



Internet Industry Association

Communications Legislation Amendment (Content Services) Bill 2007

Response to Bill as Tabled

May 2007

1. Background

The Internet Industry Association (IIA) welcomes this opportunity to comment on the exposure draft of the proposed Communications Legislation Amendment (Content Services) Bill 2006.

As Australia's national Internet industry organisation, the IIA represents broad range of industry players including fixed and mobile telecommunications carriers, content service providers, ISPs, internet content hosts, online auction sites, search engine providers, web publishers, web developers, e-commerce traders and solutions providers, hardware vendors, systems integrators, insurance underwriters, Internet law firms, ISPs, educational and training institutions, Internet research analysts and a range of other businesses providing professional and technical support services.

On behalf of our members, the IIA provides policy input to government and advocacy on a range of business and regulatory issues, to promote laws and initiatives which enhance access, equity, reliability and growth of the medium within Australia.

IIA's 200 corporate members collectively service over 90% of all Australians using the internet today. Our relationships with the regulatory and technical experts within our multinational member companies, together with our international affiliations with sister organisations in the US, Canada, Europe, China, South Africa and South East Asia, have afforded us extensive and reliable access to comparative internet policy advice globally and the opportunity to consider the implications of emerging online services and business models.

1.1 The IIA and Content Regulation in Australia

Since our inception in 1995, the IIA has played a pivotal role in the co-regulation of internet content through our registered Content Codes of Practice (the 'Codes'), the first of which were developed and registered in 1999 under the Broadcasting Services Act 1992 ('BSA') and came into effect on the same day as Schedule 5 of the BSA ('Schedule 5'). Our Codes evolved from previous work done in 1997 and 1998 with a voluntary code which incorporated the protection of minors and a notice and takedown scheme in respect of illegal material. It is therefore evident we have a longstanding interest in this area.

As required by Schedule 5, the Codes were revised in 2002 and 2004 and re-registered with ACMA, each time bringing in additional measures to enhance and extend community safeguards, and in particular, the protection of minors.

In the last revision of the Codes, we incorporated new provisions dealing with access to internet content via mobile devices. The development of a classification scheme and complaints mechanism together with age verification requirements for restricted mobile content pioneered a coherent and enforceable mechanism which was universally accepted by mobile carriers in Australia and dovetailed with our existing obligations on ISPs and content hosts.

Some elements have now been subsumed by the Mobile Premium Services Determination ('MPSD') and industry Scheme which AMTA has had a key role in implementing. We are currently in the process of a further Code revision, in consultation with ACMA and relevant members, to rationalise any duplication while examining additional measures to further protect Australian families in the face of new forms of content presentation and delivery. This includes a complementary operational element to the Government's PAFO Scheme which ISPs and others might be expected to adopt. We are also required to monitor the development of new filters might also address ephemeral content, in part the subject of this Bill.

Subject to the final form of the legislation, we are willing to consider devising a new Code that provides meaningful safeguards for end users, will meet the registration requirements of ACMA and achieve widespread industry support, uptake and compliance.

Recent audits of Code compliance by ACMA show near universal adherence among top- and mid-tier ISPs, who collectively service over 90% of online users.¹ This demonstrates that educative efforts combined with a workable regime can deliver tangible protections to internet users and vindicates the joint industry-government approach to tackling these issues.

The flexibility of Codes to adapt to changes in technology has enabled us to keep pace with emerging social policy challenges. That they are enforceable by an independent

¹ See

www.acma.gov.au/acmainterwr/aba/contentreg/codes/internet/documents/isp%20code%20compliance%20audit.pdf for the 2006 report

statutory regulator means that no Australian need be exposed to content which they would prefer not to view. The complaints mechanism, the independent evaluation of content, the integration of the latest filter technologies, the notice and take down scheme in relation to domestically hosted content, the IIA Family Friendly ISP branding scheme, the independent testing of filters, the notifications to 'Family Friendly' filter providers by ACMA, the referral to law enforcement bodies in respect of extreme content – all these elements combine under the current scheme to deliver a responsive and workable solution to the challenge of inappropriate online content accessible by minors.

This is further complemented by the role NetAlert has played as a community advisory body. In this, we have a vehicle by which Australian families and those responsible for children can be made aware of their rights and responsibilities, and relevantly, the availability of filters as a tool in managing the online experience. We are pleased that the role of NetAlert is being preserved under its new home in ACMA.

1.2 Balancing outcomes

The legislative response to internet content regulation in Australia has sought to balance the protection of the public with the legitimate rights of industry players to provide competitive and viable commercial internet services to Australians. This balance is evident in the language of subsection 4(3) of the BSA which sets out the premise of regulatory policy:

4(3) Parliament intends that internet content hosted in Australia, and internet carriage services supplied to end users in Australia, be regulated in a manner that:

- a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on Content Hosts and Internet service providers (ISPs);*
- b) will readily accommodate technological change; and*
- c) encourages:*
 - i. the development of Internet technologies and their application;*
 - ii. the provision of services made practicable by those technologies to the Australian community; and*

iii. the supply of Internet carriage services at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community.

For its part, the IIA supports a measured set of responsibilities for industry, consistent with subsection 4(3). This takes form according to our approach of 'industry facilitated user empowerment'. The preamble to the IIA Content Codes of Practice states:

The IIA endorses and supports effective, practical and appropriate measures that assist Australians to manage their use of the internet. The IIA endorses and supports end user empowerment as one of the most effective strategy to manage content issues. Specifically the IIA endorses, and this Code supports, the provision of information about content issues to end users, including strategies for managing children's and minor's use of the Internet as well as the availability of end user filtering products and other tools by which responsible adults can facilitate controls that are appropriate for themselves or their family.

2. Our Attitude to the Bill Generally

In the face of developments in internet content consumption and provision, particularly those facilitated by broadband, the incorporation of provisions to address ephemeral internet content is understandable, as are the provisions which address mobile internet content, which we have similarly tackled in our current version of the IIA Codes.

We therefore support the general intent of the Bill and most certainly the preservation of the co-regulatory model whose strengths have been validated in the seven plus years since the current scheme was introduced. Indeed, Australia's co-regulatory response to internet content regulation is now recognised internationally as a sophisticated and flexible response to this challenging area of internet governance.

It is with these sentiments, and in the interests of making the new legislation as workable as possible, that we venture the following analysis, which also contains recommendations for improving the Bill.

3. Problem Areas within the Exposure Draft

Having regard to the historical policy intent of both the Government and the IIA, as co-architects of the current system of internet content regulation, we have, in consultation with our members, identified a number of issues within the exposure draft. These will result in practical problems and/or run contrary to the spirit in which content regulation has developed in Australia.

Specifically, our concerns involve:

- **Carve-out of exempt services**
- **The definition of 'Content Services'**
- **The MA15+ threshold for stored video accessible via the internet**
- **The Restricted Access System**
- **User generated content: Ephemeral vs Stored**
- **Carriage Service Providers Providing Content**
- **Practical difficulties complying with any special take-down/service cessation/links deletion notices**
- **The impossibility of achieving the Type A / Type B remedial situations, given the broad definitions**
- **Relationship to the Mobile Premium Services Determination**
- **The application of the "Australian connection" test for content services**
- **Service cessation notices for live content services**
- **Protection from civil and criminal proceedings**
- **Concurrent Application of State and Territory Laws**
- **Minor drafting points**

We understand some of these concerns have also been identified by others including our members in their individual submissions. We seek to support and amplify those concerns here.

3.1 Carve-out of exempt services

Provision

Clause 2 Schedule 7 of the Bill exempts 24 categories of services from the content services definition.

Problem/Implication

On further consideration of the Bill since we first saw it in December, we believe the approach taken in defining by exclusion 'content services' by exempting 24 categories of content is somewhat cumbersome and unlikely to survive rapidly evolving technologies and business models.

We expect the hybridisation of services to continue, with the effect that no business or content service may purely or neatly fit exactly within the boundaries of the proposed exemptions.

This will progressively expose more and more industry participants to liability – and may ultimately result in a dampening of innovation and decreasing the range of services available to Australian internet users.

Suggested remedy

In our view, it would make more sense to narrowly define exactly those content services and activities the Bill specifically seeks to regulate and not attempt to second guess the nature and scope of online services which will soon render the legislation obsolete or carry unintended consequences which are not capable of being identified at this stage.

We therefore recommend a recasting of the 'Content Services' definition to operate by inclusion with specific reference to conduct which the Government considers requiring regulation.

3.2 The definition of 'Content Services'

Provision

The Clause 2 Schedule 7 definition of a Content Service by referring, in paragraph (a), to a service that "*delivers*" content to end users appears to confuse the roles of a content service provider and a carriage service provider.

Problem/Implication

This 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.

Suggested remedy

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.

3.3 The MA15+ threshold for stored video accessible via internet

Provision

The Bill (in Clause 2 Schedule 7) lowers the threshold for Prohibited Content for stored video to MA15+.

Problem/Implication

Currently stored video is regulated the same as text and still images (rated as R it requires age verification, and beyond that is prohibited for hosting in Australia altogether). While it is the Minister’s stated intention to bring the internet content regulatory regime into line with other media regulation, we understand that television does not place any restriction on MA15+ other than viewer advice warnings pursuant to industry codes. The proposed scheme will disadvantage internet vis-a-vis television by requiring age verification processes for the same content that minors can view without restriction on TV or indeed, hire from video stores if they are over 15 years of age.

In contrast, fixed internet is susceptible to filtering by filters provided under IIA Codes (and soon PAFO), by which means parents can exclude content unsuitable for minors, including MA15+ material. While there may be a case for takedown in a mobile environment where filters and supervision are not available, we see no logic in lowering the threshold for stored content accessible by fixed internet in this way.

Suggested remedy

We submit that whether stored content is video, text or still images, or a combination of these, it should be subject to the same threshold of Prohibition, ie. R without age verification, X or RC. This change would require the removal of clause 20(c)(i-iv) in Schedule 7 from the Bill.

3.4 Restricted Access System

Provision

A “restricted access system” is not defined in the Bill although clause 14 gives powers to the 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.

Problem/Implication

The problem for industry is that there is no certainty as to what ACMA may declare as a suitable access-control system. In effect, ACMA must give its approval to whatever system may be used by industry. There is also no requirement for the ACMA to consider the suitability of existing 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, it is common industry practice in Australia to require 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.

Suggested Remedy

We suggest that the 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.

3.5 The scope of 'ephemeral content'

Provision

The Bill attempts to draw a distinction between 'stored' and 'ephemeral' content.

Problem/Implication

We are concerned that regulating ephemeral content will restrict the ability of online entertainment portals to develop into new areas of content without significant regulation compliance costs which could render the service uneconomic. This will impact on innovation and reduce the range of service offerings to Australian users. Specifically, we would be concerned that the definition of ephemeral content would be so broad as to capture some forms of user generated content.

While such user generated content is effectively "stored" content, in some respects it may be considered to be live, streamed content in that the operator of the service may simply provide the mechanism for users to upload as well as view other user's content. There may be a reduced ability for the operator of such a service to provide moderation services, other than respond to take-down requests or provide simple age verification barriers (for example, barriers that respond to age settings on some internet browsers).

Suggested remedy

The Bill should be clarified to exempt content service providers from any obligation to moderate or monitor live content generated by users.

3.6 Carriage Service Providers Providing Content

The explanatory memorandum to the Bill refers to Carriage Service Providers ("CSPs") who do no more than provide a Carriage Service that enables content to be delivered or accessed.

Problem/Implication

In our experience CSPs who provide content also provide additional services (such as customer support etc) and may not be in a position to continually regulate the content that they are carrying.

Suggested remedy

A reasonable approach would be to require CSPs to confirm the appropriateness of the content at the point the CSP first provides/contracts for the content. It is commercially unreasonable for CSPs to continually monitor the content they are providing on behalf of content providers, however it is appropriate for CSPs to comply with the current regulatory environment, namely complying with take down notices.

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

Provision

ACMA has power to serve a hosting service provider with 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.

Problem/Implication

We think there may be difficulties in application, as 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 will ACMA know this in advance of the similar content being put up?

It is difficult to know 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.

- generally, we cannot see how any liability for user generated content is capable of being managed. Satisfying a special take-down notice will be difficult without the content service provider having to monitor the service to ensure that it has not been reposted by the user or another user under a different guise; the threshold for substantially similar content is potentially very low and we are concerned that content service providers will be forced to implement monitoring and examination of all content after a special takedown notice has been issued. The volume of user generated content will make this impracticable, leaving content service providers with no choice in some circumstances than to shut down the service. We are sure this is not the Government's intent here.

Suggested remedy

We think further clarity is required for 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. For example, ACMA could require hosting service providers to not put up any content provided by a named person (ie. a specified content service provider) subject to a take down notice unless an undertaking is provided to ACMA by that person in respect of the specific content in question.

3.8 Impossibility of achieving the Type A/Type B remedial situations given the broad definitions

Provision

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

Problem/Implication

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.

Suggested remedy

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).

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".

3.9 Relationship to the Mobile Premium Services Determination

Provision

It is unclear how this Bill will affect the regulatory scheme operating under the Relationship to the Mobile Premium Services Determination ("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 the Department of Communications, Information Technology and the Arts (**DCITA**) into the appropriate longer-term regulatory approach". This review has already been completed and delivered to the Minister.

Problem/Implication

There are no provisions addressing transition from the MPSD (and the related industry code, the Mobile Premium Services Industry Scheme (**MPSI**) to the Content Services Bill 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 Content Services 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.

Suggested remedy

If there is to be one regulatory regime which governs both mobile and internet content, we suggest that, subject to rectification of the matters identified in this submission, the

Content Services Bill regime may be preferable, in that it provides a comprehensive regime for all new media, including that transmitted over the internet and mobile networks. However, having regard to the effort that industry has invested in the MPSI, it would be ideal if the two schemes could be rationalised preserving the significant investment of time and resources that both IIA and AMTA have invested in addressing mobile content issues to date.

3.10 “Australian connection”

Provision

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.

Problem/Implication

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 (ie 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 which 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.

Suggested Remedy

It would appear more sensible if the links themselves had to be hosted in Australia, irrespective of where the linked content is hosted.

3.11 Service cessation notices for live content services

Provision

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.

Problem/Implication

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.

Suggested Remedy

It is suggested that the ACMA be required 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.

3.12 Protection from civil and criminal proceedings

Provision

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. Presently officers, members and staff of ACMA and other Government organisations are also immunised under Part 8 of the Bill.

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.

Problem/Implication

From time to time the IIA or its members may receive information from the public about Prohibited or Potential Prohibited content. Having carriage of the legislation and its processes, immunising ACMA staff is a sensible inclusion. For the same reasons however, Code administrators or the employees and officers of organisations which have industry codes in place may, by virtue of their role and in the course of performing their functions come into possession of materials which may be illegal.

Suggested Remedy

We submit the Bill should be amended to extend the immunity to such persons and to service providers who might also come into contact with Prohibited or Potential Prohibited content *in the course of performing their duties*.

3.13 Concurrent Application of State and Territory Laws

Provision

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.

Problem/Implication

We think 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.

Suggested remedy

We think that in fact it is preferable for Schedule 7 to exclude those laws.

3.14 Minor drafting points

Clause 55

Clause 55, which provides for the application of notices, currently applies only to Internet content. For the sake of consistency it should be extended to also cover mobile content.

“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.

We trust the preceding comments are helpful and we look forward to any further assistance we can provide to the Committee.

A handwritten signature in purple ink, appearing to read 'P. Coroneos', is positioned above the typed name.

Peter Coroneos
Chief Executive, IIA