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**AMTA Submission to the Senate Inquiry**  
***Communications Legislation Amendment (Content Services) Bill 2007***

***28 May 2007***

# 1 Executive summary

AMTA firmly agrees with the Government that appropriate safeguards must be in place to ensure children are protected from exposure to material that may be offensive or harmful. AMTA also supports the Government's stated objective in the Communications Legislation Amendment (Content Services) Bill 2007 (**the Bill**) of regulating such services in a platform and technology neutral manner, and supports the approach of "*allowing industry the opportunity to develop industry codes to implement cost-effective mechanisms and rules for meeting their obligations under the regulatory framework*"<sup>1</sup>. This approach is appropriately consistent with the Objects and regulatory policy outlined under the Broadcasting Services Act (**BSA**) and the Telecommunications Act, under which the industry is currently operating, which emphasise the importance of regulating industry without placing "*onerous or unjustifiable burdens on industry*"<sup>2</sup>.

AMTA and the mobile industry's commitment to these objectives is evidenced by its leadership in developing and implementing the Mobile Premium Services Industry (**MPSI**) Scheme, which gives practical effect to *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 No 1 (MPSD)*.

AMTA is generally supportive of the Bill, believing it to provide an appropriate regulatory framework for regulating content services across convergent devices. Significantly, the broad generic framework allows for the dynamic nature of the industry. However, AMTA has some specific areas of concern relating to particular parts of the Bill. There are sections of the Bill, as currently drafted, which are ambiguous, would be difficult to apply in practice and would result in regulatory uncertainty.

AMTA's concerns are outlined in this submission, along with suggestions about how its concerns might be addressed.

AMTA believes its concerns can be addressed in a relatively straightforward manner through minor amendments to the Bill or by placing references in the Explanatory Memorandum as points of clarification. The detail can be resolved through discussions with the Department of Communications, Information Technology and the Arts (DCITA) and the Australian Communication and Media Authority (ACMA).

In summary AMTA's concerns and recommendations are:

- **Definition of Content**

The definition of a content service by referring to a service that "delivers" content to end users appears to confuse the roles of a content service provider and a carriage service provider. AMTA believes that the definition is confusing in the context of new media technologies where there is clear distinction between content and carriage. In this context, the carriage service provider exception in clause 5 gives no protection for a carriage service provider who may provide more than a mere carriage service but nonetheless has no role in securing that the content be made available.

***AMTA suggests that the word "delivers" in paragraph (a) of the definition of content services should be replaced with the words "makes available". This adopts the technology neutral concepts in the Copyright Act 1968 (Cth) in relation to communicating content to the public.***

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<sup>1</sup> Communications Legislation Amendment (Content Services) Bill 2007, second reading speech.

<sup>2</sup> Second Reading Speech to the legislation introducing Schedule 5 & outlined in the Telecommunications Act.

- **Restricted access system**

A “restricted access system” is not defined in the Bill although clause 14 gives powers to ACMA to declare that a specified access-control system is a restricted access system for the purposes of the Bill. Importantly, ACMA must have regard to the objective of protecting children who have not reached 15 years from exposure to content that is unsuitable for children not at that age. The problem for industry is that there is no certainty as to what ACMA may declare as a suitable access-control system. In effect, industry must obtain ACMA’s approval to whatever system industry wishes to use. There is also no requirement for ACMA to consider the practicality of the system it endorses, nor the suitability of existing access-control systems already implemented by industry, for example, as a result of the MPSI scheme or, by most Internet Service Providers (ISPs), through requiring a credit card to be used for on-line services.

***AMTA’s suggestion is that ACMA should be required, under the Bill, to approve an access-control system that is consistent with current industry practice, is easily understood by consumers and can be readily implemented by industry. Currently, the only way to pragmatically restrict access to Internet content services to persons over 18 years, and thus achieve the policy objectives of the Bill, is to require production of a credit card.***

- **Practical difficulties complying with any special take-down/service cessation/links deletion notices**

ACMA has power to give a hosting service provider a special take-down notice under clause 52 where ACMA is satisfied that the hosting service provider is hosting *or proposing to host* content that is the same as, or substantially similar to, content which has previously been identified in a take-down notice. AMTA believes there may be difficulties in the application of this clause. To issue the notice, ACMA must be satisfied that the similar content is prohibited, or potentially prohibited content. This raises the question of how ACMA, or the content host, would know in advance that a content provider was going to post similar content.

***AMTA requires further clarity in relation to these special take-down notices to ensure that hosting service providers can practically comply with them without having an ongoing responsibility to monitor content hosted by them.***

- **Achievement of the Type A/Type B remedial situation**

Under clause 47, ACMA can, following an investigation, direct a hosting service provider to take steps to ensure either a Type A or Type B remedial situation. AMTA believes that the drafting of Type A remedial situations and Type B remedial situations for hosting services is problematic. Their definitions in clauses 47(6) and (7) do not make clear what needs to be done to ensure compliance.

***AMTA believes that this should be redrafted to link the conduct to the hosting service provider, eg as “a content service provider does not provide the content to the public (whether on payment of a fee or otherwise) by use of the hosting service provided by the hosting service provider”.***

- **Relationship to the MPSD**

AMTA is unclear how this Bill will affect the regulatory scheme operating under the MPSD. Certain provisions of the Bill clearly conflict with the MPSD and would override the relevant MPSD provisions to the extent of the inconsistency. The Explanatory Memorandum to the Bill describes the MPSD as an “interim arrangement, pending the outcome of a review DCITA into the appropriate longer-term regulatory approach”. This review has already been completed and delivered to the Minister.

There are no provisions addressing transition from the MPSD (and the related industry MPSI Scheme). This leaves as uncertain the regulatory status of a number of services that are not covered as comprehensively in the Bill, such as chat services. In addition, unlike the MPSD, the Bill is not limited to mobile content provided via premium services or proprietary network services.

***AMTA suggests that if there is to be one regulatory regime which governs both mobile and internet content, subject to rectification of the matters identified in this submission, the Content Services Bill regime is preferable, in that it provides a comprehensive regime for all new media, including that transmitted over the internet and mobile networks. There will need to be significant consultation between ACMA and industry to work through the required amendments to the MPSD and MPSI.***

- **Australian Connection**

AMTA believes that the proposed enforcement mechanisms against hosting services, live content services, and links services all require the relevant service to have an “Australian connection” (clause 3). The application of the “Australian connection” test in relation to links services is unclear.

***AMTA suggests that for clarity, it would appear more reasonable if the links themselves had to be hosted in Australia, irrespective of where the linked content is hosted.***

- **Service cessation notice for live content services**

The breadth of the service in respect of which ACMA is able to issue service cessation notices under clause 56 is unclear. Unlike take down notices and link deletion notices, which are directed specifically at the offending content, service cessation notices are instead directed at the live content service itself. The definition of “service” includes an internet site or a distinct part of an internet site, so a service cessation notice could presumably be targeted to the offending part of the service.

It would appear that ACMA would have the power to issue a service cessation notice in respect of a live content service in its entirety for prohibited content that may only form part of the service. If ACMA were to determine that the whole live content service be taken down, then the only flexibility for the provider would be to offer an undertaking under clauses 57 and 58.

***AMTA suggests that ACMA be required to publish guidelines on how it will make decisions giving a service cessation notice including a requirement to notify the live content host carriage service provider of its decision.***

- **Protection from civil and criminal proceedings**

Clause 111 of the Bill only provides hosting service providers, live content services providers, and links service providers with protection against “civil proceedings” in complying with the relevant notices issued by ACMA.

This provision should be contrasted with section 91 of Schedule 5 of the BSA, which gives very broad limitations of liability to internet content hosts under State and Territory laws and rules of common law and equity.

***AMTA suggests that there should be an equivalent protection for service providers in the new Bill.***

- **Concurrent application of State and Territory Laws**

Clause 122 of the Bill states that it is the intention of Parliament that Schedule 7 is not to exclude concurrent State and Territory laws. AMTA believes that this could allow a State or Territory to enact laws which mandate take downs of content in different circumstances to those in the Bill - and given the nature of the Internet and mobile services, they would effectively be regulating that content nationally. This could be a significant cost on the industry.

***AMTA suggests that it is preferable for Schedule 7 to exclude those laws.***

## **2 Introduction and overview**

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### **2.1 Introduction**

The Australian Mobile Telecommunications Association (**AMTA**) is the Australian mobile industry’s peak body. AMTA’s members include mobile phone carriers, handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. AMTA’s mission is to promote a socially, environmentally and financially responsible and successful mobile telecommunications industry in Australia. For more details about AMTA, see <http://www.amta.org.au>.

AMTA welcomes the opportunity to provide comments to the Senate Committee on the Communications Legislation Amendment (Content Services) Bill 2007..

### **2.2 Overview of AMTA’s position**

AMTA firmly agrees with the government that appropriate safeguards must be in place to ensure children, are protected from exposure to material that may be offensive or harmful. AMTA also supports the government’s stated objective of regulating such services in a platform- and technology-neutral manner.

The mobile industry’s commitment to ensuring consumer protection is evidenced by its considerable work in developing and implementing the MPSI Scheme. The MPSI Scheme gives

practical effect to the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 No 1*, which regulates the provision of mobile premium services. The MPSI scheme, which only commenced on 29 October 2006, covers all aspects of mobile premium services ranging from assessment of content, complaint handling, take-down arrangements and compliance plans.

Although the MPSD and MPSI Scheme have ensured that there is now protection for consumers in the mobile telecommunications space, AMTA acknowledges that there are some gaps in the existing regulatory framework, and that legislation devised in a pre-convergent world may benefit from amendments to ensure it is effective, workable and consistent with new media and technologies. AMTA believes that, subject to addressing the concerns identified in this submission, the Bill provides an appropriate regulatory framework for regulating content services across new convergent devices made possible by rapid developments in the internet and broadband technologies. By providing a high-level over-arching framework, the Bill will allow the government's objective of robust consumer protection across a range of platforms to be met in an effective and efficient manner. This will be supplemented by a co-regulatory approach, via the development of industry codes, to support the implementation of the Government's policy objectives.

It should be noted, however, that AMTA's support for the current legislation is predicated on its understanding that DCITA and ACMA will carefully work through the operational issues of Bill implementation with industry to ensure that existing Schemes and Codes, such as the MPSI Scheme, can be tailored as the basis to meet the new Bill's requirements in the most efficient manner possible. Further comments on the practical aspects of the Bill's implementation are detailed below.

## **3 Specific Concerns**

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### **3.1 Definition of Content**

By referring to a service that "delivers" content to end users, the definition of a content service appears to confuse the roles of a content service provider and a carriage service provider.

AMTA believes that the definition is confusing in the context of new media technologies where there is clear distinction between content and carriage. In industry's view, a content service provider is not responsible for the delivery of content but rather it makes content available to the public. This is distinct from a carriage service provider which has no control over the content which it carries over its network. The definition of a content service in the Bill could potentially include activities of carriage service providers, Internet service providers, premium service providers and content hosts.

In this context, the carriage service provider exception in clause 5 gives no protection for a carriage service provider who may provide more than a mere carriage service eg. billing of services, collection of revenues or accepting advertising in conjunction with a content service, but nonetheless has no role in securing that the content is made available.

AMTA suggests that the word "delivers" in paragraph (a) of the definition of content services should be replaced with the words "makes available". This adopts the technology neutral concepts in the *Copyright Act 1968 (Cth)* in relation to communicating content to the public.

### **3.2 Restricted access system**

A "restricted access system" is not defined in the Bill although clause 14 gives powers to ACMA to declare that a specified access-control system is a restricted access system for the purposes of the Bill. Importantly, ACMA must have regard to the objective of protecting children who

have not reached 15 years from exposure to content that is unsuitable for children not at that age.

The problem for industry is that there is no certainty as to what ACMA may declare as a suitable access-control system. In effect, industry must obtain ACMA's approval to whatever system industry wishes to use. There is also no requirement for ACMA to consider the practicality of the system it endorses nor the suitability of access-control systems already implemented by industry, for example, as a result of the MPSI scheme or, by most ISPs, through requiring a credit card to be used for on-line services.

For example, BigPond Movies requires its subscribers to verify their age on production of a credit card. As credit cards are only issued to person aged over 18 years, this is considered the most practical way of ensuring that inappropriate content is not made available to children aged under 18. The practical effect of this is that MA15+ video content, and indeed any video content, will not be able to be purchased by persons aged 16-17.

AMTA's suggestion is that ACMA should be required, under the Bill, to approve an access-control system that is consistent with current industry practice, is easily understood by consumers and can be readily implemented by industry. Currently, the only way to pragmatically restrict access to Internet content services to persons over 18 years, and thus achieve the policy objectives of the Bill, is to require production of a credit card.

### **3.3 Practical difficulties complying with any special take-down/service cessation/links deletion notices**

ACMA has power to give a hosting service provider a special take-down notice under clause 52 where ACMA is satisfied that the hosting service provider is hosting or *proposing to host* content that is the same as or substantially similar to content which has previously been identified in a take down notice.

AMTA believes there may be difficulties in the application of this clause. To issue the notice, ACMA must be satisfied that the similar content is prohibited content or potentially prohibited content. This raises the issue of how ACMA, or the content host, would know in advance that a content provider was going to post similar content.

This presents difficulties in recognising if there are likely to be practical issues with these special take-down notices without knowing how broadly they will be drawn by ACMA. If they are drawn by reference to:

- types of content, eg *"take down all similar RC, X18+ content"*, then there will be a real issue as to how hosting service providers can actually comply with that notice as they will then have to monitor all content hosted by them (contrary to the policy intent) and will only have the reasonable diligence defence to fall back on;
- the types of content and the content service provider, eg *"take down all RC, X18+ content posted or supplied by XXXX"*, this will require hosting service providers to monitor all postings or content by XXXX, determine if they are prohibited or potentially prohibited, again, contrary to the policy intent, and then not *"host it"* or ensure that it is not provided by a content service to the public. This may be more practical for content service providers who operate commercially, but it would seem very difficult to manage for user generated content.

AMTA requires further clarity in relation to these special take-down notices to ensure that hosting service providers can practically comply with them without having an ongoing responsibility to monitor all content hosted by them. For example, ACMA could require hosting service providers to not put up any content provided by a named person (i.e. a specified content

service provider) subject to a take down notice unless an undertaking is provided to ACMA by that person.

### **3.4 Achievement of the Type A/Type B remedial situation due to broad definitions**

Under clause 47, ACMA can, following an investigation, direct a hosting service provider to take steps to ensure either a Type A or Type B remedial situation.

AMTA believes that the drafting of type A remedial situations and type B remedial situations for hosting services is problematic. Their definitions in clauses 47(6) and (7) do not make clear what needs to be done to ensure compliance. Both types of remedial situation are satisfied where:

- a) the provider does not host the content; or
- b) the content is not provided by a content service provided to the public (whether on the payment of a fee or otherwise).

It is not clear when paragraph (a) would be satisfied, as there is no definition for the term “host”. A firm could be considered to be hosting content even if it was merely storing content and not making it available to the public. This suggests that the firm would need to delete all copies of the content in its possession, which could be problematic if the firm needs to maintain a copy for evidence, or if it wishes to contest a classification decision.

Paragraph (b) above is also problematic as it requires that the recipient of the take down-notice ensure that the content is not provided by “a content service provided to the public”. This seems to require the hosting provider to ensure that the content is not made available by any content service which is clearly impossible. It cannot ensure that the actual supplier of the relevant content does not use a different service provider to make it available to the public.

Similar comments to the above apply in relation to paragraph (b) of the definition of Type A/Type B remedial situations for link-deletion notices in clause 62(6) and (7) of the Bill.

AMTA recommends that there should either be:

- a definition of “host” which at least allows providers to keep a copy of the content provided they do not make the content available to the public; or
- a change to the definition of Type A/B remedial situations to refer to the hosting provider “ceasing to provide a hosting service to the public in relation to the hosted content the subject of the take-down notice” (thereby bringing in the definition of “hosting service” in clause 4 of the Bill, which has a concept of providing the hosted content to the public).

AMTA believes that this should be redrafted to link the conduct to the hosting service provider, eg as “a content service provider does not provide the content to the public (whether on payment of a fee or otherwise) by use of the hosting service provided by the hosting service provider”.

### **3.5 Relationship to the MPSD**

AMTA is unclear how this Bill will affect the regulatory scheme operating under the MPSD. Certain provisions of the Bill clearly conflict with the MPSD and would override the relevant MPSD provisions to the extent of the inconsistency. The Explanatory Memorandum to the Bill describes the MPSD as an “interim arrangement, pending the outcome of a review by DCITA

into the appropriate longer-term regulatory approach". This review has already been completed and delivered to the Minister.

There are no provisions addressing transition from the MPSD (and the related industry MPSI Scheme). This leaves as uncertain the regulatory status of a number of services that are not covered as comprehensively in the Bill, such as chat services. In addition, unlike the MPSD, the Bill is not limited to mobile content provided via premium services or proprietary network services.

If the MPSD is to remain in force in its current form, mobile operators will be subject to two separate regulatory regimes in respect of content offered over their mobile networks. This would potentially result in additional costs, systems and processes in complying under both regimes.

AMTA suggests that if there is to be one regulatory regime which governs both mobile and internet content, subject to rectification of the matters identified in this submission, the Content Services Bill regime is preferable, in that it provides a comprehensive regime for all new media, including that transmitted over the internet and mobile networks. There will need to be significant consultation between ACMA and industry to work through the required amendments to the MPSD and MPSI.

### **3.6 Australian Connection**

AMTA believes that the proposed enforcement mechanisms against hosting services, live content services, and links services all require the relevant service to have an "Australian connection" (clause 3). The definition of Australian connection has a number of elements:

- if any of the content provided by the content service is hosted in Australia (irrespective of whether or not the content service is a hosting service);
- in the case of live content, if it originates in Australia (irrespective of where it is hosted);
- in the case of a call (telephone or video) based content service, if any of the participants in the call, other than the end user, are present in Australia.

The application of the "Australian connection" test in relation to links services is unclear. On looking at the interaction between the definition of links services (i.e. a content service that provides one or more links to content and is provided to the public whether on payment of fee or not) and Australian connection, it would seem that the content it is linked to has to be hosted in Australia for there to be an Australian connection. Accordingly, if the link is on an Australian-hosted site, then the link-deletion notice should be addressed to the host of that site.

AMTA suggests that for clarity, it would appear more reasonable if the links themselves had to be hosted in Australia, irrespective of where the linked content is hosted.

### **3.7 Service cessation notices for live content**

The breadth of the service in respect of which ACMA is able to issue service cessation notices under clause 56 is unclear. Unlike take down notices and link deletion notices, which are directed specifically at the offending content, service cessation notices are instead directed at the live content service itself. The definition of "service" includes an internet site or a distinct part of an internet site, so a service cessation notice could presumably be targeted to the offending part of the service.

It would appear that ACMA would have the power to issue a service cessation notice in respect of a live content service in its entirety for prohibited content that may only form part of the

service. For example, if a live content service was to offer multiple channels, only one of which streamed prohibited content, it seems that under clause 56, ACMA could demand the termination of the entire live content service, not just the prohibited content channel.

If ACMA were to determine that the whole live content service be taken down, then the only flexibility for the provider would be to offer an undertaking under clauses 57 and 58. However, the decision as to whether to accept the undertaking from the service provider is ACMA's, who may refuse. There are no specific guidelines indicating when ACMA is to prefer one or the other of these remedies.

AMTA suggests that ACMA be required to publish guidelines on how it will make decisions giving a service cessation notice, including a requirement to notify the live content host carriage service provider of its decision.

### **3.8 Protection from civil and criminal proceedings**

Clause 111 of the Bill only provides hosting service providers, live content services providers, and links service providers with protection against "civil proceedings" in complying with the relevant notices issued by ACMA.

This provision should be contrasted with section 91 of Schedule 5 of the BSA, which gives very broad limitations of liability to internet content hosts under State and Territory laws and rules of common law and equity.

AMTA suggests that there should be an equivalent protection for service providers in the new Bill.

### **3.9 Current application of State and Territory Laws**

Clause 122 of the Bill states that it is the intention of Parliament that Schedule 7 is not to exclude concurrent State and Territory laws.

AMTA believes that this could allow a State or Territory to enact laws which mandate take downs of content in different circumstances to those in the Bill - and given the nature of the Internet and mobile services, they would effectively be regulating that content nationally. This could be a significant cost on the industry.

AMTA suggests that it is preferable for Schedule 7 to exclude those laws.

## **4 Drafting Points**

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### **4.1 Clause 55**

Clause 55, which provides for the application of notices, currently applies only to Internet content. AMTA believes that for consistency purposes this should be extended to also cover mobile content

### **4.2 Specialising**

The concept of "*specialising*" appears in a number of places, including the definitions of "*exempt point to point service*", "*exempt internet directory service*", and "*exempt internet search engine service*", and the extended definition of linking in clause 8. There is a lack of clarity around the meaning of "*specialise*", particularly in clause 8. This leaves the effect of clause 8 uncertain, and indeed the need for clause 8 at all. The Explanatory Memorandum does not

provide any further guidance as to the meaning of specialisation. AMTA suggests clarification of the use of the word “specialising”.

### **4.3 Definition of prohibited content**

AMTA believes the definition of prohibited content is broader than that which applied under Schedule 5 of the BSA (which did not have MA 15+), although it is consistent with the approach in the MPSD. This means that ACMA may request that far more internet content can be taken down, that more live content services be terminated, and more links be deleted, than was previously the case. This could also lead to a substantial increase in monitoring and administrative costs, making compliance far more burdensome. AMTA suggest further clarification of the definition of prohibited content to alleviate issues relating to operational implementation.

## **5 Conclusion**

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- 5.1 AMTA appreciates and endorses that an important part of Government policy on this issue is to protect children from inappropriate content. In supporting this principle, AMTA has been at the forefront of industry co-regulation to achieve these policy objectives, as seen in the development of the MPSI Scheme and the safeguards inherent in that Scheme.
- 5.2 There are some operational points and drafting issues that may require remedy to ensure that the Government’s objectives can be met in a practical and efficient manner. AMTA believes the necessary changes can be achieved through DCITA, ACMA and industry working co-operatively together to identify how to best resolve the issues through minor amendments to the Bill, or through references in the Explanatory Memorandum.
- 5.3 AMTA thanks the Senate for the opportunity to comment on the Bill and looks forward to working with DCITA and ACMT to address its concerns.