minister's Answers tabled Aug 2001
R18	5	11
X18	12	9
RC	50	44
Total	67	64



R18 prohibited content

As shown above, almost twice as much content was classified R18 than reported in the official six–month reports. Approximately half the items classified R18 (detailed information about aspects of adult life that may be disturbing or harmful to minors) were apparently reported in the same category as child pornography instead of in the R18 category.

Some of the material that was classified R18 and prohibited is equivalent to material legally available in magazines classified "Unrestricted", that is, in magazines that can be legally sold in Australia to persons under 18 years. This occurs because the regime applies film censorship guidelines to static images and text, instead of publications guidelines. As well, when a web page displays only one image that infringes the law, and many that do not, the entire page is prohibited. Unlike offline magazine publishers, online publishers are not notified of which specific images or text infringe the law and given the opportunity to remove those. Instead, the entire web page is banned.

X18 prohibited content

Material classified X18 (non–violent sexually explicit material depicting consenting adults) has also been incorrectly counted in the number of items reported to involve child pornography.

In EFA's [analysis](#) of the second six–month report (Jul–Dec 2000), we remarked that:

"It is reasonable to assume that the items referred to police concern child pornography, particularly given that the ABA's breakdown of items by category supports this contention, e.g. takedown notices were issued in relation to 45 items that were categorised as either 'exploitative/offensive depiction of a child' or 'paedophile activity'."

However, it has since become apparent that it is not reasonable to make such an assumption.

For example, the [third six month report \[7\]](#) claimed that 23 Australian-hosted items classified 'RC' were referred to State/Territory police because they involved "exploitative/offensive depiction of a child".

However, the Minister subsequently [informed the Senate \[8\]](#) the correct number was 13 (not 23) and that, in addition, 10 items classified 'X18' (non-violent sexually explicit material depicting consenting adults) were referred to State/Territory police.

Whether in fact the 10 items classified 'X18' were referred to police is questionable. If they were then, according to six-month reports and the Minister's answers to questions, 57 or 58 items classified 'RC' plus 10 items classified 'X' were referred to State/Territory police in the year ended June 2001, i.e. a total of 67 or 68 items. However, the [ABA Annual Report 2001 \[9\]](#) states only 59 items were referred to State/Territory police.

The purpose of referring items classified 'X' to State/Territory police is unclear given it is not illegal to make 'X' content available to adults online under State/Territory laws, except under Victorian law (as at October 2002). Perhaps all four of the complaints about 'X' material in the six months coincidentally happened to concern content hosted in Victoria. However, referring 'X' material to police in States/Territories where it is not illegal to make available, and incorrectly reporting it as 'RC', is a means of ramping up the item count so that it appears more Australian content involving child pornography is being found and referred to police than is factual.

Number of items involving child pornography referred to police

As noted above, the number of items allegedly referred to State/Territory police because they involved "exploitative/offensive depiction of a child" has been exaggerated in government reports. However, the correct number remains unclear.

In relation to 'Australian-hosted', three different numbers have been claimed in government reports for the year ended June 2001:

- the two six-month reports state 68 items involving "exploitative/offensive depiction of a child" were referred to State/Territory police,
- the Minister's answers state the number was 57, and
- the [ABA's Annual Report 2001 \[9\]](#) states the number was 59,

suggesting the six-month reports exaggerated the number by approximately 16%.

With regard to content hosted outside Australia:

- the two six-month reports state 209 items were referred to the Australian Federal Police,
- the [ABA's Annual Report \[9\]](#) states the number was 176,

suggesting the six-month reports exaggerated the number by approximately 19%.

Further exaggeration of the number of items categorised as "exploitative/offensive depiction of a child or paedophile activity" is found in the [DCITA Review Issues Paper](#) which states: *"Of the items Refused Classification during the first 24 months of the Scheme's operation, 492 involved exploitative/offensive depiction of a child or paedophile activity. This represents 59 per cent of the items Refused Classification under the Scheme"*.

The number 492 bears no resemblance to the numbers previously claimed in government reports, nor in the Minister's answers to questions. According to the four six-month reports, the number was 432, not 492. However, according to the Minister's answers to questions on notice, the numbers in at least two of the four reports were wrong and, at most, 421 items involved exploitative/offensive depiction of a child or paedophile activity.

Furthermore, if 492 represents 59 per cent of the items Refused Classification ("RC") as stated in the Issues Paper, then a total of 833 items must have been categorised RC. However, only 756 items were prohibited according to the Issues Paper and at least 150 of the 756 prohibited items were not classified RC.

In relation to accuracy of the number of items allegedly referred to police, the Minister was asked in the Senate why the ABA [informed a Senate Estimates Committee \[10\]](#) (on 30 November 2000) that 91 items had been referred to State or Territory police in the eleven months to 30 November 2000, while the official reports state less items (89) for the full calendar year. The Minister [answered \[5\]](#) (on 8 August 2001):

"The discrepancy appears to relate to misclassification and/or double-counting of some items in the ABA's complaint database at the time the November 2000 statistic was calculated. The complaint data are regularly reviewed for accuracy and the inaccuracy was corrected prior to calculation of the December 2000 statistic. ..."

Nevertheless "misclassification and/or double-counting", or other errors, in relation to statistics for period ended December 2000 was still occurring in 2001 as shown in [Table 3](#) above. Evidently, misclassification and/or double-counting continued to occur in reports concerning the 2001 year and in preparing the DCITA Review Issues Paper in 2002.

Errors and discrepancies in governmental statistical reporting undermine the credibility of the government's claims regarding the number and type of items located and prohibited. Moreover, as the errors noted above came to light from questions asked about only Australian-hosted content in one year, it seems likely there are also errors in reports for other periods and also in relation to overseas hosted content.

Although there has been much governmental fanfare implying the legislation is effective in reducing the quantity of child pornography material on the Internet, there is no support for this contention in government reports. Such material was already illegal to possess and distribute, both offline and online, under pre-existing law in all Australian States and Territories. Reporting on numbers of items referred to police, even an exaggerated number, does not demonstrate effectiveness. Notably, government reports contain no information on the [outcome of police investigations](#), if any, regarding content referred to police by the ABA.

Distribution of child sexual abuse images via the Internet is a serious problem that requires sufficient funding of police forces to enable specialised training and adequate resources. EFA

considers funds used in locating and categorising merely controversial speech as "prohibited" would be more usefully directed to increased funding of police engaged in tracking down those who distribute globally agreed illegal material such as child sexual abuse images.

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Effectiveness of the Scheme

Take-down Notices: Australian hosted content

As defined in the Act, 'Australian-hosted' content includes content on web sites hosted in Australia and also messages posted by people all over the world to the global [Usenet newsgroup network](#).

In relation to Web site content, although government reports claim that prohibited 'Australian-hosted' content found by the ABA has been taken-down, both the government and the ABA believe the prohibited content remains on the Web. This is demonstrated by their refusal to provide the URLs or titles of prohibited Australian-hosted Web pages under Freedom of Information law on the ground that the information would enable a person to access prohibited content. Obviously, if the content had been taken-down from the Web, the URL would not facilitate access to it.

In relation to prohibited content in global [Usenet newsgroups](#), the ABA only sends a take-down notice to one ISP, that is, to the complainant's ISP. This is evident from documents released to EFA under Freedom of Information law and also in the Minister's [answers to questions \[8\]](#) in the Senate. However, as discussed [above](#), messages posted to newsgroups are automatically distributed to many ISPs' news servers. Hence, the same content remains available on news servers of numerous other Australian ISPs (there are approximately 650 ISPs in Australia). Nevertheless these items, which account for approx. 50% of "Australian-hosted prohibited content" in the year ended June 2001 are counted and reported as having been taken-down from Australian servers.

Referral to Filter Makers: overseas hosted content

As noted [above](#), around 83% of the ABA's Internet censorship efforts have been directed to investigating content hosted on overseas web sites. Prohibited items are then notified by the ABA to approved filtering software vendors listed in the Internet Industry Association (IIA) [Code of Practice](#). ISPs are required to provide an approved filtering product to any customers who wish to obtain/use same, at a price that does not include profit for the ISP.

However, neither the ABA or IIA are required to verify that approved vendors update their censorware blocklist as a consequence of the ABA's notifications and no reports have been issued indicating that either the ABA or IIA has ever checked whether blocklists are updated accordingly. Moreover a [report on the effectiveness of approved filtering products \[11\]](#) commissioned by the ABA in 2001 states: "The list of sites [used in tests] does not include any that are included in the list of notified sites sent out to registered filter vendors by the ABA".

Most of the approved vendors do not sell filtering products that are reliant on vendor provided blocklists. Only 8 of the 17 do so (as at October 2002), while the remainder leave it to the purchaser to compile a blocklist, or use solely other means of blocking content such as keywords or skin

colours.

Referral of prohibited items to filtering product vendors represents a government subsidy to a largely US-based industry that is most likely well ahead of the government anyway. For example, by March 1999 one censorware vendor that had been in business for three or four years had reportedly identified 8.5 million offensive sites ([according to Senator Alston during a radio interview \[12\]](#)) without Australian tax-payer funded assistance. In comparison, during the two years ended December 2001, the ABA notified merely 529 items to censorware vendors. It seems very likely the vendors would already have known, or would have found out, about those 529 items without the ABA's notification.

In all probability, the ABA is entirely wasting its time referring URLs to approved censorware vendors, especially in the absence of any verification by the ABA as to whether censorware vendors update blocklists in accord with ABA notifications.

Complaints System

During the year ended November 2000, 2.7 million Australian households had home Internet access and 6.9 million Australian adults accessed the Internet ([ABS 8147.0 \[13\]](#)).

The ABA reported receiving 937 complaints during the two years ended December 2001 and approximately half (487) of these resulted in the ABA finding prohibited content.

While the number of 'complaints' reported is already extremely low in comparison with the number of Australian Internet users, the government reports over-state the number of complaints received.

Under the legislation, only Australian residents are entitled to make complaints. Clause 25 states:

"25 Residency etc. of complainant

A person is not entitled to make a complaint under this Division unless the person is:

- (a) an individual who resides in Australia; or
- (b) a body corporate that carries on activities in Australia; or
- (c) the Commonwealth, a State or a Territory."

It could therefore be assumed that all 'complaints' were made by Australian residents. However, this is not so.

[According to the Minister \[8\]](#), when the ABA receives information from persons located overseas, or the ABA decides to initiate an investigation of its own accord, these are counted as 'complaints' and included in "Table 1: Outcome of investigations...(number of complaints)" in the six-month reports, although they are not valid complaints under the legislation.

For example, [in response to questions \[5\] in the Senate](#), the Minister said:

"The ABA initiated 33 investigations during the period 1 January – 31 December 2000. All 33 investigations were initiated following receipt of information which could not be formally considered to be a complaint (because the person was not entitled to make a complaint or the complaint did not contain all the required information), but which the ABA considered warranted investigation due to the apparent serious nature of the content concerned.

Thirteen investigations were initiated as a result of information received from persons who were not Australian residents, mainly from overseas complaint hotlines. The remaining 20 investigations were initiated after receipt of anonymous complaints."

Given that most overseas hotlines deal only with content relating to child pornography and paedophilia, and would presumably only refer Australian-hosted content to the ABA, it seems likely that 13 of the reported 22 'complaints' (in the calendar year 2000) that resulted in finding Australian-hosted prohibited content were not valid complaints, but referrals from overseas hotlines.

It would not be surprising if most, possibly all, of the content relating to child pornography and paedophilia had been referred by overseas hotlines rather than being an outcome of the complaints system. By encouraging Australian citizens to report child sexual abuse material to the ABA, the system places complainants at risk of committing a criminal offence, since mere awareness of the existence of such material implies that it has been downloaded into the user's computer. There is nothing in the *Broadcasting Services Act* which grants immunity from liability for users who report illegal content. In fact, there is at least one known Australian case where an Internet user has been prosecuted in exactly these circumstances.

EFA does not suggest that the ABA should not investigate referrals from overseas hotlines. However, it appears that the actual effectiveness or otherwise (including cost effectiveness) of the legislatively established complaints system would be clearer if the outcome of investigations resulting from valid complaints, and from other information, was reported on separately.

Prosecution Rates

On 8 August 2001, the following question and answer concerning prosecution rates was [tabled \[5\]](#) in the Senate:

Q. "(7) In relation to the 89 items referred to state or territory police, and the 156 items referred to the Australian Federal Police, in the [calendar year 2000], has the Minister inquired about the prosecution rate of offenders and received information from police that would support claims that the Internet has been made safer; if so, how many prosecutions have commenced in Australia."

A. "(7) Law enforcement investigations relating to Internet content that the ABA has referred to a State or Territory police service are matters to be determined by the relevant agency in question. The issue of feedback on content referred to the Australian Federal Police (AFP) will be addressed in a new service level agreement to be negotiated between the ABA and the AFP, replacing the current Memorandum of Understanding between the two organisations. As part of the new agreement, the ABA will receive regular reports on action taken in relation to matters it has referred to the AFP. Where appropriate, the ABA will report on the feedback it receives."

Although fourteen months has since passed, neither the Minister or ABA have reported receiving any information from police that would support claims that the Internet has been made safer. Furthermore, it seems likely that if any Australians had been caught and prosecuted as a result of the

legislation and ABA's activities, this would have made headlines, at least in a Ministerial media release.

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Cost of the Scheme

The estimated \$2.7M annual cost of the scheme is difficult to justify given the limited outcomes achieved. Costs reported by the ABA and/or the Minister to Senators are as follows.

For the financial year 1999/2000, [the ABA spent \\$915,000](#) on its Internet regulatory activities, which included only the first 6 months of the scheme's operation. This included \$100,000 spent on classification fees charged by the OFLC. [10]

For the calendar year 2000¹, [the ABA spent over \\$618,319](#) and NetAlert spent \$786,984. (The ABA amount probably does not include the \$85,040 spent by the ABA on OFLC classification fees.) [5]

For the first **half** of 2001, [the ABA spent \\$531,478](#) and NetAlert spent \$813,955. (The ABA amount probably does not include the \$27,030 spent by the ABA on OFLC classification fees.) [8]

This suggests a total cost in the region of \$2.7 million per year, approximately \$1 million p.a. by the ABA and \$1.6 million p.a. by NetAlert.

Notes:

1. The cost for the calendar year 2000 is under-stated in comparison with costs for the other two periods. It does not include corporate overheads nor a number of other costs included by the government when reporting costs for the other two periods.
2. The government has not made figures for the financial year 2001/2002 publicly available.

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Application of the OFLC's classification guidelines

Comment is sought on the practical application of the OFLC's classification guidelines to the Scheme.

EFA is opposed to classification of material traditionally found in publications as if it were a film or computer game merely because the publication method is digital rather than paper. The current application of Film Classification Guidelines to static images and text on the Internet is inappropriate and results in prohibition of content online that is legally available in magazines classified "Unrestricted" under the Publications Classification Guidelines, that is, in magazines that can be legally sold in Australia to persons under 18 years. It appears this occurs in part because unlike offline publishers, online publishers are not notified of the reasons for a classification, as further discussed later herein.

Furthermore, we dispute the claim made by various Federal and State politicians that online content providers should know how a particular web page containing static images and text 'would be'

classified simply by referring to the film classification guidelines. Even trained classifiers are unable to apply the film guidelines in a consistent manner to a *movie*, as illustrated by the numerous non-unanimous decisions of the OFLC Classification Board and the inconsistencies between decisions of the Board and the Review Board. Two well publicised instances, for example, are the films *Romance* and *Baise-moi*. Not only were the Classification Board members divided on the classification, but the Review Board members disagreed with the majority of the Board. There are also many examples of disagreement over the boundary between MA15 and R18 as reported in OFLC Annual Reports and the OFLC's online classification database.

Moreover, the ABA has sent web pages that they consider would be classified R18 or RC (Refused Classification) to the OFLC and the OFLC has classified some of that material PG (Parental Guidance), i.e. not prohibited online. (Ref: [Documents released by the OFLC under FOI law.](#))

Difficulties experienced by online content providers are exacerbated by the following:

- When a web page displays only a few images or portions of text that the OFLC determines to be prohibited online, and others that are not, the entire page is prohibited. Unlike offline magazine publishers who are provided with a copy of the OFLC Classification Board's report, online publishers are not notified of which specific images or text infringe the law so that they would have the option of removing those. Instead, the entire web page is banned.

EFA submits that the OFLC and ABA should be required to provide a copy of the OFLC Classification Board's report explaining the reason for the classification with a final take-down notice, and the recipient of the take-down notice (ISP or ICH) should be required to provide the Board's report to the online content provider. (The OFLC Board already prepares such a report. EFA has received copies of these for [web pages classified PG, M and MA](#) as a result of an FOI application.)

- OFLC fees for classification of a single web page are exorbitant. The OFLC charges the same fee for a web page (\$510) as for a movie/film for sale or hire with a running time of up to 15 minutes, which is approximately five times the amount charged for classification of an entire magazine (\$130). Furthermore, on the same basis, apparently the OFLC fee for review of a classification decision is \$1,270 for a single web page, while the fee for an entire magazine is \$330.

EFA submits that the fee for classification, or review of a classification, of a single web page consisting of static images and text should be less than for an entire magazine.

- The DCITA review Issues Paper states: "Pursuant to clause 92 of Schedule 5, an application may be made to the Administrative Appeals Tribunal (AAT) for review of a number of decisions under the Scheme, including a decision to give an ICH a take-down notice and a request to the Classification Board to classify Internet content. No such appeals were made in the first 24 months of the Scheme's operation".

It is unsurprising that no such appeals were made in relation to take-down or classification of Internet content because:

- ◆ An online publisher whose content has been classified and taken down is not entitled to lodge an appeal. An application for review by the AAT may only be made by the

Internet content host or Internet service provider (s92(2)). Such entities are unlikely to have any interest in spending the time, cost and effort involved in an appeal concerning someone else's content.

- ◆ Many online publishers who provide online content free of charge would be unable to afford the approx. \$600 application fee for review by the AAT, even if their ISP or ICH was willing to appeal the decision if the publisher paid the costs.
- ◆ There is no provision to lodge an application for review by the AAT of the decision of the OFLC Classification Board on which the ABA's decision to issue a take-down notice is based. Hence there appears to be no prospect of the AAT deciding that the ABA erred in law in deciding to issue a final take-down notice in relation to content classified prohibited by the OFLC Classification Board.
- ◆ To appeal a classification of the Classification Board concerning a web page to the Classification Review Board, an online publisher would have to firstly establish they are an 'aggrieved person' in terms of the *Broadcasting Services Act* and also pay the OFLC fee for review which is apparently \$1,270 (the same as for a movie for sale or hire with a running time of up to 15 minutes).
- ◆ It would be difficult to say the least to prepare a case appealing an OFLC Classification Board decision, given neither the ABA or OFLC are required to provide a copy of the OFLC Classification Board's report explaining the Board's reasons for the particular classification.

EFA submits that online publishers should have rights in relation to review of classification decisions equivalent to those of offline publishers. We consider the legislation should grant online publishers the right to appeal to the AAT and the Classification Review Board without having to prove they are an 'aggrieved person' and without the need for involvement by their ISP or ICH.

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Co-regulatory approach—industry codes of practice

Comment is sought on the operation of the codes, in particular the 'designated notification scheme' under code 2, the scheduled filters and the designated alternative access-prevention arrangements.

Comments are sought generally on the co-regulatory approach established by Schedule 5 to the Act, including the Internet industry codes of practice and whether the registered codes have operated to provide adequate community safeguards.

In EFA's view the industry codes of practice are operating satisfactorily and, in principle, provide adequate community safeguards.

However, given the Government veil of secrecy over operation of the 'designated notification scheme', it is not possible to comment on whether this does in fact provide adequate community safeguards.

We submit that the ABA or NetAlert Limited should investigate from time to time whether or not the scheduled filter vendors are in fact adding content notified by the ABA to their blocklists. We recognise that conducting such verification procedures would be highly problematic for the

Government and the ABA given URLs of prohibited web pages would need to be provided to persons commissioned to conduct such tests. Nevertheless, in the absence of any such verification processes, the ABA may be wasting its time sending notices to scheduled filter vendors and users of scheduled filters may not be being adequately protected. Given the OFLC and the ABA are apparently able to find adults capable of looking at prohibited material without (we assume) being irreparably harmed, if at all, we expect the ABA could also find suitable people to conduct tests of scheduled filters, at the very least in relation to content classified X which is material that can be legally purchased offline in Australia by any adult.

Comment is sought on the level of responsibility taken by industry under the Schedule 5.

Comments are also sought on compliance costs and related issues associated with the Online Content Co-Regulatory Scheme.

The level of responsibility taken by Internet Service Providers is presently as high as can be reasonably required or expected given the global nature of the Internet.

EFA is concerned, however, that the Code of Practice for ISPs developed by the Internet Industry Association (IIA), to which few ISPs have actually subscribed, is enforceable on any ISP at the whim of the ABA and that breach of the IIA Code is punishable by draconian fines and threats of taking away an ISP's business. We are of the view that the requirements of the IIA Code go beyond what is necessary to provide adequate community safeguards and that the legislation should provide for registration of Codes developed by other Internet industry associations where any such other Code provides adequate community safeguards.

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Co-regulatory approach—community education and advice

Comments are sought on the industry's obligations and activities with regard to community education.

The Internet industry in Australia has moved away from content provision and community focus towards a lean, utility business model. Community groups and organisations continue to provide limited Internet training but are not qualified to educate the community as to Internet classifications or consumer advice on filter technologies.

Comments are sought on the role and activities of the ABA with regard to community education.

EFA submits that this is an inappropriate role for a regulator. The Reserve Bank does not presume to take a role in education of the public as to home budgeting.

Comments are sought on the role and activities of NetAlert with regard to community education.

EFA submits that the effectiveness of NetAlert Limited requires review in terms of adequacy of information made available to the public, public awareness of NetAlert and community attitudes

towards its focus.

Comment is sought generally on community education under the Online Content Co-Regulatory Scheme.

Community education requires a commitment to funding on the part of Government. While industry and community organisations have the necessary skills, costs of computers and facilities have been prohibitive. Over the last two years there has been very limited community education, especially in remote and rural areas.

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International developments and cooperation

Comment is sought on the effectiveness of referrals of overseas-hosted material to the AFP and to certain Internet complaints hotlines.

EFA questions how the public can comment on the effectiveness of referrals of overseas-hosted material to the AFP and overseas hotlines when government reports on operation of the scheme contain no information on the outcome of such referrals.

Comments are sought on the role and functions of international cooperation under the Online Content Co-Regulatory Scheme and, in particular, the international liaison activities undertaken by the ABA and NetAlert in this regard.

Government reports indicate the majority of this activity may involve ABA personnel travelling overseas at tax-payer cost to proclaim the effectiveness of the Federal Government's Internet censorship regime in making the Internet safer for children and adults. Given there is no evidence for such a claim, EFA questions the merit of this use of tax payers' funds.

Insofar as the referral of potentially illegal content to overseas hotlines is concerned, in the absence of any information being issued by the ABA or government as to the outcome of such referrals, it is not possible to comment on whether or not such activity is worthwhile.

However, internationally agreed illegal material (primarily child pornography) can already be dealt with in international policing circles via pre-existing communications channels among police. The ABA is empowered to refer such material to the Australian Federal Police for referral to relevant overseas police forces. Most, probably all, overseas hotlines with whom the ABA communicates (according to government reports) are not the police, or even government regulators like the ABA. They are non-government entities such as community service organisations who collect reports from members of the public concerning child pornography material and who say they refer such reports to police.

Comments are also sought on international best practice models and developments and trends in international Internet content regulation.

In March 2002, EFA undertook extensive research into Internet censorship laws and related government policy outside Australia, in response to a request for information from the Chair of the NSW Parliamentary Standing Committee on Social Issues.

EFA was unable to find any indication that any country broadly comparable to Australia (in terms of democratic political systems and cultures) has, or intends to introduce, Internet censorship laws as restrictive as the existing Commonwealth legislation. While numerous countries have laws of general application applicable to Internet content such as child pornography or incitement to racial hatred, they do not prohibit or otherwise restrict provision of "matter unsuitable for minors" on the Internet.

The lack of laws similar to Australia's in comparable countries is not due to a failure of Parliaments or Governments to consider the problems of illegal content or content unsuitable for minors on the Internet. Rather, it reflects a more realistic approach from that of the Australian Government to dealing with the problems.

EFA' report, *Internet Censorship – law & policy around the world* [14], contains an overview of governmental approaches to dealing with Internet content that is illegal, or is unsuitable for minors, followed by sections containing more detailed information about various countries. The report is available online at:

<http://www.efa.org.au/Issues/Censor/cens3.html>

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Research – filtering technologies

Comment is sought on the development of Internet content filtering technologies and whether they have developed to a point where it would be feasible to filter R-rated information hosted overseas that is not subject to a restricted access system.

Filtering technologies are no more advanced than they were three years ago. As stated in a [report commissioned by NetAlert and the ABA](#) [11], issued in March 2002, on the effectiveness of approved filters: "all products will pass through some content they should have blocked and block some content that should have passed through".

EFA does not believe that it is technically possible for filtering software to automatically detect the presence of a Restricted Access System (RAS), especially one that complies with the ABA's standard, in order to determine whether or not to allow R-rated content through. Moreover, filtering technology would have great difficulty in automatically distinguishing between some types of R and X-rated material. For material that is manually classified and added to filter blacklists, or is self-classified by the publisher, there is apparently no intent by filter makers to distinguish between sites that have RAS protection and those that do not. The ICRA self-classification system, for example, makes no such distinction.

Moreover, it appears highly probable that the majority of Australian adult Internet users consider they are capable of managing and controlling their own and their childrens' Internet access without the help of technological nannies or the government. In this regard, the Brisbane Courier Mail reported on 13 May 2002:

"...The new [IIA] code has been met with a cool response from Australia's largest Internet provider, Telstra BigPond, which charges customer \$59 to download [filtering] software.

A BigPond spokesman said customers were offered filtering software automatically when they completed registration forms online.

The spokesman said despite offering a **free trial** of one of the most recognised filters, the majority of BigPond's 1.2 million customers had opted not to download. [emphasis added]

'Most people aren't interested in it, that is our experience,' he said."

(Code to push Internet porn out of reach, Steven Wardill, Consumer Affairs Reporter, Courier Mail, 13 May 2002)

Vendors of scheduled filters have long been including content that would be classified R in their blocklists without Australian tax-payer funded assistance from the ABA, and will no doubt continue doing so.

There is little point in the ABA notifying filter vendors of R content, given neither the ABA or IIA are required to verify, even intermittently, that vendors have updated their blocklists accordingly. Moreover apparently the ABA has no interest in the effectiveness of notifying content to filter vendors given the [NetAlert/ABA commissioned report \[11\]](#) states: "The list of sites [used in tests] does not include any that are included in the list of notified sites sent out to registered filter vendors by the ABA".

EFA submits that, if there is a perception or belief that some scheduled filters are deficient in their current ability to block content that would be classified 'R', then this problem can be dealt with just as effectively without the need for the ABA to investigate R content on overseas sites and related amendments to legislation, as with those.

There is nothing particularly special about the ABA's ability to notify filter makers of pages to block. Market forces are such that filter vendors need to keep their customers happy, and their customers will not be happy if the product does not block content they believe it should block. Apparently as a result of that situation, various (probably all) filter makers who sell products containing vendor supplied block lists provide a web page where users of their product, or anyone else, can report a site for inclusion on the block list.

A Commonwealth company, for example NetAlert Limited, could collect complaints about content likely to be classified 'R' and report such content to scheduled filter vendors without even looking at it (thereby avoiding expenditure of taxpayer funds while looking at the material). Presumably they could do so using the same email addresses the ABA does to notify scheduled filter vendors.

Furthermore NetAlert Limited could also set up a web page containing links to scheduled filter makers' "report a site" pages, so that users of scheduled filters can easily find same in order to report any other content (e.g. likely to be classified PG, M and MA) that they believe the filter they are using should have blocked and did not.

Comment is sought on the provision of Internet content filtering services under the Scheme.

We refer to the remark in the DCITA review Issues Paper that: "There have been calls for filters to be made available at no charge to Internet users in Australia".

If ISPs were required to provide filters at no charge, obviously the cost would be passed on to Internet users in ISPs' Internet access fees in any case.

If the government was to provide filters at no charge, given the vast majority of scheduled filters are made in the USA and assuming a unit cost of around \$US25 for the usual home filters and several million Australian households with home Internet access, EFA wonders whether the balance of payments could afford such a Government endorsement of filter technology.

The current Internet industry code of practice requiring ISPs to provide filtering services or products on a cost recovery basis is likely to be of greater benefit to end-users than requiring filters to be made available at no charge to Internet users. The latter option would most likely result in all, or at least most, ISPs providing the cheapest filter on the scheduled list in order to minimise their operational costs and the amount by which they would need to increase all their customers' Internet access charges to recover those costs.

The cheapest filter would not necessarily be the most effective, nor most suitable for any particular end-user's needs. Currently, it appears a number of ISPs only offer one brand of filter to their customers and this also may not be most suitable for any particular customer's needs. However, we consider requiring ISPs to provide a filter at no cost would result in less choice for customers who wish to use a scheduled filter product, absent paying retail price to a filter vendor or retailer.

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Definition of 'Internet content' / live-streamed content

Comment is sought on the application of the Schedule to live-streamed Internet content.

EFA has consistently asserted that the Government's objective of classifying content in a technology-neutral way has been waylaid by interpreting all Internet content, whether in text form or static image, as if it were a motion picture screened in cinemas. Omnibus definitions of Internet content are inevitably going to lead to anomalies with classification rules in offline media and genuine problems for publishers of convergent media such as news.

In relation to "live-streamed" content and the question of whether "such content may be considered to be kept on a data storage device", a distinction must surely be made between streaming content that is essentially video-on-demand, and streaming content that is genuinely "live", e.g. webcasting. The impossibility of classifying such content in real-time makes it obvious that such content cannot be included within the ambit of the regulatory regime. The increasing availability of streaming technology illustrates the impossible task that the government has set itself in attempting to restrict access to universally legal adult material in the face of increasingly rich content and media convergence.

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Offensive Spam

Comment is sought on the application of the Online Content Co-Regulatory Scheme to offensive spam.

In EFA's view, spam is a serious problem whether or not the content of the spam email is offensive of itself. We consider that any legislative attempt to prohibit or reduce spam should cover the sending of spam irrespective of the content of the email.

Moreover, application of the Online Content Co-Regulatory Scheme to offensive spam is unlikely to be workable due to the definitional problems that will arise in re-defining 'ordinary email' in a way that excludes some types of email without having the unintended consequence of catching personal email. In this regard we note that Explanatory Memorandum concerning Schedule 5 of the *Broadcasting Services Act* ("BSA") states: "The exclusion of 'ordinary electronic mail' from the definition of Internet content is intended ... to ensure that personal e-mail is not caught by the definition of 'Internet content'".

EFA questions the need for new/additional Commonwealth laws concerning 'offensive' spam. We note that the revised Explanatory Memorandum concerning Schedule 5 of the BSA states:

"the framework will not apply to private or restricted distribution communications such as ordinary e-mail; however, current provisions of the *Crimes Act 1914 (Cth)* in relation to offensive or harassing use of a telecommunications service will apply in this context;"

Section 85ZE (1)(b) of the *Crimes Act (C'th)*, 'Improper use of carriage service', prohibits the knowing or reckless use of a telecommunications carriage service in a way that would be regarded by reasonable persons as being offensive. While 'Internet content' as defined under the BSA is excluded from the provisions of s.85ZE, 'ordinary email' as referred to in the BSA is not 'Internet content' and therefore apparently can be dealt with under s.85ZE.

If the existing provisions of *Crimes Act* s.85ZE (1)(b) have proven to be inadequate in dealing with offensive spam sent by Australian spammers, relevant information in that regard should be publicly provided to inform debate on any proposed related changes to either the *Broadcasting Services Act* or the *Crimes Act*.

If s.85ZE has proven ineffective in relation to offensive spam, it appears this is likely to be because the vast majority of such spam is sent by persons in overseas countries and so cannot be prevented or dealt with by existing (or even new) Australian legislation. Hence, amendments to the BSA would be no more effective.

EFA is of the view that significantly [more could be done by some Australian ISPs to prevent spammers using their network](#). Numerous Australian ISPs undertake best practice in this regard in implementing technical measures to minimise the quantity of spam that can be sent, and in promptly enforcing terms and conditions of use of their system when they become aware that one of their customers is breaching same. However, spammers work out which ISPs either do not care about preventing spam, or have weaknesses in their network security, and use those ISPs exclusively.

We also consider that amendments to the *Privacy Act 1988 (C'th)* would result in major reduction in the amount of spam Australian Internet users receive from Australian based spammers without the need to carefully define terms such as "ordinary email", "spam" and "offensive spam". We consider

that a first step in terms of legislative options for dealing with spam should be to amend the *Privacy Act* to remove the existing exemptions and loopholes (intended or otherwise) that permit spammers and direct marketers to collect and use individuals' personal information (such as their email address) for the purpose of sending them unsolicited material without the explicit prior consent of the individual. This matter is addressed in more detail in our recent submission to NOIE [15], which is available online at:

[EFA submission in response to NOIE Spam Review Report](#), 16 Sep 2002.

http://www.efa.org.au/Publish/efasubm_noiespam.html

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Convergent Devices

Comment is sought on the potential impact that convergent devices may have on the operation of Schedule 5 to the Act.

As stated [above](#), anomalies abound as print media content is made available online and material rated offline as a publication becomes liable to classification online as if a motion picture.

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General Scope and coverage of Sch. 5

Comments are sought generally on the scope and coverage of Schedule 5.

In submissions to Government since 1995, EFA has proposed that Internet censorship and classifications be in accordance with offline media, taking into account the global nature of the Internet and emerging privacy aspirations. The current regime does not achieve such an objective. It makes content that is legal offline, illegal online and requires Australian-based, and only Australian-based, online content providers to invade Internet users' privacy before allowing them to access information online that they can legally and easily obtain offline without any such infringement of their privacy.

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Conclusion

There is no evidence or indication in government reports to support the Minister's [claim](#) that the Internet has been made safer as a result of the Federal Government's Internet censorship law.

Although government reports claim prohibited Australian content has been taken-down from the Internet, the government's desire to [amend Freedom of Information law](#), to place a thicker veil of secrecy over operation of the regime than already exists, demonstrates the government is well aware that "taken-down" content remains publicly accessible on the Internet. The emergence of Internet archival services, which document web pages as they existed at various points in time back to the very beginnings of the Web, makes a mockery of any attempt by governments to achieve the

modern-day equivalent of burning books.

The vast majority of content found and prohibited by the ABA is on overseas websites and continues to be made available by persons beyond the reach of Australian censorship legislation, which prohibits online publication of information that is not prohibited online [in any country broadly comparable to Australia \[14\]](#) in terms of democratic political systems and cultures, and also prohibits information online that is legally available to adults offline in Australia.

Filtering software has been available to Internet users who wish to use same since several years before the government introduced Internet censorship legislation. By March 1999 ([according to Senator Alston \[12\]](#) during a radio interview) one censorware vendor had reportedly already identified 8.5 million offensive sites without Australian tax-payer funded assistance. The 529 items of overseas-hosted content that the ABA notified to filter vendors over two years is a drop in the ocean of the millions of web pages unsuitable for children.

After several years, censorware has not improved and cannot be relied on as a technological nanny. As reported in [a study commissioned by NetAlert and ABA \[11\]](#) (issued in March 2002) "all products will pass through some content they should have blocked and block some content that should have passed through".

Internet-specific censorship law was not necessary to deal with globally agreed illegal material such as child sexual abuse images. Such material was already illegal to possess and distribute, both offline and online, in all Australian States and Territories. As [noted by the NSW Parliamentary Standing Committee on Social Issues \[16\]](#) in June 2002, banning child pornography twice will not make it go away any quicker. It is doubtful that any Australian website would host child pornography material, since website ownership is too easily determined. Hence, it is unsurprising that most of the "Australian" material of that nature is found in Usenet [newsgroups](#), most likely originating from outside Australia.

The few, if any, prosecutions of Australians initiated as a result of ABA investigations have been handled by State/Territory police under pre-existing laws; the ridiculously few web sites actually shut down by the ABA have made no difference to the millions of controversial web pages online.

The legislation has failed dismally insofar as its alleged objective of making the Internet safer for children is concerned.

It has, however, resulted in Australian adults self-censoring their speech more than required in offline publications in Australia or paying overseas, instead of Australian, Internet Service Providers/Content Hosts to host their web pages. The restrictions on Australian sites send Australian money offshore because Australian adults visit overseas sites to access content equivalent to material that adults can legally purchase offline in Australia, including material that is legally sold in Unrestricted magazines.

While the Australian government will no doubt continue attempting to hoodwink the public, EFA hopes that the increasing number of Australian adults who use the Internet is resulting in less parents being lulled into a false sense of security by the government's claims. The government cannot make the global Internet safe, or even 'safer', for children.

Protection of children on the Internet is a serious community problem, requiring adequate police resources and a commitment to community education, including practical Internet lessons for children and for adults unfamiliar with computer and Internet technology. The Government's

Internet censorship scheme has been all fanfare and no substance.

EFA recommends that Schedule 5 of the *Broadcasting Services Act* be repealed and the costly and failed Internet regulatory apparatus be dismantled.

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