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STANDING COMMITTEE ON ENVIRONMENT,
COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE
ARTS

Reference: Communications Legislation Amendment (Content Services) Bill 2007

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**SENATE STANDING COMMITTEE ON
ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND
THE ARTS**

Friday, 1 June 2007

Members: Senator Eggleston (*Chair*), Senator Bartlett (*Deputy Chair*), Senators Birmingham, Kemp, Lundy, Ian Macdonald, Webber and Wortley

Participating members: Senators Adams, Allison, Bernardi, Boswell, Bob Brown, George Campbell, Carr, Chapman, Conroy, Crossin, Chris Evans, Faulkner, Ferguson, Fielding, Fieravanti-Wells, Forshaw, Heffernan, Hogg, Humphries, Joyce, Lightfoot, Ludwig, Lundy, Marshall, Sandy Macdonald, McGauran, McLucas, Milne, Moore, Nash, Nettle, O'Brien, Parry, Payne, Robert Ray, Siewert, Stott Despoja, Watson and Wong

Senators in attendance: Senators Birmingham, Eggleston, Ian Macdonald, Webber and Wortley

Terms of reference for the inquiry:

Communications Legislation Amendment (Content Services) Bill 2007:

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Committee met at 8.34 am

CHAIR (Senator Eggleston)—I declare open this public hearing of the Senate Standing Committee on the Environment, Communications, Information Technology and the Arts in its inquiry into Communications Legislation Amendment (Content Services) Bill 2007. The committee's proceedings today will follow the program as circulated.

These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is to be taken and the committee will determine whether it will insist on an answer, having regard to the ground on which it is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

[8.36 am]

GILES, Ms Katherine, Solicitor, Arts Law Centre of Australia

Evidence was taken via teleconference—

CHAIR—Welcome. Do you wish to make an opening statement, after which we will proceed to questions?

Ms Giles—The Arts Law Centre of Australia is the national community legal centre for the arts. It was set up in 1983. Our submission details the type of clients or callers that we advise. Basically we give free legal advice to artists and arts organisations all around Australia. We provide legal resources, education and advocacy on behalf of artists and arts organisations. We have a number of issues of concern with the Communications Legislation Amendment (Content Services) Bill 2007 and the explanatory memorandum.

The first point we make is that we note the lack of time given to review the legislation and provide feedback concerning the legislation. Further, we note that Arts Law and other organisations representing content creators such as artists were given very little chance to respond. We note that NAVA, the National Association for the Visual Arts; ASA, the Australian Society of Authors; ASDA, the Australian Screen Directors Association; and organisations such as dLux Media Arts, representing new media and multimedia artists, were not consulted or given the opportunity to see the legislation in its draft form before it was publicly provided for review.

Further, we note that Arts Law contacted DCITA in March 2007 when it was reported in the *Sydney Morning Herald* and on Crikey.com.au that the government was contemplating a bill entitled the ‘Content Services Bill’. We contacted DCITA and were informed that consultations with a number of parties had already taken place, that no further consultations would occur and that the draft would not be made available until it was tabled in parliament. So we note our concern that a number of organisations were not consulted during this initial consultation process, nor given the chance to give input during that process.

We note that we advise content creators—artists who create short video works, moving image art and films which might be distributed by broadband services to mobile handsets and the internet. This is a potential market for a lot of artists and a way to generate income from the internet and mobile distribution but also for many artists one of the only ways that they are able to share their work with the public. Arts Law submits that the onus imposed on carriage service providers to remove access to a service where it is considered to contain prohibited material is likely to result in an exercise of that very broad discretion in a way which may discriminate against digital and multimedia artists.

Some of our further concerns are that it is difficult for an artist or a content creator to know when their work will be potentially be rated X18+. How will an artist, a content creator, know when their work is likely to be rated R18+? It also appears that artists who create anything that might be suitable for an MA15+ or above audience would be seriously disadvantaged under the bill. This is unsuitable when artists and content creators are creating material that might deal with serious dramatic scenes that question society or refer to drugs, sex or violence in any way that is beyond the scope of an MA15+ rating. When material is removed from a

carriage service provider, who will decide that it is potentially prohibited content? Can this decision be appealed by the content creator? Who will decide that there is a substantial likelihood that the content would be prohibited content if it were classified?

The explanatory memorandum also refers to industry codes of practice. Will these industry codes of practice also provide protection and an appeals mechanism for the artist, the content creator? When a content provider is obliged to engage appropriately trained assessors to provide advice on likely classification, will the artist, the content creator, be able to appeal the decision of this trained assessor?

The ACMA will also have the power to determine industry standards in accordance with prevailing community standards where industry codes are considered deficient. But how will these community standards be ascertained, and will content creators and artists be able to provide input in terms of determining these community standards? We submit that it would be helpful if the ACMA liaised with and took into account the role, perspective and needs of content creators—artists and multimedia artists—in developing industry standards, the codes of practice which are referred to and the service provider rules.

We are also concerned about the principle of consistent treatment of essentially the same content, which is outlined in our short written submission. For example, proposed section 43 of the bill refers to the ACMA investigating complaints, and requires that the ACMA notify the complainant of the results. There is, however, no provision requiring ACMA to notify the content creator that a complaint has been made against their material, or that allows them to rectify it or to put their argument forward in relation to the material, or that enables them to appeal the decision which has been made.

We note that the carriage service provider will not always be the content creator. We are concerned about the lack of appeals process for the content creator. Our submission sets out the need for an appeals process for content creators such as artists whose work has been removed as a result of a take-down notice. Whilst the ACMA will be empowered under the bill to receive direct complaints relating to possible breaches of content provider service provider rules as well as possible breaches of the code of practice requirements, we ask that consideration of the artist as the content creator and their needs and interests are also met. Further, in the proposed section 47, take-down notices will be given to the service provider but the content creator, who could be an artist, will not be notified. There is no provision for this notification to be provided to the content creator who, as we have noted, could be an artist.

If material is referred to the Classification Board, for example, for classification, we note that the ACMA will pay the fee; however, will the content creator have the right to appeal any decision of the Classification Board or even make submissions when the Classification Board is reviewing material? This does not appear to be the case. Further, when stored content and ephemeral content services are to be pre-assessed, how will this affect the artist or content creator, and will they be able to have input during this process?

In conclusion, it is our submission that the proposed legislation does not adequately take into account the needs of filmmakers, multimedia and digital artists in Australia. The broad scope of the discretion available to carriage service providers for the refusal of access to certain material is likely to detrimentally affect both artistic expression and dissemination of

that artistic expression. The proposed legislation does not in our view sufficiently cater for artists likely to be affected and fails to provide an appeals process or revocation avenue to content creators against whom an access decision has been made. Arts Law was not consulted during the DCITA consultation process and we submit that further investigation regarding the impact of these proposed changes on artists creating content needs to be further explored before the bill is adopted. Thank you.

CHAIR—You said in your presentation that there was a lack of specific criteria and it was difficult to know when something would be prohibited. But in the explanatory memorandum it does say it is if material has been classified RC or X18+, or both, and goes on with a further list of classifications. What additional criteria are you seeking? Could you clarify that for me?

Ms Giles—Where we are coming from is that a lot of multimedia artists or short video work artists—or sound artists, for example—might distribute their work just on the internet. It is not being shown in a cinema or anything like that, so to date it would not have to be classified before it goes up there. For many artists who work in that particular way, getting access to advice on whether their work would potentially be considered X18+ or R18+ or even MA15+ might not be feasible. So it is very hard for them to know whether their work would fit within those criteria, even though the Classification Board, the Office of Film and Literature Classification, provides guidelines on what those particular ratings are and how they would work. For many artists, getting access to someone who is able to provide an opinion on how their work would be classified is difficult.

CHAIR—Even so, any artist could access what those classifications prohibit. That must be on record and easily accessible.

Ms Giles—Certainly, and that was the reference I was making to the Office of Film and Literature Classification in terms of the points that they make about each particular rating. But, for many artists, it is difficult to work out whether their work is a piece of cutting-edge art or whether someone else would think that, for example, it is R18+.

CHAIR—I would not have thought it was all that difficult really, if you have the precedence of what the Classification Board is prohibiting, to get a pretty fair idea of whether or not a piece of work is likely to fall under the same kind of criteria or not.

Ms Giles—But we only have to look at certain films, for example, where there are disputes over whether an R18+ rating is appropriate or not. Different jurisdictions might rate films differently. So there can be discrepancies in terms of how things might be viewed.

CHAIR—As a final point, I agree that at the periphery there is doubt, but there would be clear-cut cases as well, which I would have thought would make up the bulk of the work that we are dealing with in this matter.

Ms Giles—Certainly, but when we are dealing with the kinds of clients who we deal with at Arts Law—who are perhaps involved in cutting-edge art—that might be different from other sectors that you are referring to.

Senator WORTLEY—Thank you, Ms Giles, for your submission and your opening statement. You said that the industry which you represent was not consulted, and that was going to be my first question. When did you first become aware of the bill? Was that your reference to the *Sydney Morning Herald* and Crikey?

Ms Giles—Yes, we first became aware of the bill in March 2007 when it was reported in the *Sydney Morning Herald* and on Crikey that the bill was available. I believe that Crikey leaked a copy of the bill, but it was a very old draft. We contacted DCITA and asked if we could be provided with a copy of the bill and that we would be happy to make submissions on behalf of the arts community. We were informed that there were no further consultations taking place.

Senator WORTLEY—This bill will, as you suggest, affect artists who use content convergent technologies in their work. What percentage of artists in Australia would you consider would be affected by this bill?

Ms Giles—I do not have any figures in front of me. The bulk of people whom we advise at Arts Law fall within the visual arts area, and a small percentage of those artists work with multimedia or video art procedures in disseminating their work. It is a smaller part of the arts community, but it is definitely growing. Many young students at art schools, for example, are very interested in video artwork. They are very interested in sound and short video works, and the internet is one of the ways that they can distribute that work at a low cost.

Senator WORTLEY—Can you explain the effect this bill will have on their work? I know you touched on it in your opening statement, but could you provide us with a little bit more information about the impact that you think this bill will have?

Ms Giles—I think it creates a complex environment for artists who upload their work to carriage service providers, whether that is by mobile phone distribution or the internet. It means that they will need to seek more advice in relation to their work before it goes up and, as you can see from our submission, the present system which is put forward in the bill would be difficult for them to negotiate. The lack of an appeals procedure would mean that they may have no recourse if their work is taken down.

Senator WORTLEY—Is it fair to say that this is a growing medium?

Ms Giles—Definitely.

Senator WORTLEY—So this bill will have a potentially greater effect in that it will potentially restrict this medium of art from developing?

Ms Giles—Definitely.

Senator WORTLEY—Do you consider that artists should be exempt from the bill?

Ms Giles—Perhaps that would be one way of going forward—an exemption for artists or an appeals procedure which is easy for them to access.

Senator WORTLEY—Would you propose an amendment that there be an appeals procedure? How do you consider artists being able to access this in an effective way so as to be able to do their work?

Ms Giles—As we put forward in our submission, if there were an appeals procedure that artists could access when their work is taken down rather than the focus being on the complainant and the carriage service provider, then that would provide some equality in terms of giving the artist access to that appeals procedure. But Arts Law recognises that there is obviously community concern about things which are on the internet. So that or, as you have suggested, providing an exemption for visual arts are perhaps ways of balancing it out.

Senator WORTLEY—Could you explain in a bit more detail how you envisage this appeals procedure would work?

Ms Giles—We have not had time to look at that in detail. However, if we look at sections 43 and 47, we see that perhaps amendments could be included which allow the content creator to access an appeals procedure in the same way that the complainant can access some kind of complaints procedure.

Senator WEBBER—I want to go back to when you first made contact with the department. You said that they told you that the consultation process was over. They are appearing before us later on today. Did they give you any information about what consultation they had undertaken, who they had spoken to and the time line, or did they just say, ‘Too bad, so sad, too late’?

Ms Giles—I was told that they consulted with some industry groups and other media groups but I was not given any further information than that.

Senator WEBBER—So it was a pretty short and sharp conversation with them then?

Ms Giles—I would not describe it as short and sharp but I was told there was not to be any further consultation until the bill was tabled in parliament.

Senator WEBBER—Did they give you any information about when they started their consultation process?

Ms Giles—No.

Senator WEBBER—It seems to me that they have consulted with the people who are going to convey the content but not with the people who are going to create the content, particularly in emerging technology, so perhaps our consultation process is not keeping up with creativity and new technology.

Ms Giles—That is the view that we take as well.

Senator BIRMINGHAM—You have expressed concerns about the requirement to respect community standards and how community standards may be assessed. Obviously it is a difficult thing to put down in legislation. You understand the objects of this bill and I imagine probably support those objects insofar as they seek to provide some protections. How would you suggest that is changed to address a clearer definition of community standards?

Ms Giles—We would need further time to look at that. Perhaps, if we were given further time, we could provide a proposal.

Senator BIRMINGHAM—You and a couple of others have expressed concern about the provisions for access to works to be removed based on them having essentially the same content. Could you just take me through that concern in a little more detail please?

Ms Giles—Our concern is that, if perhaps one work were considered to fall into the scope of being potentially prohibited material, this particular provision would mean that all other works of a similar nature, even though there may be differences, would also fall into the same barrel.

Senator BIRMINGHAM—Thank you.

CHAIR—Ms Giles, thank you very much for appearing and for that evidence.

Ms Giles—Thank you for your time.

[8.57 am]

ALTHAUS, Mr Chris, Chief Executive Officer, Australian Mobile Telecommunications Association

KANAK, Ms Debora, Manager, Policy, Australian Mobile Telecommunications Association

INMAN-GRANT, Ms Julie, Regional Director of Internet Safety and Security, Microsoft Corporation

BEAN, Ms Trudi, Corporate Counsel, Optus

van BEELEN, Mrs Jane, Deputy Director, Telstra Regulatory, Telstra Corporation Ltd

CHAIR—Welcome. Would the Australian Mobile Telecommunications Association like to make an opening statement?

Mr Althaus—Thank you and good morning. I will give you a brief outline of some of our key thoughts on the matter of this legislation, and my colleagues will add to that. It is certainly important to note that AMTA is the peak organisation for the mobile telecommunications sector and we welcome the opportunity to participate in this inquiry. We have a keen interest in this bill. We broadly support the principles that it is seeking to convey. There is nothing more important than the protection of particularly minors. The mobile telecommunications sector is working hard on that as convergence brings forward further challenges for us all in terms of how our product and services relate to the subscriber base. Of course, the subscriber base in mobile telecommunications in this country is reaching what we describe in the industry as almost saturation point. We are at a point now where there are over 19.7 million subscriptions in this market, so it is an incredibly pervasive technology and, of course, we have more and more opportunity through the third generation of mobile telephony to access and participate in a wide range of content.

The industry has not been idle on this matter; in fact, in response to the mobile premium services determination we have over the last 2½ years been working on a mobile premium services industry scheme. We were always aware that the determination was an interim measure, pending the development of this legislation, but the scheme the industry has put together addresses many of the concepts and issues that the legislation seeks to address. In fact, the presence of the scheme itself is a good example of how this industry works with government—and works successfully, can I say—insofar as legislation of this kind sets general parameters or general principles and, because of the speed and dynamic nature of change within the industry, we are often asked in a co-regulatory way to adopt schemes and codes underneath the legislation to monitor and manage industry performance. That is a very important part; it gives the industry an incredible amount of flexibility and also bestows upon us an important level of responsibility. To date, I think we have proved to government that we are skilled at meeting the responsibilities of legislation under these codes and schemes. I am highlighting that because this particular legislation and the existence already of our mobile premium services industry scheme, which has been registered by the Communications and Media Authority, is a classic example of a good workable partnership between industry and government.

This is an incredibly important area and we certainly support the objectives of this particular legislation. While being supportive broadly, we have identified some areas where further clarity and certainty are required for industry. My colleagues will go to those points. But if I can finish on the clarity and certainty issue, that is certainly what is paramount, and to that end there are a few drafting issues we have identified which I will ask Jane to comment on.

CHAIR—Thank you.

Mrs van Beelen—As Mr Althaus said, industry supports the bill and supports the objectives of the bill. Industry is also supportive of the changes to the objectives of the BSA to reflect that these services need to be regulated but in a way that is not going to impose undue financial or administrative burden upon the industry and in a way that will enable the services that are enabled by the technology to flourish. To that end, we want to draw to your attention to a few drafting concerns in respect of which we would seek some clarification or in respect of which it would be helpful if the bill provided greater certainty to industry.

The first of those is in relation to the definition of a content service. The principal concern is the use of the word ‘delivers’ in paragraph (a) of the definition of ‘content service’. The reason for the concern is that the word ‘delivers’ connotes, I suppose, the concept of transporting something. In the new media world there is a situation unlike that in the broadcasting world. In the broadcasting world if you get a broadcasting licence you get not only a licence to provide the content but also, attached to that, an apparatus licence, which is effectively your licence to use radio communications spectrum to deliver your content, and the two are welded together as a broadcasting licence. In the new media world, the content service provider and the provider of the infrastructure or services which facilitate the delivery or the making available of that content are, in most circumstances, separate entities. That means that the use of the word ‘delivers’ just creates some uncertainty about the extent to which carriage service providers who may provide additional facilities to carriage but are nonetheless not involved in the making available, as in the selection and the putting online, of the content may inadvertently capture them as content service providers and even commercial content service providers.

AMTA recommends that this could be addressed by changing the word ‘delivers’ to ‘makes available’. That removes that transport component of the definition and makes it clear that it is someone who makes it available—that is, puts it in a place like a server or a play-out centre whereby it can be delivered or is made accessible by use of a carriage service provider. We think that would more clearly distinguish the role of the content service provider from that of the carriage service provider, who may provide other things. We note the exemption in clause 5 that you are not held to be a content service provider merely by virtue of providing a carriage service, but we point out that there are circumstances in which mobile carriers do provide more than a carriage service but are nonetheless not involved in the selection and making available of the content. For that reason we are concerned about that uncertainty.

I will move on to the next point that I think will be helpful. The second key thing I draw to your attention is the practical difficulties in complying with a special take-down notice. The special take-down notice is where ACMA can issue a notice requiring, for example, the content host not to host similar types of content. The obligation that seeks to impose is very

broad, and the impact of it may be that it requires a content host to continuously monitor the content that it is hosting. Our understanding of the regime set up with the take-down notices is that it is not meant to require content hosts to undertake continuous monitoring; rather, they are meant to respond to take-down notices when the notices are received. That reflects the fact that continuous monitoring would be unworkable and incredibly onerous and that it is not appropriate to put content hosts in a situation where they are the judges and censors of the content. So AMTA has requested some clarity there—for example, that the special take-down notice identify the specific person whose content is not to be hosted rather than be so indefinite as to impose onerous obligations on the content host.

The final key drafting issue that I draw to the committee's attention relates to the difficulty we see in achieving a type A or a type B remedial situation—again, the best example is probably in relation to hosted content. Firstly we note that there is not a definition of 'host' in the bill and so it would be a concern if the obligation not to host the content actually required the content host to remove all copies of the content that it may have on its systems. It may be that it has some copies stored but not hosted—as in not stored in such a way that they are accessible to the public—and it may be that the service provider needs to retain those for various business reasons, including the reason potentially that they have concerns about the way the legislation is applied to them. That problem could probably be rectified by having a definition of 'host'. The second issue is that the broad drafting of the second limb, where it would effectively require the content host to ensure that that content is not available anywhere on the internet, is clearly unworkable; it is not something that a single content host can achieve. It would be better if the provision or requirement were an obligation on them not to themselves host that particular content.

They are the key drafting concerns I wanted to raise. There are others recorded in our submission which I am happy to talk to if necessary, but I thought articulating those would be helpful to the committee. I will now hand over to Ms Bean, who is going to talk about the restricted access system issues.

Ms Bean—I am going to speak on both the restricted access system and deal a little bit with the Mobile Premium Services Industry Scheme and its relationship to the determination. 'Restricted access system' is not defined in the bill, and mobile operators are quite familiar with operating restricted access systems now. It is clear that there are two requirements: the identification of the customer and the ability to verify their age. Currently, when we offer credit services to our customers, when we do a credit check, mostly those customers have to be over 18 to get those services; in fact, we even have a credit reference. Our research shows that over 99 per cent of customers are over 18 once they have those mobile services. So we have a high degree of certainty that a customer receiving an account with a telecommunications provider is over 18. In the case of customers who do not have accounts, who have prepaid services, the ability to check their age by requiring them to do a credit card transaction would ensure that they over 18 and, currently, the internet industry does that. They use credit cards to verify that the provision of adult content is to people over 18.

Our main concern is that, because 'restricted access system' is not defined, ACMA, who has the ability under the bill to approve such systems, is not confined to looking at current industry practice or what is practical. So on the issue of clarity and certainty we are quite

concerned that existing systems that make us feel quite confident may not meet the approval of ACMA. So clarity in that area is really desirable from an industry point of view.

I would like to touch now on the determination that currently exists, the Telecommunications Service Provider (Mobile Premium Services) Determination that was issued by ACMA. Because of that determination, the industry has developed the Mobile Premium Services Industry Scheme, and that scheme currently regulates content as well as providing consumer protection measures, such as being able to stop premium services subscriptions once you have subscribed to them if you no longer want them and other billing issues.

It is desirable to have only one content regulator or one set of content regulations for premium services and other material that is provided by our industry or by our content providers. Our suggestion is that the bill is the appropriate mechanism for dealing with that content because it will deal with a range of material and because uniformity of classification and approach to content is appropriate, rather than having a variety of schemes. So, clearly, the determination needs to be clarified—and, as Mr Althaus said, it was considered to be an interim measure to start with. While the consumer protection measures do need to be preserved and also the complaints system that operates, allowing consumers to make complaints about premium services operators who do not comply with the scheme, the regulation of content needs to be clarified so that we are not faced with increased burdens in terms of the operation of our businesses.

CHAIR—Thank you very much. Now, Microsoft.

Ms Inman-Grant—Thank you, Chair. In my capacity as Microsoft Corporation's Regional Director of Internet Safety and Security, I work with government policymakers, law enforcement, NGOs and consumers in 13 countries across the Asia-Pacific region. It also bears mentioning that I am making this testimony on behalf of Microsoft Corporation as an offshore provider based in the United States, rather than Microsoft Australia, which does not host content—and also not on behalf of ninemsn, which is the joint venture between Microsoft's MSN and PBL, which does host content in Australia. Ninemsn would potentially be regulated very differently from Microsoft Corporation under this particular bill, and ninemsn did make their comments and concerns known through the Internet Industry Association's submission, so their concerns were certainly taken into account.

As a first matter, let me say that Microsoft understands and shares the concerns of the department and the parliament in relation to the exposure of Australians, particularly young Australians, to illegal and offensive content. While the economic and social benefits of the internet are undeniable, it is also true that the internet provides a means for inappropriate access to offensive material and, in some cases, can facilitate criminal activity. We also believe that the content services bill is one of the most sweeping reforms of its kind. Given Australia's role as a policy bellwether in the region—particularly in the internet safety space—we believe that the precedential impact for future laws and regulations developed in the Asia-Pacific is very important and tied to the outcomes of the development of this bill. The only possible example of other similar legislation is the audiovisual media services directive that is currently pending in the European Commission. It is expected to be considered in June this year.

For its part, Microsoft invests heavily in technological solutions; consumer education and partnerships with government, NGOs and law enforcement to ensure that such content is not provided using our services; and in providing consumers with the tools to control their and their children's internet experiences. Examples of this in Australia include our participation in the national e-security education week; our planned launch of the 'think you know' internet education safety program, in cooperation with the Australian Federal Police, ACMA and NetAlert; and a broad range of recent law enforcement training we have conducted in Australia, including one that we did in conjunction with the Queensland Police, Interpol and ICMEC, the International Centre for Missing and Exploited Children, on helping over 100 Australian law enforcement officials learn more about how to track down online paedophiles and predators.

Microsoft's perspective in relation to this bill is as a provider of content services that are hosted offshore, principally in the US. These services are numerous, and I am often confounded and confused by them. They include: Windows Live Hotmail, our email service; Windows Live Messenger, our internet messaging service; Windows Live Spaces, which is our social networking or blogging site which is very similar to the MySpace social networking site except for some very different safety concerns and architectural differences; MSN Video, which would be akin to Google's YouTube, which provides user-generated content through video; and Xbox Live, which is our online, interactive, simultaneous gaming platform. All of these services are used by hundreds of Australians every day.

Microsoft believes that the existing schedule 5 of the BSA, which focuses on regulating offshore content providers to the extent that they host content in Australia, is a very pragmatic and reasonable approach. Our interest in the content services bill and the current bill is to ensure that we can continue to provide our content services to consumers on a global basis on substantially the same terms and that Australia's approach harmonises with that of other jurisdictions. The government, both DCITA and Minister Coonan's office, have been very open and receptive to our comments and understanding of our concerns. We were not initially invited to participate in the limited consultation. We requested specific permission, and they did grant us that. So we are very appreciative of that willingness.

One of the concerns we outlined, both in the exposure draft and in the current bill, was the potential application of the bill to offshore links. Service providers could encompass Microsoft where a user of one of its services, rather than Microsoft itself, creates a link to prohibited content hosted in Australia. An example is used in our submission in section 3.2 where a user of Windows Live Spaces could create a link that is hosted in Australia. That would be beyond our knowledge or editorial control. Ostensibly the individual or group who has hosted the content would be under the purview of the bill.

Secondly, we believe there is significant ambiguity in the Australian connection definition—although it is an improvement on the Australian link definition that was included in the exposure draft—because it does not specify how to identify where live content originates. This potentially impacts on a number of Microsoft services. This may be a different concern to those expressed by our AMTA colleagues in that live content potentially could be generated interactively amongst a number of people from different jurisdictions around the world—for example, you could use an Xbox Live multiplayer game where you

could have players from Australia, the US and Japan. Ostensibly a move made by an Australian player to go up a hill or shoot a dart could be considered live generated content originating from Australia even though it may be a negligible part of the overall live content being streamed.

Our third concern is with the definition of the term ‘content services’. Because of the structure, it is a broad definition with 22 significant exceptions. We believe there is significant scope for unintended consequences to flow from this approach as technology and new services evolve over time. Certainly if you think two or three years back, things like social networking were not really mainstream activities—and there is potential for new and unexpected services to emerge. Just this week, Microsoft introduced a product called Microsoft Surface, which is actually an interactive computer tabletop which is touch based. It is very much like what you use at an ATM. They expect that, in the next three years, this sort of tabletop computer will be embedded as a delivery platform into refrigerators and microwaves and will be among a multibillion-dollar industry. The possibilities are endless. We certainly appreciate the complexities that go into drafting something and trying to anticipate the types of services and uses of content going forward.

In section 5.2 of our submission we recommend as a first option narrowing the basic definition of content services to encompass the types of content services to be regulated, and perhaps these could be reviewed over time. As a second option we suggested in section 5.4 applying a dominant feature test. A number of these current services, an example would be instant messaging, can be used as a voicemail chat, email or text chat, and also as a file-sharing mechanism. If you apply the dominant test to the service, that would allow for an easier interpretation and application of the content service definition to one or more of our services. In any case, I kindly ask that you do refer to the written submission for more detailed information. I am certainly happy to answer any questions that the committee might have. Thank you.

Senator WORTLEY—Thank you for your submissions and for appearing here today. My first questions will be directed to the AMTA and then I will move to Microsoft. If at any time I ask a question that is relevant to your area then feel free to jump in and give an answer. Do you think this bill will adversely affect the growth of the mobile telecommunications industry in Australia?

Mr Althaus—Our work on the bill has been fairly extensive and we do not believe it would adversely affect growth. Having said that, it is a very dynamic sector. I guess I would go back to the notion of this kind of legislation being broad in its scope. My colleague from Microsoft has just given a couple of very good examples of the speed of change within the telco sector, and that is increasing with convergence. So our ability to be flexible and take growth opportunities, and not be limited by legislation, is very closely linked to the broadness of the legislation. Our assessment of this particular bill is that it is not going to limit our opportunities for growth.

Senator WORTLEY—AMTA says that there are some technical issues in the drafting of this bill. Is that right? You say further that the definition of content service vis-a-vis carriage service requires clarification. Does clause 5 not provide sufficient clarification in AMTA’s opinion?

Mrs van Beelen—As I said in my opening remarks, the concern with clause 5 is that on one reading it provides an exemption if all that you do is provide carriage, but there are a number of examples where a mobile carriage service provider may, for example, also provide a billing service for the content. That is not to say that they have anything to do with the choosing or the making available of the content but they do have the mechanism to bill for the content via the bill for the mobile service. There is some uncertainty about whether they would still fall within the exemption in clause 5 by virtue of the fact that they do more than provide a carriage service. If you like, I can articulate an example by reference to Australia Post. They are not responsible for the content of the letters that they carry, that is clear, but they do provide billing services for the gas and electricity companies et cetera. That does not make them responsible for the gas service. In the same way we need to be very clear, because mobile carriage service providers may provide carriage and billing services and perhaps other services which are nonetheless not related to the provision of the actual content, that they are not caught as content service providers by the bill.

Senator WORTLEY—In your submission you also address restricted access systems. Can you explain why you have concerns about the provisions relating to the restricted access systems? I acknowledge that you did that to some degree in your opening statement but could you provide some more detail with regard to that?

Mrs van Beelen—The main concern is that a restricted access system, which as defined in the bill, is required in respect of restricted content but the definition merely refers to that which ACMA says is a restricted access system. There is one criterion, I think, which is that it has to be a system that ensures that children cannot access restricted content. But it is not clear what ACMA would determine is a restricted access system. It is not clear to what extent ACMA would take into account what industry is already doing, or whether ACMA might seek to impose any more onerous requirements on industry in order to determine that what industry is using as a restricted access system actually is one for the purposes of the bill.

Senator WORTLEY—At this stage do you feel that there needs to be more clarification with regard to a restricted access system?

Mrs van Beelen—It would be helpful if there were some greater clarity as to what ACMA's decision-making criteria would be in determining what constitutes a restricted access system for the purposes of the bill.

Senator WORTLEY—Is there one type of restricted access system that would adequately achieve the bill's objectives?

Ms Bean—I do not think there is one type and that would limit operators, but generally operators have systems that identify a customer and also obtain their age either by requiring date of birth for identification or by production of a credit card. I think it would create expense on industry if only one system was set out in the bill because of the variety of systems we are already using.

Senator WORTLEY—Can you think of a restricted access system that can adequately or accurately verify the ages of those young people aged between 15 and 17?

Ms Bean—The production of a credit card because they have to be over 18 to have one.

Senator WORTLEY—What about those between the ages of 15 and 17?

Ms Bean—No, there is not a system that will do that unless we ask them to make a declaration or if their parents authorise them to have use of material based on their age.

Senator WORTLEY—Do you think that the proposed provision will serve to protect these children?

Ms Bean—Yes, I do because those children are not going to have access to material that is not appropriate for them because the restricted access system will require the account holder to approve their use if they are a user of a service.

Senator WORTLEY—I refer to clause 47 of the bill, which refers to the fact that ACMA can, following a successful investigation into the hosting of prohibited content by a hosting service with an Australian connection, direct a hosting service provider to take steps to ensure a type A or type B remedial situation. This clause runs over 3½ pages and contains subsections, so it would appear that the government has gone to some length to set out action to be taken in relation to hosting services in breach of the bill. Notwithstanding their efforts, can you explain what a type A or type B remedial situation is in lay person's terms?

Mrs van Beelen—I can try. A type A situation exists where the specific provider to whom the take-down notice is addressed does not host the content that is the subject of the notice or:

(b) the content is not provided by a content service provided to the public.

It is subclause (b) that we have an issue with. Basically, as we read it, if you receive a take-down notice, you are required to cease hosting the content or otherwise ensure that the content is not made available.

CHAIR—Which clause is that?

Senator WORTLEY—I am reading from clause 47(6). I have noticed that throughout some of the responses there have been comments saying, 'As we take it,' and so on. Is it fair to say that this clause is unclear and that it could or should be further clarified?

Mrs van Beelen—That is one of the things that we have asked for clarity on. It is not clear to us how a content host could otherwise ensure that the content is not made available. That is not going to be within their control.

Senator WORTLEY—How would you clarify it?

Mrs van Beelen—We did make a suggestion on that. I will refer back to my comments. As I said, the first issue we raised was that of definition of 'host' and what that means. The second one was about making it clear that, having defined 'host', the host is required to cease hosting the content. It seems to me that that is what is within the realm of the control of the content host.

Senator WORTLEY—I am going to go back one step to the questions regarding the restricted access for people between the ages of 15 and 17. You were saying that credit cards would be a way of ensuring that. Credit cards are provided to people over the age of 18, so how do those people between the ages of 15 and 17 verify their age?

Ms Bean—Those people would not be able to have access to the content unless the account holder of the mobile service authorised their use.

Senator WORTLEY—Unless the account holder of the mobile service provided them with their credit card details?

Ms Bean—No. Unless the person who was operating the mobile account or was in control of that account authorised them to be a user on that person's account. An example would be that a parent has a mobile account and they allow their child to have a mobile service, so there are two mobile services operating on the one account. But we will require the account holder to authorise those people who are users on the account to have access, or not, based on their—

Senator WORTLEY—And if they were authorised, can that access be restricted to that age group—up to 17 but not 18? Are there provisions for that?

Ms Bean—Not currently.

Senator WORTLEY—So if the mobile phone account holder provided access on their account, say, to a 15-year-old, that would automatically give them access to material that is not suitable for—

Ms Bean—That is behind the restricted access system.

Senator WORTLEY—Perhaps we will just move on from there. Before we do, is there any way to address that that you can think of?

Ms Bean—I think the restricted access system is not subtle enough to allow content that is directed only to 15- to 17-year-olds. That content—MA15+ content—will be behind the restricted access system, because of the concern of the community and operators that people between 15 and 17 do not have unrestricted access to it. It clearly needs to be within the control of a person over 18—a parent, guardian or other person who is over 18, not allowing people under 18 to give access to the material. I think restricted access systems currently are not subtle enough to allow material to be directed just to 15- to 17-year-olds. As you have highlighted, the difficulty in determining the age of those people would make such systems very complicated and expensive.

Ms Inman-Grant—You have put your finger on something that would be considered a global conundrum, because there currently really are not technologies that are capable of proving that a child is a child. You can prove that an adult is an adult through credit card verifications. There are some pilots in the US and other places that we will be looking at. In the US you can drive at age 16, so you could potentially look at driver's licences as a way of at least verifying from 16 and over. There are of course a lot of privacy concerns related to that. The other option that we are looking at is doing a pilot with schools. Schools are really the only bodies at this time that probably have the names, ages and identities of children—but again there are numerous other safety and privacy issues associated with that. So I think it is a conundrum that we are going to have to really look at and grapple with very closely.

Senator WORTLEY—When you say you are looking at doing a pilot, do you have any idea as to how long it will be before you get the results?

Ms Inman-Grant—It depends on how limited the pilot is. It could be a matter of six months to a year, but it is something that our leadership at the very top of the company is looking at. We have got an application called CardSpace, which is an authentication mechanism. Clearly identity management is an important issue in Australia and elsewhere, so

we are looking at ways that we could use this platform, which is open and can use a number of different types of age and identity verification systems going forward. But I would say that the technology and the systems are not mature yet anywhere in the world.

Senator WORTLEY—I would like to move on to interim or final take-down notices. Can you explain AMTA's understanding of how this provision, which is section 52 of the bill, would work.

Mrs van Beelen—I have section 52 as the special take-down notices.

Senator WORTLEY—Maybe it is section 51, but perhaps we can touch on both of those. What is your interpretation of how that would actually work?

Mrs van Beelen—Section 51 is about the revocation of final take-down notices, on my copy.

Senator WORTLEY—While that is being checked, could you talk about the special take-down notices and then we will move on to the interim or final take-down.

Mrs van Beelen—That is the one that we have raised some concern about. A special take-down notice, as we understand it, would be issued if ACMA had concerns that content of a similar nature and that which raises similar concerns to that which had been the subject of a take-down notice might be posted—potentially as a substitute in an attempt to avoid the specific provisions of the take-down notice. That is what we understand to be the trigger for the issue of the notice. The content host, for example, would be required to achieve a type A or a type B remedial situation in relation to that content. It raises some issues as to how ACMA is going to know that that content is going to be put up and, likewise, how the content host is supposed to know that that content is going to be put up and therefore prevent it from occurring. It is conceivable that similar content could be put up by somebody completely different. It could be put up by the same content service provider. It just seems to me that that clause raises some concerns for industry about exactly what might be required of a content host upon receipt of that notice in order to comply with it, given that 'similar content' is quite a broad concept and a content host is not in a position to know the nature and substance of the content that it is hosting. That is why we have a take-down regime which is directed to specifically identified content. While we understand and appreciate that we would not want the regime to be able to be easily avoided, there is some concern that the provisions here are going to impose onerous obligations on hosts.

Senator WORTLEY—How do you see it working in the instance of an aggregated content site? From what you have read into the bill, who would have to comply with the notice—the host site or the producer of the content?

Mrs van Beelen—What we understand is that it would be directed at the host, and therein lies the concern.

Senator WORTLEY—Do you think that there is any way that a content host could know in advance that a content provider was proposing to host content that is the same as or is substantially similar to the content identified in an interim or final take-down notice.

Mrs van Beelen—It is not clear to us how that would be the case.

Senator WORTLEY—How would you propose the government clarify this provision?

Mrs van Beelen—We have suggested that if a take-down notice has been issued in respect of content supplied by a particular content service provider, then, perhaps rather than just saying ‘similar content’, the notice could specify similar content as being ‘content similar to that referred to in the take-down notice you have already received and supplied by the same content service provider’. That would at least narrow the operation and therefore the activity that the content host would need to undertake. It is actually quite a difficult one—particularly in relation to user generated content, I might add. I know a number of submitters to the committee have suggested the exemption of user generated content, but it is potentially quite difficult to comply with something like this when you have got user forums.

Senator WORTLEY—I would like to move on to telecommunications service provider determination. You say in your submission in your opening statement that the effects of the MPSD are unclear. Were you consulted about the effect of the bill on the MPSD prior to the release of the bill?

Ms Bean—We were consulted about the bill but not specifically on that question, and so we have raised that ourselves.

Senator WORTLEY—You said that you were consulted about the bill. Were you aware that this was going to be included?

Ms Bean—Sorry?

Senator WORTLEY—Were you aware there were going to be issues around MPSD?

Ms Bean—Once we started looking at the bill ourselves we drew attention to the potential conflict where both the determination and the bill were regulating the same material and our suggestion is that the bill takes that over. In fact, the way the mobile premium services industry scheme operates, complaints go to the complaint body that has been appointed as the telecommunications industry Ombudsman. The Ombudsman’s office is well practised in dealing with the consumer protection part of these complaints—complaints about billing, complaints about content providers not stopping subscriptions when asked to and so on—but they are not an appropriate body to be making decisions about content and appropriate classification.

So, as part of the set-up of the scheme, we have had some discussions between the Telecommunications Industry Ombudsman’s office and ACMA about how complaints would be handed off to ACMA to deal with content. This bill in fact clarifies, or could clarify, that issue very clearly so that content is dealt with by the bill and the determination then is amended so that content is no longer covered.

Senator WORTLEY—It does clarify or it could clarify?

Ms Bean—No, the bill does not clarify it yet, but our proposal is that the bill should do that. If content is going to be dealt with under the bill then our proposal is that the bill should make clear that it is the one that deals with content and not the determination.

Senator WORTLEY—So there would need to be amendments to clarify that?

Ms Bean—Correct.

Senator WORTLEY—When I asked you if you were consulted about the effect of the bill on the MPSD prior to the release of the bill, you said you were consulted. When you received the bill, you then became aware that there were issues. Is that correct?

Ms Bean—We were not asked that question specifically; that is all I was saying. We were given ample opportunity to be consulted and to give back our comments about the determination and the way the bill and the determination operated and the conflict that existed. So, yes, we were consulted.

Senator WORTLEY—Are you aware if anyone else in the mobile industry was consulted in respect of the MPSD?

Mr Althaus—The bulk of the consultation took place through the AMTA group, which represents all facets of the industry.

Senator WORTLEY—Was that prior to the release of the bill?

Mr Althaus—Yes. During the development of the bill we were in discussions with the department and the minister's office on elements of the bill.

Senator WORTLEY—So you were consulted; you now have the bill before you—but those issues were not raised previously?

Mr Althaus—We had a range of discussions on the bill as the development process took place, but, as with every piece of legislation, when the final product hits the desk there are ongoing issues that we want to discuss, and the relationship with the determination is one of those.

Senator WORTLEY—So what effect do you think the bill will have on the MPSD?

Mr Althaus—Our core concern is that, in the regulation of this aspect of the industry, we do not end up with too many layers of regulation that are confusing to industry and reduce the level of certainty under which we operate. So I think, as my colleagues have outlined, our interest is in clean and clear, certain regulation. To that extent, we need clarity on the relationship between this bill and the determination, and it is our view that ultimately it should be the bill that carries the load.

Senator WORTLEY—How could these effects be best managed?

Mr Althaus—Like we said, the nature of this legislation in a very dynamic sector is always going to be quite problematic. I think the government has taken the right approach in putting together a broadly based bill that gives industry—and government, for that matter—flexibility in terms of regulation and co-regulation with industry to deal with the dynamics of the sector. So we are keen for this approach to continue, we think this bill does a good job, we are on board with the objects of the bill and we look forward to working with the government to get a successful outcome.

Senator WORTLEY—But your views are that this area needs to be addressed—it needs to be clarified?

Mr Althaus—Clarity and certainty are very important. We have a new piece of legislation that is essentially taking over from a previous determination. We have done a lot of work

under that determination and can see it makes sense that ultimately this bill is the primary guiding force in this context.

Senator WORTLEY—You also have some concerns about the ‘Australian connection’ test in relation to links services. Can you explain those further?

Mrs van Beelen—I do not think that the Australian connection is particularly articulated in relation to links services, and that is the basis for our concern. So I guess we would just seek some clarity on what, if any, test does apply for an Australian connection in relation to links services.

Senator WORTLEY—Do you have any views on this?

Mrs van Beelen—Only that whatever is imposed needs to be able to be complied with. We do not have any specific suggestions as to how that would be done—potentially, if the link is hosted in Australia. I note our colleague from Microsoft Corporation has highlighted some challenges that she is probably better qualified to speak to than I am.

CHAIR—Do you want to make a comment on that—expand the whole issue, Ms Inman-Grant?

Ms Inman-Grant—Yes. I think I will use the example of Windows Live Spaces, which is our social networking site. The challenge would be: the service is hosted in the United States but a user without our knowledge may have a link to a prohibited site that is hosted in Australia. Ostensibly, through this legislation, the government would have the power to regulate that particular individual group or that hosted site in Australia. Our concern is that in our read of the links connection services that prohibition would also apply to Microsoft, the offshore content provider, where we would really have no knowledge that this hosted link in Australia that was put up by the user was prohibited.

We take these safety concerns very seriously. We use filtering technology in all of our spaces that detect flesh tones. If the tool flags to us that there is any inappropriate content, particularly pornography or child pornography, it violates our terms of service and we will take down that offending link. We will preserve it for law enforcement. We will report it to law enforcement and to the National Center for Missing and Exploited Children. Clearly, this sort of offending content is a concern to us as a service provider, and that is not the type of service that we want to be hosting. We are just concerned with what could be interpreted as an overly broad interpretation of link service provider. If the US, the Australian government or otherwise lets us know there is offending content and we have the ability to take it down, we will. But, then again, we do not want to be ensnared in something that we do not have knowledge or editorial control of. Does that make sense?

CHAIR—A little bit; not totally. You said you had a filtering system, which presumably applies to your American services. Are you implying that the kind of material which this bill is designed to prohibit could not be transmitted into Australia from the United States on your service?

Ms Inman-Grant—The content—say, videos or Live Spaces—is actually hosted on servers in the United States that an Australian user may have put up on their MySpace webpage. It will actually be sitting on a server in the United States that the Australian consumers or users from around the world can access, so that filtering technology applies to

all of the sites that are set up. We are concerned with some of the links. There may be a website link to a service that is indeed hosted in Australia that we would not have knowledge of and we would not proactively go through each space's website and analyse whether the links that individuals have on their personal webpages comply or not. Does that make sense?

CHAIR—Yes, it does. So the link material would not go through your system; it would be direct from the user to the link?

Ms Inman-Grant—Yes. Again, ostensibly, if the user is in Australia or is using a prohibited site that is hosted in Australia, my reading of the bill is that ACMA or others would have jurisdiction to go directly after that link or site rather than going after Microsoft, which is hosting the content offshore.

Senator BIRMINGHAM—How does your ability as an offshore provider of, say, live space with a link built in—the example being used there—differ from that of an Australian onshore provider to regulate what that link might lead into? Say it were MSN, your affiliate, that had a link there. Is there a point of difference there?

Ms Inman-Grant—I do not think there would necessarily be a point of difference to the link. Every system is going to be different. There are some social networking sites that do not have a filtering service, or may not be proactively patrolling the sites to make sure they are clean. They may have different terms of services. But I think it would be very difficult, whether it is housed in the US or housed in Australia, to have the capacity to check every single link that is posted on a user's individual webpage.

Senator BIRMINGHAM—So whilst there may be difficulties for ACMA, or whomever, to actually regulate who is carrying links, if they are offshore, why is there any difference between what is carried onshore and what is carried offshore? Why should we exclude those links?

Ms Inman-Grant—Again, the individual link has nothing to do with our service but may be posted on an individual's webpage. There would really be no way for us to go through every link and be able to assess what is prohibited and what is not prohibited content, if it is hosted elsewhere. I guess the point we are really trying to make goes to how far this legislation extends its extraterritorial reach. We believe that the current schedule 5 takes a pragmatic and reasonable approach that we can and do live by and abide by. Our interpretation is that the way it is currently drafted could potentially extend its extraterritorial reach in a way that could prove to be cumbersome and difficult from a compliance perspective.

CHAIR—This segment is scheduled to go until quarter past. I do not know whether Senator Macdonald has any questions of a legal nature.

Senator IAN MACDONALD—I have a couple of questions, not necessarily of a legal nature. I heard you mention to Senator Wortley that you were consulted about this, but have you made these comments known to the department and the drafters?

Mr Althaus—When the bill was introduced to the parliament we were able for the first time to see the finished product. Discussions on the issues that we have been raising have been ongoing during the process of the development of the bill. But, as I said earlier, to the extent that the final product was not available, as soon as it was we raised those issues again.

To a large degree these are finetuning, drafting issues. We are also making it very clear to the department and the minister's office that we do not want the bill to become overly prescriptive. Some of these operational issues will be dealt with by the operation of our scheme, in partnership with ACMA, but it is the clarity and some of the confusion, given the scope of this bill, that we have been seeking to address.

Senator IAN MACDONALD—That is how I understand your submission. None of you object to the principles and the goals of the bill—in fact, you both support them.

Mr Althaus—Absolutely. We are in this space already and these issues have been under determination for some years, to the extent that we finished our own mobile premium services industry scheme before this bill commenced. That scheme has been registered by ACMA and is in operation today.

Senator IAN MACDONALD—Have you had feedback on any of these substantive issues from the drafters as opposed to the policy makers?

Mr Althaus—We have discussed them, yes. In the very short time that we have had the bill we have had some initial discussions, but without conclusion. I guess we are using this process to air those more formally.

Senator IAN MACDONALD—Not having been a lawyer—I do not think lawyers know too much, mind you. Have you had decent lawyers have a look at this? Perhaps some of you are decent lawyers!

Mr Althaus—My colleagues to my right are part of that process; so, yes, we have looked at it in detail. One of the challenges here is part of that translation of operational pragmatism into a legal framework.

Senator IAN MACDONALD—I cannot speak for the committee, but I think that so often the government has good ideas and good policy proposals but sometimes we fail to get the people on the ground to implement the policy proposal because the legislation is not thought through well enough. It is difficult for me to argue at great length on your suggestions, but it does seem to me—and I cannot speak for the committee—that a lot of your suggestions warrant further consideration by the drafters rather than the policymakers.

Mr Althaus—I agree with that, Senator. There is a lot here that is finetuning. We think the bill has come a long way. We as an organisation and as a sector have worked very cooperatively with both the department and the minister's office in preparations so far.

Senator IAN MACDONALD—I should make it clear that I am not criticising the drafters, the minister's advisers or the department in any way. Applying them on the ground is very often different to sitting in Canberra thinking about how they should operate. There are some other groups in your area that would be interested in these outcomes if the law were changed in this way. Are there others who might look at these and say that that has changed the approach?

Mr Althaus—To give you an example, we are the peak group for the mobile telecommunications sector—

Senator IAN MACDONALD—Is that for Optus, Telstra, Vodafone—

Mr Althaus—Indeed; all the carriers and all the manufacturers are members of AMTA. In this increasingly convergent environment we, by definition, form alliances and relationships and interact with other sectors which are in the overall picture—for example, the internet group—and we partnered with the Australian Direct Marketing Association in the development of our premium services scheme. To the extent that we engage that way, we have a reasonable handle on what people are thinking in this context. We have been able to bring a lot of our views on the bill as it stands into our submissions. We do not speak for them by any means, but we have canvassed the space.

Senator IAN MACDONALD—Would people like—these are examples only and I mention them because they are on the agenda—the Council for Civil Liberties and the Festival of Light often use you as a first line of approach for things they wanted to deal with?

Mr Althaus—No, not necessarily. I am referring to us generally going out to other industry colleagues to drill into the operational implications of legislation of this nature.

Senator IAN MACDONALD—I am sure we can ask both the Council for Civil Liberties and the Festival of Light these questions ourselves, but would any of you think that anything you are proposing would offend the broad approaches of either of those or other organisations—as I said, I am just using them as examples because they are on the agenda?

Mr Althaus—We are in agreement with the principles and objects of this legislation. We are keen to have the pragmatic approach taken by the government to a very dynamic sector that is changeable and the protection mechanisms to protect younger Australians. We think this is a pragmatic approach, but we do not stop; we keep going as technology changes and other things become available. We look at them as they arrive.

Senator IAN MACDONALD—The finer drafting principles are a bit too much for me these days, but would any of the people who have strong views on these things one way or another say to us, ‘They are just weasel words, trying to make it easier for them to avoid their obligations’?

Mr Althaus—I do not believe so.

Senator IAN MACDONALD—But you have not had any input from anyone else who might—

Mr Althaus—No.

Ms Inman-Grant—I do not have much insight into how the department or the minister’s office went about deciding which stakeholders would be part of the limited consultation. As I said to your committee colleagues earlier, we requested specific permission to participate and they very generously granted that to us. But there are some players in the Australian content industry that did not partake and I am not sure if that was by choice or by accidental omission. I am thinking of people like the game developers, the Interactive Entertainment Association of Australia and some of our offshore colleagues such as Google, YouTube, News Corp and MySpace, the major social networking sites. I would have thought that this legislation would have been very critical to their interests and needs. I was surprised that they did not partake, but I am not sure what the circumstances were.

Senator IAN MACDONALD—Perhaps it means they are happy with it as it is.

Ms Inman-Grant—It could be.

Senator IAN MACDONALD—Very often because of timetables governments are not able to have the full consultation period, but this committee tries to help out in those areas whilst in no way wanting to interfere with the government's general approach.

Senator BIRMINGHAM—I have a general question. In terms of the content that is captured and restricted by this proposal, do any of you have any opinions as to whether it is the right balance or whether it captures too much or too little?

Mr Althaus—That is a good question. Our view is that, again going back to the legislative regulatory model that we use, it is important that this bill is fairly broad. I do not think it goes too far, but certainly our ability to be nimble and react to changes over time is going to be embedded in how we manage our mobile premium services industry scheme. Key to that, and to a lot of this, is the relationship between industry and the Australian Communications and Media Authority. To the extent that that will evolve as this bill comes into law, we will be working in that regard, but we think the balance is broadly right at this point.

Senator BIRMINGHAM—So you believe that the bill provides the flexibility for the industry to manage control of content through your industry structures into the future without being overly prescriptive?

Mr Althaus—In partnership with the media and ACMA. Our own scheme extends that partnership to the TIO, the Telecommunications Industry Ombudsman, for other elements of monitoring this space.

Senator BIRMINGHAM—I want to return very briefly to the issue of restricted access that Senator Wortley was speaking of. Obviously your concerns are that ACMA may come up with a system that is more onerous or more difficult than, for instance, in the 18+ sector, the current simple credit card check.

Mr Althaus—That is right.

Senator BIRMINGHAM—On the issue of the MA 15+ category and 15-year-olds to 17-year-olds, which is obviously carried over from media such as television, at present there is no filter or restriction on the access of 15-year-olds to 17-year-olds, or even those under 15, to such programs aside from parents' control of the television set and the remote control, basically. That is a fair assessment, isn't it?

Ms Bean—I could just clarify that. Under the mobile premium services industry scheme that material is also within the restricted access system. So it is slightly more restrictive than broadcast media.

Senator BIRMINGHAM—In your medium, it is more. How do you restrict that at present?

Ms Bean—If I can just turn to my notes about how the systems are operating. All mobile accounts are automatically defaulted to 'blocked'. So when you start your mobile service you do not have access to that material. Then you may request access to that material. If you have a post-paid account—so a mobile running on an account—you have already had to meet the credit check, so we have already ascertained that you are over 18 because you have a credit reference. If you are in a prepaid service you have to have a small credit card transaction with

a credit card in the your name—the account holder’s name—to then opt into the restricted access system which gives you access to content that is MA 15+ and above.

Senator BIRMINGHAM—The point I am attempting to make there is that, under your current system, as well as presumably under systems that may be imposed after this bill, access to such classified content is harder through the medium of your technology than it is in the home on a television set.

Ms Bean—That is correct.

Senator BIRMINGHAM—And this bill will obviously continue to make that harder, potentially, if it is not amended, depending on what guidelines ACMA put in place.

Ms Bean—Yes.

Senator BIRMINGHAM—You talk about clause 122 in schedule 7 related to state and territories laws. Is there a particular basis for concern there that the states may enact concurrent laws that could have effects across Australia? Is there a reason that you are aware of why that clause has been written as it is in the bill?

Mrs van Beelen—No. Again, it is a legal concern that there is that theoretical possibility that states and territories could enact other laws and that, because of the nature of the internet and the nature of these services in that they are generally nationally available, the effect of the conduct of one state or territory government would have national effect. Some states and territories now already regulate this space to some extent—for example, some of them prohibit certainly criminal activity over the telecommunications network, I understand. It is just more a legal issue that there is that possibility.

Senator BIRMINGHAM—Thank you.

Senator IAN MACDONALD—Just on that point, what happens in the event of conflicting laws under this bill and under state and territory law? This provision says that it is not to exclude concurrent state and territory laws. What happens in the case that they are conflicting?

Mrs van Beelen—The Commonwealth has the constitutional power to legislate in relation to carriage services—to telecommunications—so I expect—

Senator IAN MACDONALD—This is a provision relating to not excluding. Isn’t the Commonwealth saying, ‘If there is a conflicting law, then it will take precedence’? You do not read it that way?

Mrs van Beelen—I think the word ‘concurrent’ suggest that there is other legislation in the field. I do not think there is other legislation that is specifically in this field at the moment, but that is not to say that there perhaps could not be. It would be a constitutional question how the states would legislate in that way. Our legal advisers foresee that there is at least that possibility and thought it was unusual that it was not specifically excluded.

Senator IAN MACDONALD—In the previous recommendation you have a different protection that is provided for in the Broadcasting Services Act. Is there any reason why that might be?

Mrs van Beelen—We could not think of one. We could not think of why there would be a difference from what is in schedule 5, so we were just seeking consistency there.

Senator IAN MACDONALD—Thank you very much.

Senator WORTLEY—In your submission you raise concern with the limitation of liability provisions in section 111. You suggest that they should be broadened. Why, in your opinion, should they be broadened?

Mrs van Beelen—That is the consistency issue I was just discussing with Senator Macdonald.

Senator WORTLEY—Yes, but to move on from that, are there any specific reasons why you consider they should be broadened, and in what way?

Mrs van Beelen—It is simply that schedule 5 gives that broader limitation, including by reference to common law, laws of equity and state and territory laws. I trust that the drafters of schedule 5 thought that that was necessary. So I guess it is more a question of why it would be narrower in schedule 7. We are not aware of why that would be.

Senator WORTLEY—Thank you. Microsoft's submission raises issues regarding the definition of 'content services'. I have to agree that 22 exceptions are rather a lot. Can you explain the deficiency that Microsoft sees in the definition of 'content services'?

Ms Inman-Grant—I appreciate that it is very difficult to anticipate the types of services that may emerge in the future, which is why I assume the drafters took the approach of drafting the definition of 'content services' by exclusion rather than inclusion. We just think it would be much easier from a compliance perspective if, rather than looking at every service or component of each service and mapping that against each of the 22 exceptions, there were a much narrower definition of 'content services' that has more clarity and granularity in terms of what content services are trying to be provided. That would be our first recommendation: rather than by exclusion, more clarity and narrow the scope in terms of content service. If you decide not to take that approach, we would simply ask that you consider that there be a dominant feature test applied to each content service. Xbox Live, for instance, is primarily an online interactive gaming platform, but a chat function also exists. Most people will not use the chat function on Xbox to call their friends, although it is a secondary or tertiary feature. So, for instance, for Xbox, the dominant purpose is multiplayer interactive gaming. I think it would be much easier for us to apply the content services definition and test rather than apply 22 different exceptions to different layers of that particular service—if that makes sense.

Senator WORTLEY—In Microsoft's opinion, what would a narrower definition be and how would this assist? You have explained it in relation to Xbox—

Ms Inman-Grant—The 'content service' would be a specific, narrow definition that says, 'This is what the government considers a content service to be,' rather than, 'This is generally what a content service is, except for 22 exceptions.' Does that make sense?

Senator WORTLEY—Yes.

CHAIR—It sounds cumbersome, but in fact it is a way of doing it that is effective, isn't it? You state what isn't objectionable, so whatever is left is.

Ms Inman-Grant—Right. I would also note that in the exposure draft user generated content was included as an exception. So if you are going to take that approach we recommend that user generated content be dropped in as an exception as part of this bill. That would be consistent with the approach that the European Commission takes with the Audiovisual Media Services Directive. Again, I think, from a compliance perspective—from an organisation that delivers these programs globally—to the extent that there is harmonisation and consistency in these types of laws across the globe, it would make it much easier for us to deliver the services and comply. I would ask that you consider excluding user generated content as an exception.

CHAIR—It is interesting that you referred to the EU law. We might seek to find what its details are today or in the next few days to inform the committee.

Ms Inman-Grant—I am happy to provide a link to members of the committee.

CHAIR—If you would.

Ms Inman-Grant—Indeed.

CHAIR—That concludes this segment. I thank you all for appearing. It has been very helpful evidence.

[10.21 am]

HALLINAN, Mr Matthew, Intern, New South Wales Council for Civil Liberties

WALTON, Mr Michael Robert, Committee Member, New South Wales Council for Civil Liberties

CHAIR—We welcome both witnesses from the New South Wales Council for Civil Liberties and invite you to make an opening statement.

Mr Walton—We thank the committee for allowing us to come and give evidence today. I hope that the point of our submission is very clear, but in this opening statement I will summarise it in the following way. The New South Wales Council for Civil Liberties agrees that children should be protected from unsuitable content. The council also agrees that unlawful content should, of course, be reported, investigated and prosecuted. The council supports community education on internet filtering technologies for parents and for educators. The problem that the council has with both schedule 7, which is proposed in this bill, and the existing schedule 5 is that the council cannot support prohibition and the restriction of lawful speech on the internet or other delivery systems.

The council does not support such a censorship regime for the following reasons. The primary reason is that it restricts free speech unnecessarily. In the analysis provided in our submission, the senators will see that we believe it violates Australia's international obligations under the International Covenant on Civil and Political Rights. We also believe that the schedules do not and in fact cannot protect children from unsuitable material on the internet. The reason for that is that the vast majority of offending material is hosted overseas, so the restriction and prohibition here obviously has no effect on that. We are of the view also that age verification technology does not necessarily work. It also exposes citizens to the risk of identity theft. We believe the aims of the censorship regime can be achieved without prohibition and restriction of lawful speech of Australian citizens, simply by the use of content filters on end-user devices—specifically home PCs and school PCs. Obviously content filtering is not perfect, but it is the best technology that we have. It is a proven technology and there is research to that effect. It is also configurable for the individual, so as a child matures, for example, different filtering parameters can be used.

In short, the council believes the censorship of lawful speech on the internet is unnecessary. It is unnecessary because such speech can be filtered out on the PC at home or at school. Under the International Covenant on Civil and Political Rights, restrictions on speech are only permissible where it is necessary to restrict speech. The restrictions imposed by the censorship schedules 5 and 7 to the Broadcasting Services Act are unnecessary and therefore, we believe, an illegitimate burden on freedom of speech.

CHAIR—Could I ask you a question taking up the point that you made—that is, people will be able to access this content through overseas providers and servers. That is a very important dimension to this. It is a little bit like banning internet gambling, which you can do in Australia, but people can still access gambling sites through the internet overseas. So would you like to develop that a little bit for the purposes of recording it in *Hansard*?

Mr Walton—I believe Senator Fielding gave a very effective demonstration earlier this week.

CHAIR—He sought to, yes, but there was a filter on the minister's computer.

Mr Walton—I was not aware of that. Effectively any citizen or any child, I guess, either at home without filters on their PCs or by walking into an internet cafe, for example, or into a library—I believe not all libraries use content filters—can very quickly come upon sexually explicit material that may be hosted, for example, in the United States or Russia. I would imagine they could do that within the space of a few minutes if they were looking for unsuitable content. It could be anywhere in the world. Without content filtering on the end user device, that material is clearly accessible. Prohibiting and restricting such material on Australian web servers has no effect at all on access to the material hosted overseas, which is why we say it is simply unnecessary to prohibit and restrict such lawful speech on Australian servers.

CHAIR—You see filters as the only effective technology?

Mr Walton—We base that on a recent US decision where, I think, his Honour Judge Lowell Reed of the District Court in Philadelphia undertook a trial that went for approximately a month. He took evidence on this from experts from the industry; interested groups including the ACLU—the American Civil Liberties Union—groups with opposing views; and experts from the US government. After hearing all the evidence, his Honour concluded that content filtering was the only proven technology and the only effective technology to ensure that children were protected from offensive material. In fact, he pointed out that filters are not perfect—they cannot filter out everything. His conclusion after listening to the expert evidence was that approximately 95 per cent of all offensive material could be filtered out using these filters. In fact, he heard evidence from Australian research, the research that was done by NetAlert here recently where they went through a series of filters. They looked at them all and rated them as to how effective they were. His Honour referred to that research and pointed out that some of the results showed that the AOL content filter was particularly effective—in some instances it could filter out 100 per cent of offensive material—but, as his Honour said, it is not foolproof. It cannot capture everything. However, it is far more effective than restricting and prohibiting speech on web servers, which has no effect or negligible effect. So the difference is between the negligible effect provided by restriction and prohibition, and the 95 per cent effectiveness of a content filter.

Senator WORTLEY—To follow on from there, you further note in your submission that the judge in *ACLU v Gonzales* found the age verification systems do not work. Can you explain why this was the case?

Mr Walton—His Honour heard evidence on a series of different technologies. The primary one, of course, was the use of the credit card. He heard about other technologies as well. But his final conclusion, having heard all the evidence, was that these technologies were simply not capable of verifying the age of the end user, primarily because of the anonymity of the person on the internet who is connected. For example, a child can very easily get hold of their parents' credit card, record the number and then enter that for an age restricted purpose, and the age restriction access system simply cannot pick that up; it is just based on that number. In the same way he also looked at systems that use personal identification numbers, and the

same logic applies. All the verification system can do is verify that the person who applied for access is over the age of 18, but it cannot guarantee that the person who is actually using the service is over 18.

Senator WORTLEY—In light of the findings in the ACLU case, what is your view of the access control systems provided by the bill?

Mr Walton—My understanding of what the bill proposes is to leave it up to the regulator to decide what effective age restriction systems will be implemented here in Australia. But I note that in 1999, I think it was, the ACMA released the *Restricted Access Systems Declaration (No. 1)*, to which we refer on page 11 of our submission, and it recommends the use of credit cards and personal information numbers. That, of course, falls foul of the same logic that the US judge has used. Effectively, the age restriction access systems that are being recommended by the regulator here can only guarantee that the person who applies for access is over 18, not that the person who is using the service is over 18.

Senator WORTLEY—I would like to explore some further issues raised in your submission. You note that section 81 provides for trained content assessors. Can you explain why trained content assessors are, in your view, problematic.

Mr Walton—Certainly. We have a few problems with those particular provisions in the bill. Under section 81 the proposal is that industry codes and industry standards for commercial content providers ‘should’ include the use of trained content assessors, so it is effectively mandatory. But if one turns to the next section, 82, it states in subclause (1):

This clause sets out examples for matters that may be dealt with by industry codes and industry standards.

I emphasise the use there of ‘may’. Then in subclause (3) it refers to a complaints mechanism. So our concern, from looking at that drafting, is that content providers must use content assessors to look at the material they are going to provide, but parliament, by passing the bill as it stands, is not mandating any kind of complaint mechanism. So if a content assessor makes a decision about particular content it is not clear, at least from our reading of the bill, whether that decision will be in any way appellable.

Senator WORTLEY—So your concern is that there are not provisions for appeal from the trained content assessors. Would the inclusion of an appeal mechanism from the trained content assessors resolve this issue?

Mr Walton—It would not resolve it completely. There are two issues that we have with the content assessors. The provision of a clear complaints mechanism would certainly improve the bill, obviously. But one of our other concerns is simply that these trained content assessors will be private contractors; they will not be government-employed classifiers, as we have with the Office of Film and Literature Classification. The concern there is that there is a very clear mechanism for a classification decision. I guess ultimately that is coming back to the same concern we have that there is no complaint mechanism that is clear and affordable. Ultimately it would appear—at least as the bill is drafted—that anyone who is not happy with a classification decision of a content assessor may have to go off to the Office of Film and Literature Classification and pay for an official classification. The bill does not seem—at least

on our reading—to make it clear whether a decision made by a content assessor has the same status as a decision from the Classification Board.

Senator BIRMINGHAM—I guess it is safe to assume that the Council of Civil Liberties, as a general perspective, opposes censorship—and this is an extension of censorship, so naturally we would expect you to oppose this legislation.

Mr Walton—It is certainly a principled opposition to censorship and any restriction of lawful free speech.

Senator BIRMINGHAM—It is good to have all perspectives on this debate come before us today. We were having a discussion before about how content is regulated in different mediums. In a traditional medium such as free-to-air television, for example, whilst we have a classification system, the viewing of that content once it is classified is really in the hands of whoever controls the remote control. Is it fair to surmise that potentially the restricted access systems already in place—under some industry code and some government regulation—and proposed further regulation under this bill would make it harder to access such material through the new mediums than through the traditional mediums? Is that a fair proposition or summary, in your view?

Mr Walton—It certainly does. I will give a practical example. Only a few weeks ago I was fortunate enough to watch a film called *Bad Education*, which was screened on SBS TV, rated MA15+. It was on too late at night for me, so I videotaped it. That technology is available to anyone, and the videotape can be replayed at any time. But the film was certainly broadcast under the industry standard, in a late schedule. The streaming of that film—or even a trailer that was also rated MA15+—on premium mobile services, for example, being restricted just does not seem to make sense to us. Listening to the evidence from some of the people who were here previously, it appears that the way that a premium service works is that everything is blocked out initially anyway and that parents have the ability, for example, to restrict internet access on a mobile premium service. I think we said in our submission that we noted—and in fact the US judge also noted—that there is currently no provision for content filtering on mobile phones. A parent would be ill advised, quite frankly, to enable internet access on a mobile phone for a child until such technology becomes available—which is not to say that it should be restricted and prohibited on web servers; it is simply that perhaps parents should be monitoring more closely what their children are watching on their mobile phones.

Senator BIRMINGHAM—And the reason that, even with legislation such as this, a parent would be ill advised to allow free rein to internet services on a mobile phone is that trailers and feature films like *Bad Education* will still be available but just not from Australian content providers or Australian hosts.

Mr Walton—And in fact far more objectionable material as well would be freely available. So I guess, to go back to your analogy of the remote control, in effect that is how parents effectively have a similar control over premium services, deciding which services will be enabled or disabled on premium services for their children.

Senator BIRMINGHAM—I want to turn to your comments on the prohibition of lawful e-commerce. In part 5 of your submission you talk about how material rated X18+ is

commercially available in some aspects in Australia but might be restricted or in fact would be prohibited under this bill. Can you take me through those laws please?

Mr Walton—Certainly. Currently the classification system that classifies content, for example X18+, does not ban it as such. It is state legislation in particular states that decides which content will be restricted, which content will be banned. Here we are dealing with federal legislation which is doing a similar thing—not at the newsagency, not at your local adult store, but on the internet. Essentially what we are trying to explain in this part of our submission is that it is lawful under certain circumstances in Australia to sell over-the-counter X-rated material. You see it here in the territory; you see it in the Northern Territory as well. Such material is also freely available and can be ordered on the internet from other jurisdictions.

By prohibiting Australian businesses from hosting this kind of content on their web servers, by prohibiting Australian businesses from selling these kinds of services on the internet, all we are doing is driving these businesses offshore into other jurisdictions. They simply host their businesses overseas and that has several impacts. One obvious impact is on the Australian IT industry, for example, where programmers lose out on the job of programming that content or where content providers here or hosts, ISPs, are losing that business to overseas businesses as well. So ultimately the bottom line is that this material is, under certain circumstances, lawful material, adults have a right to access it and the council simply objects to that material being prohibited in this context. It makes no sense that you can go down to your local newsagency or adult store and pick up this material but you cannot access it from an Australian web server, but you could access it from a New Zealand web server or an American web server.

Senator BIRMINGHAM—So making it clear: the magazine with the non-transparent coating in the service station or the newsagent, the on-line version would be prohibited from being stored or available on an Australian hosted site under this legislation.

Mr Walton—Precisely, yes, and denying adults their freedom of expression.

Senator IAN MACDONALD—Can I return it your argument that this bill, in effect, does nothing to protect children. Is the filtering, if parents so decide, a guaranteed way? I do not fully understand filtering unfortunately—I was not at the estimates committee when the minister and Senator Conroy were going to go and filter some stuff—but is that a foolproof way?

Mr Walton—No, it is not foolproof at all, it is not 100 per cent effective. I base that on the decision of the District Court in the US. The judge who looked at all the evidence and heard the expert evidence concluded it is 95 per cent effective but is not 100 per cent effective and no filtering technology will be.

Senator IAN MACDONALD—How do parents access filtering technology? Do you go down the shop and buy it?

Mr Walton—In the past that was the way it was done, yes. There was software provided by particular software houses that had different levels of filtering available in them. For example, I believe that AOL has several levels of filtering that a parent can choose. They can choose one for under 10s, another one for under 14s and another one for under 16s and 18s. It

is also configurable in the sense that parents can individually filter out particular sites. So, for example, if a parent does not want their children watching *Big Brother Uncut*, they can simply stop all content from that particular website coming into the PC, it is filtered out. That kind of technology is now, I understand, built into the latest operating systems. So it now comes free, for example, for anyone purchasing the new operating system called Vista from Microsoft. So it does not require a separate purchase of more software.

Senator IAN MACDONALD—So just by doing something on your keyboard you can—

Mr Walton—Yes.

Senator IAN MACDONALD—And the same applies for mobile phones?

Mr Walton—No. Currently, to the best of my knowledge, there is no such technology available for mobile phones, which is why we have said in our submission that it is probably ill-advised for parents to enable internet access on mobile phones for their children until such technology is available.

Senator BIRMINGHAM—The government has an outstanding program making filtering services freely available, as you would be aware. Chair, I suggest that we might pose that question on the development of mobile phone filtering technology to the AMTA as a request for further information from them. They may be aware of those technology developments.

Mr Walton—I can also point the committee to that particular report that was created by NetAlert here in Australia. I think it was a CSIRO research paper. It goes through all the different filtering software and rates them, and that might also be useful. I believe that there is a reference to it, if I can just find it, in our submission. It is in footnote No.17 on page 9. It is called the *Effectiveness of internet filters software products*. It is a 2001 report from the CSIRO.

Senator IAN MACDONALD—Thanks very much for that.

CHAIR—You also say the bill unreasonably restricts the use of computer games. Do you want to enlarge on that?

Mr Walton—Computer games are playable on the internet; they are also playable on mobile phones and other premium services. The council's concern is a very simple one: at the moment the classification system for computer games is highly restricted. It only allows adults to see or to play games, to purchase games here in Australia, that are suitable for 15-year-olds; there is no adults-only rating or classification and there is no X-rated rating either. So all of these games are just simply banned here in Australia and we see no reason for this. The classification system could be expanded to provide an R-rated and an X-rated classification for computer games as well so that adults can play the games that they wish.

CHAIR—Are there any other matters that you would like to put before the committee? If you would like to do so, please do so.

Mr Walton—Just very quickly, I would like to make a point about the link service providers. This is mentioned in the bill itself. A problem that we can see is essentially that a link provider has no control over the content to which their link will send a user. I will give you an example—and I probably have to say here that I am the de facto webmaster of the New South Wales Council for Civil Liberties website. If one day I put a quite innocent link

onto a website, it might be that the very next day that website has put up some prohibited content. This bill would mean that the Council for Civil Liberties, and probably me, would be in breach of the law. That seems ill thought out and it is going to catch innocent people who had no intention of breaching the law.

Senator IAN MACDONALD—You are saying, I think, retrospective acts? That does not ring true to me. I am not sure why. Under perhaps what used to be section 22 or section 23 of the Queensland Criminal Code, if something happens beyond your understanding of it—

CHAIR—It is a similar point to the point made by Microsoft: that although they themselves are not hosting prohibited material they have links on their sites, and a link may have prohibited material.

Senator IAN MACDONALD—If it is linked at the time you do it then you are in trouble, and rightly so. But if it changes the day after you do it, without any warning or any reasonable suggestion that it would change, I cannot imagine the broader law would hold you—

CHAIR—That is quite an interesting legal point, isn't it? Microsoft obviously have many links. You would probably have not so many and you could perhaps check them, whereas Microsoft would find that difficult to do. But there is obviously still this problem that you have referred to of the content of the link changing the day after you put it up or whenever.

Senator IAN MACDONALD—And you would not check it every minute of every day. It would be impossible to do that.

Senator BIRMINGHAM—The extension of the Microsoft argument is that if you were to run a blog on the Civil Liberties website, being an organisation promoting free speech you probably would not be censoring what people were putting on that blog and you would not necessarily be checking every link of people who posted comments.

Mr Walton—No, that is very true, and there are lots of websites hosted on Australian servers who do exactly the same thing.

Senator BIRMINGHAM—Including some politicians.

Mr Walton—Yes. I am sorry, Senator Macdonald, I just cannot answer your question. I do not know whether the bill takes that into account. I can certainly take that one on notice and give you—

Senator IAN MACDONALD—Perhaps we could put that to the department.

Mr Walton—That would be more suitable, yes.

Senator IAN MACDONALD—Just one other thing, very briefly, Mr Walton. You were here when the previous witnesses were giving evidence?

Mr Walton—We were towards the end, yes.

Senator IAN MACDONALD—Have you had the opportunity to look at their submission?

Mr Walton—I have indeed, and I must say I was impressed with Microsoft's list of the freely available software that they provide that allows parents to filter out the content that is coming in from the internet.

Senator IAN MACDONALD—My question relates to the amendments they recommend which they say—and from my brief reading of them it seems they are right—are more technical amendments dealing with what could be practical and obvious flaws in the legislation, not changing the thrust of the legislation but improving it by giving clarity. I wanted to ask you if there was anything in what they say that you would violently disagree with, but perhaps you have not gone into it at length.

Mr Walton—No, I am afraid I have not gone into it in that detail. Essentially, the council's view is that schedule 5, at least those parts which offend free speech, should be repealed and that those parts of schedule 7 which offend free speech should never be enacted.

CHAIR—Thank you very much. That concludes this segment.

Proceedings suspended from 10.54 am to 11.13 am

EGAN, Mr Richard John, National Policy Officer, Festival of Light Australia

CHAIR—Welcome to the hearing. Would you like to make an opening statement?

Mr Egan—I find myself in agreement with the previous witnesses from the Council for Civil Liberties on the general view that this bill and similar legislation trying to regulate internet access is necessarily going to fail to protect children in the way that the object of the bill sets out to do. That is because of the policy limitations that have been put on this bill and measures like the internet gambling legislation and the suicide related materials legislation. The legislation essentially regulates Australian content and effectively does nothing about the overwhelming majority of content which is hosted extraterritorially. I think that, until the policymakers bite the bullet on that question and shift from merely regulating Australian content to regulating carriers and requiring carriers to use effective filter services to filter out objectionable material in the various categories, we are not going to be adequately protecting children. That was dramatically demonstrated with the tragic suicide just recently of Jodie Gater and Stephanie Gestier in Victoria following the detailed step-by-step instructions on a how-to-commit suicide site hosted in the Netherlands. I saw some of these sites during my research for the suicide-related materials bill and, while I was very pleased with the government's initiative in bringing that measure in, again, it only deals with Australian content so therefore did nothing to help protect Jodie and Stephanie from a website that not only gave them the instruction but urged them to carry through those actions.

The solution proposed by the earlier witnesses of simply relying on parents to install content filters on the PC or the end user device is inadequate, as I think the testimony from the Canberra Hospital Child at Risk Assessment Unit at their 2003 Australian child abuse conference indicated. They were seeing a spate of children aged nine and 10 who had become sex abusers of even younger children after consuming pornography on the internet. Clearly, these children came from at-risk homes to start with. In the case study that was presented, the nine-year-old's single mother had had four successive de facto boyfriends living with her. Clearly none of them had taken anything that remotely resembled a paternal interest in the child, and that was not a home where enforced parental content on the PC was going to be the solution to the problem. So, are we just going to abandon the most at-risk children because we will not bite the bullet on mandating ISP level filtering? That is our broad approach to this whole question.

A similar example comes up with the Attorney-General's current move to include material that advocates terrorist acts within the refused classification category for films and publications, a measure I support. But, again, that is not going to stop an al-Qaeda-sponsored video of the beheading of a hostage being broadcast over the internet and being available in Australia with the most inflammatory language encouraging people within Australia to act on calls to engage in terrorist activities. The only thing that can deal with that is ISP level—or, alternatively, a national—filtering system.

To make a couple of specific points about content, it is difficult to get consistency across the various media for the different classification levels, but the policy position of the government is to aim for that consistency. I will briefly make some comments on MA15+. It is not an advisory category; it is a legal category. A cinema owner who knowingly lets an

under-15-year-old into an MA15+ film, a video store owner who rents an MA15+ video to someone under 15, or someone who sells an MA15+ game to someone under 15, faces legal penalties. So it is a legally-controlled area and should not be misunderstood to be merely an advisory one.

With television, of course, the free-to-air broadcast nature of it makes that difficult. The measures there are a combination of time zones which are required—you cannot broadcast MA15+ before a certain time—and, in that case, relying on parents, as has been said. For that reason, we support the measures that are in this bill to include MA15+ as restricted access. We note that the legislation allows ACMA to approve a restricted access system that would identify 15-, 16- and 17-year-olds and allow them access to this material. It seems that there is no current feasible system that the industry are interested in on a commercial basis. That may be, and, if they come up with one at some point, they can put that to ACMA under this legislation and that can be provided for. In the meantime, this ensures that it remains in the legally-restricted category so that 14-year-olds cannot get that material.

With the R18+ classification, there is an oddity in the bill. Things that are classified as restricted category 1 are going to be prohibited under the bill but things that would, if classified, be classified restricted category 1 are not going to be. With restricted category 2, material that would, if classified, be restricted category 2 are going to be prohibited. This whole provision is to prevent the need to submit every website to the OFLC for a formal classification. Our recommendation is that anomaly in the bill be corrected. With the X18+ classification, it seems to me that it is the territories alone that are the standouts on this and that the Commonwealth is perfectly justified in treating X18+ material the same way that all six states treat it—that is, not making it freely available even to adults. The mere fact that the two territories do so is no reason for the Commonwealth government to follow their lead rather than take a uniform policy position on this in line with the states.

I will finish on a point about mobile phones. It is proposed that there be an exemption for mobile phone internet access from the requirements of service providers to offer device based content-filtering systems. If we follow that through, we are saying that we are letting the carrier services off the hook and not requiring them to filter what is coming in from overseas. We are requiring them to offer under the whole NetAlert scheme and so on device based content-filtering systems to the end user, but we are going to carve out a whole class of end user devices—mobile phones. It seems to me that rather than doing that this would be the opportunity to put some responsibility back on the carriers and say, 'If you want to offer internet access via mobile phones you have to have at your ISP hub the filtering system so that you can offer a filtered service or, for those who pass the age verification system, allow in the material that is prohibited—

Senator IAN MACDONALD—Is that technically possible?

Mr Egan—Yes, it is certainly technically possible.

Senator IAN MACDONALD—Is it easy?

Mr Egan—It is easy; it is relatively effective. Just like with the user based content-filtering systems, it is a matter of degree. It obviously carries a cost, but with regard to the cost I will cite the explanatory memorandum, which says:

... it is reasonable that, where content service providers offer services on a commercial basis, they should meet the costs of ensuring that adequate safeguards are in place to protect children in particular from the risk of exposure to offensive or harmful content that could be accessed using their service.

The same principle applies to carrier services trying to tap into the potentially lucrative market of mobile phone based internet access. That is my final point.

Senator IAN MACDONALD—Thank you for your submission. Is there a statistic that gives—or do you have a guess at—the percentage of at risk children in Australia or any given community? These are those children who would be thought not to have parents who would—

Mr Egan—That would be a hard figure to guess at, because there are so many factors involved. I will quote the figure from the Child at Risk Assessment Unit here at the Canberra Hospital. In the first six months of 2003, they identified 48 children under 10 years of age who had engaged in sexualised sexually abusive behaviour. While certainly not saying that internet access was the only factor, that was a factor in a significant number of the case studies.

There are different categories. There are families that are so dysfunctional that any hope of getting them to take responsibility for putting a filtering system on the computer does not exist. I think there are a large number of other families where the problems are more complete. They are like the ‘too many rabbits in China’ man in the ad we are all seeing at the moment. The technology is simply not within their reach at all. They may have paid for someone to come and put a computer in, but they do not anything more about it than that.

Senator IAN MACDONALD—This does not necessarily follow, but your organisation would have some idea of the number of Australians who would be reasonably expected to go the extra mile to protect their children. I think the figure would be 75 per cent, 80 per cent, 90 per cent or 95 per cent.

Mr Egan—Certainly I would agree that the majority of parents want to do what is responsible for their children. I think though that in this area parents need a partnership with government and with the industries involved and that the onus should not be entirely on them. The government is doing that through their support for end based user systems, but it does seem to me that we have too readily closed off the other path. I know there have been investigations that have said that it is too hard or the industry has objected, but all I am looking for at this point is, as committees like yours deal with legislation that is tackling this problem simply by dealing with the Australian content, that you at least acknowledge in your report that it does not deal with the whole problem. That cannot happen unless we tackle filtering at an ISP or national level.

Senator IAN MACDONALD—If there is one child that is put at risk, that is one too many, but if the Australian percentage is 0.01 per cent do you take that liberty and choice away from the other 99.9 per cent of Australians to protect the 0.01 per cent. I acknowledge that even one child is too many.

Mr Egan—In citing the Canberra figures, I am highlighting the most horrific impact of this. How do you put back together the life of a nine-year-old who is a sex abuser already? That is just devastating. The Australia Institute’s work found in 2003 that 38 per cent of 16-year-old and 17-year-old boys were deliberately using the internet to view sexually explicit

material while 84 per cent of boys and 60 per cent of girls had experienced unwanted exposure to sexual material. That is in the teenage age bracket and it is clearly indicating that—

Senator IAN MACDONALD—I am asking whether we should we putting more emphasis on saying to parents, ‘You can’t rely on the government to do everything; you have to have a role in all this.’

Mr Egan—I think we have to see the internet much more like television, and we do not do that with television. We do it up to the MA15+ level, but we do not allow R18+ films over free-to-air television. The internet is like free-to-air television; it is practically freely available in every home, at your friends’ homes, at internet cafes, at the public library and so on. I think we have to treat it the same way.

Senator WORTLEY—In your submission you said that you consider the most obvious means of protecting children is requiring content filtering at an ISP level. Can you explain why you think that is a better approach?

Mr Egan—Filtering at an ISP level ensures the key objectives, which are to protect children from objectionable material because it simply becomes unavailable, and to allow adults to still view what they want because an ISP level filtering system would be like the premium mobiles phone services that we heard about earlier. The standard is that the material is blocked and if you want to unblock it, you have to verify your age and ask for it to be unblocked. At that level you could allow the age-verified prohibited material, that is R18+. In our submission, you would further filter out for all users in Australia R18+ and what would be refused classification. That would deal with suicide promotion, advocacy of terrorist acts and the more extreme versions of pornography, including child pornography.

However, at the moment our default is to let everything in and then put the onus on each individual parent in every household in Australia to take steps to fix this problem, when it can be done by each ISP much more efficiently. The coverage is clearly going to be more comprehensive than if we are relying on selling this proposition to one parent at a time, as it were.

Senator WORTLEY—You also note in your submission that children are not protected from content hosted on overseas websites. Would filtering address this issue?

Mr Egan—Yes. The filtering that we are talking about would involve a combination of things. I think the ideal would be if ACMA were responsible for overseeing or probably contracting out to someone the compilation of a blacklist that is updated daily and is made available to ISPs; that is one means of blocking. The other means of blocking requires real-time filtering, similar to the things that Microsoft were talking about in terms of identifying pornography by flesh tone calculations and so on, and there are certainly companies that provide that service—for example, to departments of education for school system wide filtering systems or to businesses to stop employee use of company internet time for viewing pornography and other things. And they can be tailored at various levels, so they certainly could be tailored to accommodate blocking out X18+ and RC material for the whole country and allowing R18+ material on an age-verified opt-in system.

Senator BIRMINGHAM—Could you explain to me the difference between category 1 restricted material and category 2 restricted material, please?

Mr Egan—Without being too indelicate, category 2 is essentially penetration visuals and category 1 is things that are short of that but are nonetheless sexually explicit.

Senator BIRMINGHAM—And your issue is that under the bill all category 2 restricted material is prohibited content?

Mr Egan—Yes, whether it is has actually been classified by the OFLC or would, if classified, fit into that category.

Senator BIRMINGHAM—And, in category 1 restricted material, only that which is classified is prohibited.

Mr Egan—It has actually been classified by the OFLC.

Senator BIRMINGHAM—So that which is available through other mediums and therefore has gone through a classification process, either way, is prohibited?

Mr Egan—Yes.

Senator BIRMINGHAM—Whereas a YouTube video maker would be breaking the law if they did something that would otherwise be category 2, but—

Mr Egan—Here we are actually dealing with stills, because the restricted categories 1 and 2 are to do with publications. So we are talking about the electronic version of print publications.

Senator BIRMINGHAM—But the equivalent category 1 material, as made by you or me, not published in a print version and put online would not be a prohibited item?

Mr Egan—That is right—or, more likely, downloaded from an overseas website but stored on an Australian content host. I could not see any rationale in either the bill or the explanatory memorandum for that anomaly.

Senator BIRMINGHAM—It seems unusual. You could argue about which way—

Mr Egan—Which way it should go, but—

Senator BIRMINGHAM—it should go, and I realise that you would argue one way and our previous witnesses would argue probably the other—

Mr Egan—Yes.

Senator BIRMINGHAM—but consistency would seem reasonable. Turning to the internet filters point and your recommendation there, you are essentially recommending that, if the filtering software for mobile phones et cetera is not viable, the providers of content for mobile phones should run a filter across everything before they make that content available.

Mr Egan—Yes. I am not quite clear on the technology here, but my impression is that, in order to deliver the internet content to the mobile phone, the ISP does some technological things that are already different from just sending that content to the computer, although the content will be the same—you are still getting Google and can search whatever you like and so on. However, to require those who choose to offer that particular means of internet access to have ISP based filtering seems to me the only way of ensuring one of the key objects of the

bill, which is to make sure there is consistency across devices. Otherwise, we are saying that, because we cannot get content-filtering software onto a mobile phone—because basically it is not a computer, which I think is the problem—we are just going to give them a free pass. Once you have the mobile phone and are getting internet, it is completely unlimited. To me, that just seems unreasonable, if the general goal is to try to treat all content provision the same regardless of the end user device on which you are receiving it.

Senator BIRMINGHAM—I would be amazed if technologically it was very hard to extend the development of filtering software from computers to mobile phones. If mobile phones can carry the same internet devices, I would think they would be able to carry the same filtering software devices as well. But you are not an expert and neither am I.

Mr Egan—I suspect it is a storage question. Converging technology means more and more that the mobile phone will eventually become a mini-laptop, I suppose, but there will obviously be degrees of capacity and so on.

Senator BIRMINGHAM—Current clause 59 of the bill puts it in the hands of ministerial discretion. If the minister believes that the filtering is not viable, paragraphs 1JK(29) et cetera do not apply in relation to access to internet content using that device. Are you able to explain what those exemptions are? I can obviously go away and read the bill and double-check those things, if need be.

Mr Egan—Are you referring to schedule 5?

Senator BIRMINGHAM—Yes. You have quoted from the bill in 3.3 of your submission.

Mr Egan—Yes. They are essentially the things that require an internet service provider to offer and make available to each new subscriber PC based, end user based content-filtering systems. The effect of the ministerial discretion, if exercised, would be that an ISP provider does not have to offer that to a mobile phone subscriber to the internet because—

Senator BIRMINGHAM—It does not exist directly.

Mr Egan—It does not exist. I think all the evidence we have heard so far suggests that it does not exist. From reading the ministerial discretion, I think it then is not whether he wants to do it but whether he is persuaded that it does not exist. That is where the scope for his discretion is made available by the legislation. It does not really allow the discretion to deal with it another way—say, in the way that I am suggesting.

CHAIR—Do you have any comment about Microsoft's concern about Australia's connection and international access?

Mr Egan—Some of the concerns raised by Microsoft and earlier witnesses about link services and who is hosting what issues all seem reasonably put, so we do not have any particular objection to those considerations. But it does highlight again the fundamental flaw in the policy approach that, if the whole scheme—again, as with similar legislation, including suicide related materials—is only designed to target Australian content, it is very secondary to my concerns as to who actually gets caught in that and who does not, because we are dealing with one per cent of the available content. In terms of fairness, I have no particular objections to some of the things that are being proposed by AMTA and Microsoft. If the legislation is going that way, it certainly should all be clear so that people know what it is and is not

covering. However, again, that does not deal with the real problem. I might make a point though, if I could, about end user generation.

CHAIR—Just to go back to that: it is about suicide, as you said; it is also about banning internet gambling.

Mr Egan—Yes.

CHAIR—It is all easily circumventable, in effect, by just going off shore.

Mr Egan—Yes, if we stick with the policy position that we will only try to regulate Australian content and not regulate access to extraterritorial content. Obviously, we cannot directly legislate for extraterritorial content—we cannot tell Nevada to take down their internet gambling sites—but we could regulate access. Sooner or later, governments will have to face that and bite the bullet on it because, as we move into an increasingly cyber world, it will mean that everything that is out there is in the family home. Having something in the home itself as the only guard against that just seems to me an inadequate public policy solution, when there are other nubs in that whole network where things can be stopped. It is like saying, ‘We’re going to let the Mafia into the country but every family is going to be given a security system to make a little fortress in their home.’ Why not keep them out of the country? We can keep this stuff out of the country on the national backbone or at ISP level. There are a finite number of ISPs and they can all be required to put the appropriate security measures in place.

CHAIR—Were you going to comment further?

Mr Egan—Yes, just on end user material. The idea that they would be exempted from being held to be content hosts—as was being suggested I think by Microsoft, if I understood them correctly—seems to me seriously flawed. This would mean that all material, including child pornography, would be exempt from the act if it were end user generated. Say you have a network of paedophiles who are all putting up their individual pictures of the acts they have engaged in or whatever they have collected; you would be exempting that from the regulatory scheme of the bill. That seems nonsensical to me.

Senator BIRMINGHAM—Obviously, the extreme example there is covered by other legislation.

Mr Egan—Yes, in terms of the take-down orders and so on that deal with that, and perhaps, if they have done it cleverly enough, even tracking down and finding out who the person is in advance. Microsoft has its own schemes in place of, course, but there will be a variety of levels of responsibility with these so-called social networking spaces. They will not all be run by companies that have as much interest in being seen to be socially responsible as Microsoft might have. The technology is there for all kinds of interested groups to set up those kinds of networks. I just think it would leave a gaping hole, even in the legislation as it stands, if you exempted user-generated material.

Senator BIRMINGHAM—There is an enormous practical challenge with user generated content—obviously, it is one that the department, the minister and others have grappled with if it was not in an earlier draft and it is in the proposal—because of the sheer volume of user-generated content that is added to the internet every minute now days.

Mr Egan—Yes. That leads me back to the notion of similar content. I can understand the difficulties that the industry experienced with those things—you may want to ask the department about this later—but what it is trying to target? Obviously, it is trying to target a content host who repeatedly offends or is seen by ACMA potentially to be in that scenario. You could get a quite ludicrous situation where objectionable content is put up, there is a take-down order and the next day they put up something that is just a little different; you have a group of people, one of whom puts something up in their name and then puts it up in someone else's name and so on.

Senator BIRMINGHAM—Or, indeed, a different ISP puts the same thing up the next day.

Mr Egan—Yes. It may need finetuning, but it certainly should not be dropped altogether, because it has obviously come out of experience with take-down orders and ways of people trying to work around them.

Senator IAN MACDONALD—Did you hear the evidence given by Microsoft and the association?

Mr Egan—I did, yes.

Senator IAN MACDONALD—Have you looked at their recommendations?

Mr Egan—I have read their submissions. As I was trying to suggest to the senator earlier, most of them seem to me to be aimed at finetuning. They seem to support the general policy of the bill.

Senator IAN MACDONALD—You do not find any particular objection to them?

Mr Egan—I did not have any principal objections to them. A couple of things I mentioned—the end-user generated stuff and the similar content stuff—I am more inclined to be tougher on even if makes it a little more difficult for industry. But I am certainly open to the department and industry between them trying to finetune that so that what the government is trying to do gets done in a way that is clear to all the stakeholders.

CHAIR—Thank you very much, Mr Egan.

[11.48 am]

HUMPHRIES, Mr Vince, Manager, Education and Telephone Content Section, Australian Communications Media Authority

O'LOUGHLIN, Ms Nerida, General Manager, Industry Outputs Division, Australian Communications Media Authority

CHAIR—We welcome representatives from ACMA. We have heard from a variety of witnesses, and the senators have some questions for you.

Senator WORTLEY—Welcome to our telephone hook-up. As a result of the controversy surrounding the *Big Brother* turkey-slapping incident last year, Minister Coonan announced that the government would introduce legislation to extend content regulation to video streamed on the internet. Is this that legislation?

Ms O'Loughlin—Yes, it is.

Senator WORTLEY—However, at the same time that this bill was being drafted, ACMA did a review of reality TV, did it not?

Ms O'Loughlin—Yes, we did.

Senator WORTLEY—And that review was released to the minister on 1 April this year?

Ms O'Loughlin—It was provided to the minister on 30 March this year.

Senator WORTLEY—Two months later, the minister has still not released the report. Can you tell us whether the report recommended any of the measures contained within this bill?

Ms O'Loughlin—The report is a report to the minister, so I am not at liberty to indicate to you what the content of that report was.

Senator WORTLEY—So you cannot even say whether or not any of the measures contained within this bill were included in that report?

Ms O'Loughlin—The reality TV report was provided to the minister.

Senator WORTLEY—Do you know when that is going to be released?

Ms O'Loughlin—That would be for the minister.

Senator WORTLEY—The aim of this bill is to protect children from accessing unsuitable material from the internet and through other information delivery technologies, isn't it?

Ms O'Loughlin—Yes.

Senator WORTLEY—I realise there are significant complexities in regulating such technology, but if this is the aim, can it be said to be achieved when the bill only applies to content services with an Australian connection?

Ms O'Loughlin—I think you have identified that this is a very complex area. It is very similar in that regard to the regulation of content on the internet. For the last few years ACMA have had in place a range of compliance enforcement measures in the internet space, which we believe work very effectively, and we see this bill as an extension of those measures into the mobile phone arena.

Senator WORTLEY—Doesn't this mean that a great deal of inappropriate material will still be available?

Ms O'Loughlin—It aims to limit the amount of prohibited or illegal material being made available. That is certainly its intent.

Senator WORTLEY—But it will actually still be available, is that right?

Ms O'Loughlin—It is obviously a little difficult over the phone, but I am not quite sure whether there were particular areas of concern.

Senator WORTLEY—Under the bill the role of ACMA is significantly increased. How will ACMA manage this new role?

Ms O'Loughlin—Yes, we have a number of new roles under the bill. We see those as being, as I mentioned, quite similar and an extension of our existing role in dealing with internet content. The bill gives us responsibilities around investigating complaints about prohibited and potentially prohibited content. Where we are responsible for registering and monitoring industry codes we will be responsible for undertaking necessary enforcement action. We have a number of powers under the bill, including directions, formal warnings and the capacity to issue interim and final take-down notices and service cessation notices and to undertake criminal or civil proceedings. We see these as similar to our existing powers under the internet content schedule 5 regime and we are very comfortable that we know how these types of roles work and we believe that we can implement them effectively.

Senator WORTLEY—The role in the complaints handling procedure would obviously be a significant increase for ACMA. Has a new division been set up to deal with this?

Ms O'Loughlin—We believe that we would be adequately resourced to implement and administer the scheme.

Senator WORTLEY—Have new people been appointed or will you be working with the same people?

Ms O'Loughlin—We have a number of officers across the authority who deal with these issues in the internet space and we would be looking to use those resources and where necessary expand those resources.

Senator WORTLEY—So at this stage there are no additional staff being employed to look after these services?

Ms O'Loughlin—We are constantly reviewing the resources we need to do our job and we can move fairly swiftly to get additional resources on board where needed.

Senator WORTLEY—How is it being funded?

Ms O'Loughlin—My understanding is that it is through our base funding.

Senator WORTLEY—And anticipated costs?

Ms O'Loughlin—I do not have that detail at hand.

Senator WORTLEY—Are you able to access that detail?

Ms O'Loughlin—Yes; it will take me a little time but I can certainly do that.

Senator WORTLEY—I refer now to the telecommunications service provider determination. How does the bill affect the MPSD?

Ms O’Loughlin—The mobile premium services determination which is currently in place covers in broad terms two areas. One is content matters and the other is other protection matters such as terms and conditions for mobile premium services. We are aware of AMTAs concerns about the application of the mobile premium services determination and the industry scheme that is underneath that. Once the legislation is passed we would move to look at that determination again to see if the bill has picked up the content matters under the original determination and to review the determination to make sure that we were not adding to the confusion in the industry between having an existing determination and new legislation.

Senator WORTLEY—As it currently stands, will mobile service operators be subject to two regulatory regimes?

Mr Humphries—I think we would be looking at addressing the sorts of things Nerida was just talking about fairly soon after the legislation is passed.

Senator WORTLEY—So as it currently stands they would be, but you are intending to address that; is that correct?

Ms O’Loughlin—That is right.

Senator WORTLEY—Do you have a time frame on that?

Ms O’Loughlin—We realise people want some certainty very quickly so we would move as fast as we can. We would also consult with the industry on it. It is fair to say, though, that because there are consumer protection measures in the determination as well as content matters, we want to make sure that the things that exist under the determination which are not picked up by ACMA are still maintained.

Senator WORTLEY—I would just like to know why ACMA did not discuss this issue with the mobile telecommunications sector prior to the bill’s release.

Ms O’Loughlin—I think we have been aware of the issue but we have been waiting till the passage of the legislation to move forward in terms of our review of the determination.

Senator WORTLEY—So the issue was not raised until after the release of the bill; is that right.

Ms O’Loughlin—No, because the mobile premium service determination was put in place as an interim measure, we were always aware that if legislation was passed by parliament there would be a need to go back and relook at that interim measure to see if it was still needed.

Senator WORTLEY—But given that the concerns were there and that you were aware that they were there, why weren’t they addressed previously? Why haven’t they already been addressed in this bill?

Ms O’Loughlin—I am not quite sure I understand your question but the determination is there to provide guidance on these matters currently. Until the legislation is passed, we would not be looking at removing that determination.

Senator BIRMINGHAM—When the bill is passed you will be looking to, as quickly as possible, bring the determination and the bill in line; obviously, it would have been pre-emptive in a sense to try to change the determination prior to having the final shape of the bill once passed by parliament.

Ms O’Loughlin—Yes.

Senator WORTLEY—And this time there will be thorough consultation?

Ms O’Loughlin—We will certainly be consulting extensively with the industry. ACMA consulted extensively with the industry in the development of the determination and the mobile premium services industry scheme—the instrument and the scheme itself.

Senator WORTLEY—I would like to move on to link services. Under the bill, ACMA can issue a link service provider with an interim or final link deletion notice if it believes that end users in Australia can access prohibited or potentially prohibited content using a link provided by a link service with an Australian connection. There is some confusion as to whether the links in respect to which these notices will apply must be an Australian link or whether the site hosting the links must be Australian. Can you provide some clarification on this?

Mr Humphries—Yes. My understanding is that the link itself must be hosted in Australia but that the content itself could be either in Australia or overseas.

CHAIR—That was a major concern of Microsoft, of course. Microsoft had an amendment related to that. Are you aware of that amendment?

Ms O’Loughlin—Unfortunately I do not have that in front of me at the moment.

CHAIR—They wanted to:

(a) amend the Content Services Bill to provide that links services are only regulated where the website on which the links appear is hosted in Australia; and

(b) introduce a “user generated content” exception to the definition of “content service” so that all content that is substantially generated by an end user of a content service is excluded from regulation.

Do you want to make a quick comment on that?

Ms O’Loughlin—I think those are matters for the department.

Senator WORTLEY—There are a number of exclusions to the definition of ‘content service’ in the bill reflecting the government’s intention that content regulated under existing broadcasting regulatory frameworks should be excluded from the scope of the bill. ASTRA raised concerns that subscription TV on demand services, such as Foxtel, may fall into the definition of content service and this may be an unintentional consequence of the bill. What is ACMA’s view on this?

Ms O’Loughlin—Again, that is probably a matter for the department.

Senator WORTLEY—We will move to service cessation notices. For live content, ACMA may issue a service cessation notice and ASTRA argued that it is unclear whether a service cessation notice would apply to each individual stream of line content or the services as a whole. Would ACMA clarify this situation, in its view?

Ms O’Loughlin—I apologise—I might need to look at the detail of ASTRA’s submission just to check exactly what their concern is in that area. I know that we are on a very tight time

frame. I am happy to take it on notice and come back by the end of today if that is appropriate.

Senator WORTLEY—That would be appropriate. I do have one last question regarding ASTRA's submission. The bill requires ACMA to have a declared restricted access system in place for prohibited content—that is, 18 plus and MA15 plus. It is possible but not mandatory for ACMA to declare different systems for these classifications. ASTRA argued that ACMA needs to clarify where it is at with the development of the instrument that will define what will be classified as a restricted access system. Could you look at that as well with regard to the ASTRA submission and provide us with—

Ms O'Loughlin—That is very much in keeping with the questions that you have raised around the determination. We understand the industry's concern about getting clarity about the restricted access system and we understand that we need to move that very quickly and in consultation with the industry to get some clarity around that issue.

CHAIR—I would like to ask you a couple of questions. Under clause 47, ACMA can, following an investigation, direct a hosting service provider to take steps to ensure that either a type A or a type B remedial situation is in place. The definitions of these situations containing clauses 47(6) and 47(7) of the bill do not make clear what needs to be done to ensure compliance. The requirements in both cases are that the provider not host the content and there seems to be a lack of definition of 'hosting'. 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. The bill also states that these remedial situations will only be satisfied when the content is 'not provided by a content service provided to the public'. This appears impossible to satisfy as any given hosting service provider can only cease to provide the material itself; it cannot stop the content creator from creating another service provider to host their material on the net. Do you have a response to this? We suggest there should be a definition of 'host' to (a) make clear that it refers to material making available to the public and (b) ensure that remedial situations are satisfied when a content service provider does not provide the content to the public, whether payment by fee or otherwise, by use of a hosting service provided by the hosting service provider. Are these questions for the department?

Ms O'Loughlin—They are probably questions for the department, but I am happy to just provide information for the committee. We see these provisions as being quite similar to the provisions we have under internet content, where those compliances on the internet service provider to take down content that we are investigating either in an interim manner or in a final manner as quickly as possible. So the emphasis we see here is to make sure that, where the content has been identified as prohibited or could be seen to be prohibited, the host can move quickly to take that content down so it is not accessible by the public. That is certainly the way we read the intent of the legislation. But, in terms of your questions around the detail of the clauses, that might be something that the department can address.

CHAIR—I have two more questions. The first is about the relationship to the mobile premium services determination. It seems 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.

There are no provisions addressing transition from the MPSD and the related industry Mobile Premium Services Industry Scheme, and 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. Do you wish to make a comment on that?

Ms O'Loughlin—As I mentioned earlier, we are very aware that there are different requirements under the interim mobile premium services determination and Mobile Premium Services Industry Scheme which are not picked up in this bill, but there are also parts of the determination and scheme that are significantly picked up by this bill. As I mentioned, we are well aware that we need to move very quickly to review the legislation as finally passed with the determination and the scheme so that we can make sure the industry has clarity around its obligations under the bill and also the residual obligations that exist in the determination which are not picked up by this bill.

CHAIR—The last question I have is about services cessation notices for live content services. The breadth of the service in respect of which ACMA is able to issue service cessation notices under clause 56 appears to us to be unclear. Unlike take-down service 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. Will ACMA be required to publish guidelines on how it will make decisions regarding these matters?

Ms O'Loughlin—If the industry felt that it were helpful for us to publish guidelines, we would certainly be willing to do so. That is something that obviously we do in other areas of our responsibility and we could certainly talk to industry about where their concerns are and what sort of clarity they would like from us.

CHAIR—We have had some advice from industry that they would like guidelines. I will now pass over to Senator Wortley.

Senator WORTLEY—Microsoft argue that, under the bill:

... service providers such as Microsoft would be classed as offshore links service providers and fall within the scope or regulation whenever the content that they link is hosted in Australia ... Microsoft considers that it is inappropriate and unnecessary to regulate offshore links service providers in these circumstances.

They argue that the bill should be amended:

... to provide that link services are only regulated where the website on which the links appear is hosted in Australia.

How do you respond to this?

Mr Humphries—I think the view from us is that the intention of the legislation, as we understand it, is to prevent the material that is prohibited being readily accessed. If that is through links, that is simply one of the mechanisms through which the content would be accessed. So it simply provides another mechanism or tool for ACMA to prevent prohibited content being accessed.

Senator WORTLEY—Can the decisions of trained content assessors who determine whether commercial content should be prohibited be referred on appeal to ACMA or the AAT? Can you provide some detail as to the appeals procedure.

Ms O'Loughlin—Certainly. Can I ask you to clarify your reference to work undertaken by trained assessors or the assessment—

Senator WORTLEY—Can the decisions of the trained content assessors who determine whether commercial content should be prohibited be referred on appeal to ACMA or the AAT?

Ms O'Loughlin—I will take that on notice and come back to you on it.

Senator WORTLEY—Will that be this afternoon?

Ms O'Loughlin—Yes.

CHAIR—Thank you for your evidence.

Ms O'Loughlin—I thank the committee for its indulgence in allowing us to give evidence by telephone.

CHAIR—We will now suspend for five minutes for a private meeting.

Proceedings suspended from 12.16 pm to 12.22 pm

BADGER, Dr Rod, Deputy Secretary, Strategy and Content, Department of Communications, Information Technology and the Arts

CORDINA, Mr Simon, General Manager, Digital Content Branch, Content and Media Division, Department of Communications, Information Technology and the Arts

PELLING, Dr Simon, Acting Chief General Manager, Content and Media Division, Department of Communications, Information Technology and the Arts

CHAIR—I welcome representatives from the Department of Communications, Information Technology and the Arts. I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits only asking questions for opinions on matters of policy and does not preclude asking questions relating to explanations of policies or factual questions about how and when policies were developed. Do you wish to make an opening statement?

Dr Badger—No.

CHAIR—That is usual practice.

Senator WORTLEY—This bill is a redraft of the exposure draft of the content services bill, isn't it?

Dr Pelling—Yes. It is a different—

Senator WORTLEY—It is a redraft.

Dr Pelling—It has gone through several iterations.

Senator WORTLEY—Why did the exposure draft have to be redrafted?

Dr Pelling—The government took a decision to release the original draft to a limited number of industry players and, as a result of comments made by those players, the minister reconsidered the policy issues and took a decision to change aspects of the scheme.

Senator WORTLEY—So the views of a limited number of industry players were taken into consideration?

Dr Pelling—In that first cycle of consultation, there were a limited number of players. But since then a range of other people have been consulted.

Senator WORTLEY—So this was for the exposure draft?

Dr Pelling—It was not a formal exposure draft as such, but the government agreed to release a copy of the early version of the legislation to a number of industry players. It was not made more generally available.

Senator WORTLEY—Perhaps it would make it clearer if you could tell us how the government went about rectifying flaws in the exposure draft bill.

Dr Pelling—As a result of the inputs provided by industry in that process, essentially the government reviewed aspects of the policy. As a result of that, we had to issue revised instructions to the legislative drafters and we drafted the bill in the preliminary version of what it currently is at the moment.

Senator WORTLEY—Can you explain the consultation process that ECITA went through prior to the drafting and then also prior to the redrafting of the bill—so the first lot of consultation and then prior to the drafting and then prior to the redrafting?

Dr Pelling—The bill builds on a review of content over convergent devices which the minister published early last year, I think, from memory. That review took place over a number of months preceding its release. The public were invited to put in submissions to that review, so there was an extensive process of consultation on the nature of the review. That review was then considered by government, resulting in the policy decisions that were made by the government. I do not recall that there were formal consultation processes in the sense that a paper was released or anything like that—the review was that process. Once the government had made its decision, it was implemented, as it normally is, through drafting, which is done through the Office of Parliamentary Counsel. That bill was then provided to a range of industry players. They provided comments on the bill. The bill was redrafted, and there has been an iterative process of consultation with industry throughout that consideration.

Senator WORTLEY—You did say a limited number of industry?

Dr Badger—The important part in that context is that in the initial stages there was an exposure to a limited number of players. Once there was feedback from those players, modifications were made, and there was then a much more extensive consultation process with a range of others.

Senator WORTLEY—Can we just get clarification? What was the consultation prior to the initial exposure draft? I know you spoke about the review taking place, but what consultation took place immediately before the initial exposure draft?

Dr Pelling—I imagine that there would have been informal discussions from time to time that the department might have had with industry in that process.

Senator WORTLEY—You imagine that there would have been?

Dr Badger—I think we will have to get the details of who did what, because I was not there and a range of other people were not there. Essentially, we had the review process, which was a convergent devices review which got a large amount of input from industry about how the issues had to be dealt with. The response to that process was taken into account in drawing up the decisions related to the drafting of a bill. That bill was then subject to discussion with a range of groups, there was feedback given on the bill as the concept was then, and then there was a much more extensive range of discussions after the event.

Senator WEBBER—Forgive me, but this is a pretty nefarious concept. You say things like ‘a limited range’ and ‘much wider’. I am not getting a sense of who was involved. Can you take on notice exactly who they were? And can you tell me whether there was any consultation with anyone outside those that will transmit content.

Dr Badger—What do you mean—content providers, publishers?

Senator WEBBER—Yes.

Dr Pelling—Yes. There were a number of discussions with publishing groups.

Senator WEBBER—This is a new and emerging field. So people that create content—who did you consult with there?

Mr Cordina—The consultation on the exposure draft focused on key industry organisations. That involved consulting with a range of industry representatives and also content producers directly, including content developers and suppliers, mobile phone companies, broadcasters, major internet portal operators and publishers.

Senator WEBBER—Internet portal operators and mobile phone companies are going to be doing the transmission; they are not necessarily going to be doing the creating. We seem to have a sector that does not feel that it was really considered too much.

Dr Badger—What we should do is give you a list of the people involved in the content development industry, the content supply industry, publishing et cetera who were—

Senator WEBBER—That would be good. I accept that there was a review—the minister announced a review—

Dr Badger—No, you are talking about the processes involved—

Senator WEBBER—but about the development of the legislation specifically.

Dr Badger—Yes.

Senator WORTLEY—Did you consult industries such as game providers or health service providers, or companies such as PBL?

Mr Cordina—We did consult with some large corporations for which part of the content they produce involves games.

Dr Badger—I think we had better get before you the detail of the range of particular providers who were consulted.

Senator WORTLEY—Could you provide us with that list this afternoon?

Dr Pelling—Yes.

Senator WORTLEY—The bill is meant to be consistent with content regulation applied to offline services in Australia, isn't it?

Dr Pelling—Broadly speaking, yes.

Senator WORTLEY—Can you explain why it is that under the principles for classification decisions in the National Classification Code it states that adults should be able to read, hear and see what they want, yet under the bill adult access to certain content is restricted.

Dr Pelling—The only answer we can really give to that is that the government took a decision about the scope of the bill, which is what it encompasses. That reflected particular considerations that they had. I think it is also important to distinguish between the operation of the classification scheme and the operation of the bill. The bill basically is about regulating availability of content through take-down notices. It uses the classification scheme with regard to determining what is prohibited and what is not prohibited content. Other than that, it makes no judgement about the scope of the classification scheme. It simply uses the scheme as an existing, independent—if that is the right word—measure for determining what is prohibited and what is not prohibited content.

Senator WORTLEY—Is there an opt-out option for adults under this regime?

Dr Pelling—I am not sure what you mean by an opt-out option for adults. The scheme regulates content with regard to certain types of content services and it applies to all Australians.

Senator WORTLEY—Are adults and children subject to the same level of regulation?

Dr Pelling—The regulation uses the classification scheme and basically says that X-rated material is prohibited, and R-rated material and in some cases MA15+ rated material must be subject to a restricted access system, which is fundamentally about making them available only to adults.

Mr Cordina—So in that respect adults have access to a broader range of material under this. They can have access to MA15+ if it is supplied commercially and also to R18+, whereas children would not have access to that.

Senator WORTLEY—Does it mean that the bill is inconsistent with the regulation applied to offline services in Australia, such as those set out in the National Classification Code?

Dr Pelling—What we have tried to do as far as possible is ensure that, where material is classified in the offline space, a similar regulatory treatment is applied. For example, in relation to books and published material, the bill effectively ensures that published material which you can buy freely in a bookshop in an unrestricted form will be able to be made available in an online version without restriction. Having said that, the scheme basically is consistent both with the schedule 5 existing internet content regulatory scheme with regard to broadly the way it operates and the way in which it regulates that content. It is also broadly consistent with the premium services determination under which the mobile phone industry operates. So in that sense it is consistent with existing practices.

Senator WEBBER—You will have to forgive me. I am easily confused when it comes to these issues, but particularly right at the end of two weeks of estimates. I am probably going to ask you what would seem to be straightforward questions but I just cannot get my head around them. Some of them are around definitional issues within the bill. I will add to that that I have not been here for the entire hearing this morning. Turning to content services first, the bill, as I understand it, provides an extensive list of exempted services. Can I just go through what that actually means to a lay person like me? For example, are the ABC and SBS—those kinds of people—exempt?

Dr Pelling—Broadcasting services are regulated by their own separate system under the Broadcasting Services Act and, in the case of the ABC and SBS, under their own legislation. Therefore they are not regulated by schedule—

Senator WEBBER—So all the commercial networks like network 10 are all exempt?

Dr Pelling—That is right. When they are providing services then they are regulated by their existing systems.

Senator WEBBER—If they decided to venture into this brave new world, would they be picked up by this bill?

Dr Pelling—Yes, broadly speaking. For example, if they do no more than retransmit their existing service, which is already regulated, the regulation system applying to the broadcasting service will be relevant.

Senator WEBBER—What about accessing newspapers online, like *The Age* where they have a blog?

Dr Pelling—They will all be under this scheme.

Senator WEBBER—I live in Perth and we have to access them online. Otherwise we can look at them three weeks later or something, which is fantastic really. What about other ways of accessing information, like Google?

Dr Pelling—There is an exemption in the definition of content service which excludes a search engine service. That is defined. In simple terms, the intention is that a search engine would not have to be regulated under the scheme merely by virtue of the fact that it provides you with an automatically generated link to a content that might itself be prohibited content. We have tried to make sure that the people we regulate are the people who provide the content, not the people who would do no more than have the mechanical means of producing a list of URLs that provide you access to sites.

Senator WEBBER—So Google would be exempt but Wikipedia, say, would fall under this—

Dr Pelling—Yes, but Wikipedia, of course, is an overseas—

Senator WEBBER—because they generate their own information.

Dr Pelling—A site equivalent to Wikipedia, which is about providing lots of information on the web, would be subject to the take-down notices under the scheme. A site which did no more than provide a search engine which enables you to access—

Senator WEBBER—So with regard to online banking information—not the teller bit but the actual accessing of financial information—would ANZ OnLine, for instance, be in or out?

Dr Pelling—I think they would broadly be covered by this scheme.

Senator WEBBER—Of course, popular sites like MySpace and YouTube are not in Australia anyway.

Dr Pelling—The critical definition is very broad, and that is the definition of content service, which is a service that delivers content or allows users to access content using a carriage service, so it has that element of electronic access to it as well.

Senator WEBBER—And it has to be Australian based.

Dr Pelling—It has to have what we call an Australian link, which essentially is that it originates in Australia or is hosted in Australia.

Senator WEBBER—When I was here earlier today, AMTA and Microsoft raised some other definitional problems that they had with the bill. Have they come to you? Has there been consultation about that?

Dr Pelling—Yes, there has. I had a phone call with AMTA on their list of issues a few days ago and we have been provided with copies of the submissions that they have made to the committee. We are analysing them.

Senator WEBBER—Has any consideration been given to further refining the bill to address those issues? They seemed to still think that they have got problems with no definition of ‘host’ and the definition, with content service, around ‘delivers’.

Dr Pelling—We are looking closely at those and are seeking the advice of our own legal staff. Once we have worked our way through those, we will prepare advice for the minister.

Senator WEBBER—They have issues with the definition of ‘restricted access’ as well.

Dr Pelling—Yes.

Senator WEBBER—So regarding the list of exemptions, are there more exempt services than services that are caught by the bill?

Dr Pelling—No, the bill covers any content service that delivers content. The list of exempt services relates to a series of quite specific activities like broadcasting services, court proceedings and proceedings of the houses of parliament et cetera.

Senator WEBBER—I am sure it makes riveting television!

Dr Pelling—They would not fall under the regulatory scheme itself but the vast majority of online content, provided it meets the requirements of the bill in terms of links within Australia, would fall under the regulatory scheme.

Senator WORTLEY—Can you clarify whether the content service is an overarching service—for example, a service such as MySpace or Windows Live Spaces—or whether a content service is each and every feature or forum on a service such as MySpace; the forum being a blog, email groups, games and that sort of thing?

Dr Pelling—I think the general answer is, unfortunately, that it depends. I think that where a user provides—

Senator WEBBER—This is not helping a layperson like me, I can tell you.

Dr Pelling—If you considered a service such as YouTube—and, of course, I am not talking in legal terms but speculating about things—there are a number of aspects about that. There is the means by which you access the user generated content, which is a website of some sort, a portal of some sort, and then there would be a range of material which is produced by users. The definition of ‘content service’ is broad enough to cover the range of people that might operate in that space. Because it is somebody who delivers content to persons having equipment appropriate for receiving that service, where the delivery of service is by means of a co-service, or a service that allows end users to access, that would mean, for example, that somebody who operated a webspace that allowed you to access a range of user generated content is potentially captured by this. I think it would also mean—I am sure somebody will correct me if I am misunderstanding this—that if, for example, the content that I produced was on a server somewhere and that server was accessed by the MySpace or YouTube server to be available to the public, that I would be responsible for the user generated content that I provide, because I am delivering or making available content to people using a carriage service. So, potentially, it could regulate a number of people in the chain.

Senator WORTLEY—There was an issue raised this morning regarding links. If someone had on their site a link to another site and then they had videos that were user generated on a blog or whatever, where would the responsibility lie?

Dr Pelling—Just to take another example: where there was, say, a *Big Brother* website and there was some capacity for you to run an email commentary on that website, whereby you chat to other interested people there, the person who operated the *Big Brother* website, I think under the scheme, would be responsible for the content that was publicly available and that people might insert on there.

Senator WORTLEY—The issue that was raised this morning was: if a website was from a link from another website and a person had the link on their website, would the organisation be responsible because, when you click on that link, you then—

Dr Pelling—Went somewhere else.

Senator WORTLEY—Yes.

Dr Pelling—The scheme regulates three types of services: it regulates those who host content and make it available to public, it regulates those who provide links to content and it regulates those who provide the live stream services. If you identified some content that you thought was prohibited content, you would make a complaint to the regulator. The regulator will consider and, if necessary, classify that content, order a take-down notice and then the service provider must comply with the notice to remove that content or to remove that link to the content. So, in philosophical terms, what is being addressed here is content that is, say, live ephemeral content—like, for example, the ‘dorm cam’. It is content which is stored on a website, hosted on a website and might provide a link to a website. Just to give you an example, if somebody were to run a website with a whole lot of undesirable content and put a blank page on the front with a click through that says ‘click here to go to all the nasty content’, that link is regulated as well as the content underneath.

Senator WEBBER—So, if I run a website with a number of links, I am going to have to monitor them every day to make sure that they are not up to anything untoward.

Dr Pelling—No, I think that is an important key issue in the way the system operates.

Senator WEBBER—It is sounding a bit onerous so far.

Dr Pelling—The system operates through a complaints based process, so there is no requirement on the service provider to monitor. If somebody—the regulator or some member of the public—identified that content was available or a link to content was available and that content was prohibited, then the regulator can take action and tell you about that. Of course, once they have told you about it then you cannot say you do not know, and then your responsibility is to remove that. If you do not remove that, then penalties apply. If you do remove that, that is the end of the matter. It is not up to you to say, ‘I’ve got to watch my website every day to make sure everything anybody says is not prohibited content or that everything anybody might put up on that website is not prohibited content.’ It is only when matters are identified to you by the regulator that the responsibility on you is to take them down, once they know that they are there, or to cease access to a service it is a live service.

Senator WORTLEY—In the definition of ‘content services’ in the bill, there are lots of references to exempt services—for example, an exempt internet directory service. Will the exempt services that are not defined in the bill be spelt out in the regulations for the bill?

Dr Pelling—There is no intention to define services further than is in clause 2 of the bill. The bill has a list under the definition of content service and then a number of those are defined by specific definitions. The only matter that I would add to that really is that paragraph 10 of the definition does allow a service to be specified in the regulations. So there is capacity to add to that list if a new type of service becomes available.

Senator WORTLEY—Do you have the list there?

Dr Pelling—Yes.

Senator WORTLEY—How many services are listed in the regulations?

Dr Pelling—There are 21.

Mr Cordina—Not including a service specified in the regulations, obviously, which can be—

Dr Pelling—So 20 plus the service specified in the regulations.

Mr Cordina—Twenty one plus, I think.

Dr Pelling—Okay.

Senator WORTLEY—So there are 21 services listed as being exempt services?

Dr Pelling—Yes.

Senator WORTLEY—Still on the issue of definitions, many definitions include the concept of a specialist or specialising in an area—that is, the definition of exempt point to point service and exempt internet directory service. What level of specialisation does ACMA require for these definitions?

Dr Pelling—The intention there is to be very specific, but the purpose is to make sure that the exclusions are not used as an avoidance measure for the general rule—in other words, for example, if an exempt point to point service specialises in providing prohibited content. ‘Specialised’ in that concept is a relatively imprecise term, but it would be up to the regulator and ultimately the courts, I suppose, to determine the scope.

Senator WORTLEY—You don’t think that the definition of it needs to be spelt out?

Dr Pelling—If you are going to spell it out further, you then start to get into issues like, say, percentages. That creates a series of problems of its own: if 50 per cent of the content is undesirable or is prohibited, it falls into one category or another—how would you measure that sort of level of content? A term like ‘specialised’ would be given its normal dictionary meaning in the interpretation and would allow a degree of interpretive assessment of the balance of services in a particular category.

Mr Cordina—Clearly, the focus of the content would have to be on prohibited content for it to fall within that meaning.

Senator WORTLEY—I am trying to understand the scope of the bans in the bill. The bill bans prohibited content. Under the bill, would an electronic version of an explicit magazine

that has not been classified RC1 or RC2 be considered prohibited content, and would it be accessible online?

Dr Pelling—Material which is not classified RC1 or RC2 is not prohibited, but I think you need to clarify that. It depends ultimately on the way in which the relevant organisation classifies the material, so whether those classification schemes allow explicit material in is a matter for those schemes in a sense. The way the bill operates is to exclude material which has been or could be classified under certain ways; it does not make any commentary about the nature of those classification schemes and what is included in different categories in those classification schemes. Ultimately—and it exists at the moment, obviously—if it were changed that changed service or system would apply.

Senator WORTLEY—Can you give an example of a magazine that is classified RC1 or RC2 or why a magazine has that classification?

Dr Pelling—I do not have the OFLC's guidelines or Classification Board guidelines in front of me but, essentially, publications which are restricted, as I understand it, would normally include various levels of violence, sexual material, drug taking or perhaps other things like suicidal or race-hate type material. I cannot remember the precise definition which is deemed to be unsuitable for children. If a matter is classified, it has to be restricted in its availability through being in a wrapper or not being for sale in certain shops.

Senator WORTLEY—Can we go over this again: is it correct that pursuant to the bill, an electronic version of one of those magazines would not be considered prohibited content under the bill and would be accessible online?

Dr Pelling—If the material has been classified restricted 1 or restricted 2, it is prohibited content. If it has not been classified, then it is not prohibited content. In addition, there is scope—I cannot remember the precise wording—for the bill to deal with potential prohibited content—

Senator WORTLEY—I am about to get to that.

Dr Pelling—in other words, if it is likely that it would be classified as this, then it can be regulated in the same way.

Senator WORTLEY—Potentially prohibited content is defined as content which:

... has not been classified by the Classification Board and if it were to be classified, there would be a substantial likelihood that the content would be prohibited content.

This provision would appear to place an unreasonable and onerous burden on the content service provider to guess whether the subject matter of content would be prohibited. How would this work in practice?

Dr Pelling—In practice, I think it is for the regulator to enable them to issue take-down notices where content has not yet been classified but where there is a reasonable likelihood that it would be classified as prohibited. Then the regulator has the capacity to seek classification of that content to confirm the decision. I am not sure if I have got the words quite right, but there is an interim take-down provision and a final take-down provision. So the regulator is not bound by material which has been classified because, of course, the vast majority of the content on the internet has not been classified. The way the scheme works is

that the regulator has the capacity to operate the take-down system if it is of the view that there is a substantial likelihood that a piece of content would be classified.

Senator WORTLEY—Can the content service provider put the material up?

Dr Pelling—Yes.

Senator WORTLEY—So they do not have to make a decision as to whether or not it would be likely to be potentially prohibited content; it is only when the regulator comes in that that is addressed?

Dr Pelling—I will just go back to something I said earlier. The scheme essentially involves the regulator, either on its own initiative or usually through a complaints system, operating to take down content. So if a person chose to put up what they knew or considered to be prohibited content, that would be at their own risk because it could then be subject to a take-down notice if the regulator chose to act or if somebody made a complaint about that content. But, as I said earlier, it is not binding on the service providers to assess all the content that they have on a constant basis to make sure it is not prohibited content.

There is one caveat, one slight difference, that I will point out. In relation to MA15+ there is a requirement under the code of practice provisions that there will be content assessors, so when commercially available content is provided the service provider has to have a trained assessor in place to look at that. But, even in that situation, at the end of the day whether or not content is prohibited content is a matter for the regulator to assess on the basis of content that is available to the public, not to speculate on things that might be available.

Senator WEBBER—Can I just expand on that a bit. This is a definitional problem again. What does ‘substantial likelihood’ mean? Given the fact that the regulator is not the one that makes those decisions for other forms of access, if the regulator decides that that substantial likelihood exists and it therefore tells you to remove it, but in fact had it gone through the classification process it would have been allowed, is there an appeal mechanism and can you get it back on air? I am not saying I want to look at any of this, by the way!

Dr Pelling—In fact that is precisely how it operates. Initially the regulator would issue, on the basis of its ‘substantial likelihood’ judgement, a take-down notice. It would then get the material classified. And it has to revoke a notice if the material is classified as not being prohibited.

Senator WEBBER—Is that all that happens? If someone had something there that it turns out the Classification Board, if we did it the old fashioned way and it was old fashioned media, would have allowed, but the regulator removed it for some time, what kind of—it just seems to me that we are a bit vague about ‘substantial.’ Is there a time frame within which that decision has to be made? Is there any kind of redress? I do not mean compensation, but there has to be something going back to the people if they put something there and it turns out it was legal, if the regulator forced them to remove it and it turned out the regulator was wrong.

Dr Pelling—I will read you an example. The particular one I have in front of me is a live content service:

If, in the course of investigation, ACMA is satisfied that live content is prohibited content, and it were satisfied that if the content were to be classified there is a substantial likelihood that it would be classified as prohibited, then it will give them an interim notice to cease the service and it must apply to the Classification Board for the classification of the content.

To paraphrase: if a response to an application made is required by subclause 3 and ACMA is informed of the classification of a particular content, ACMA must give the relevant live content service provider a written notice setting out the classification.

In the case where the effect of the classification is such that it would be prohibited content, it must give them a final service cessation notice directing them to take further action. If the material is not prohibited then it essentially lifts it in the interim. In the meantime, the scheme operates such that the material must be removed.

Senator WEBBER—But there is no time frame for that. That can drag on for a while.

Dr Pelling—I would have to look at that.

Dr Badger—We will look at the issue that you have raised and see whether the system can be improved by looking at the time frame issue.

Mr Cordina—There may be a time frame under the classification act, but I do not think that there is one specified in the actual bill.

Dr Badger—We need to do two things: clarify for you the way the classification system works and look at the issue that you have raised about the practicality of the bill.

Senator WORTLEY—So this would go to the Classification Board.

Dr Pelling—Yes.

Senator WORTLEY—Are you expecting an influx of additional work for the Classification Board?

Dr Pelling—I suppose to the extent that the bill is wider than the current online scheme in schedule 5 then one could potentially expect a greater range of material to be referred to the Classification Board.

Senator WORTLEY—Have staffing requirements been considered in regard to this?

Dr Pelling—We have been consulting with the Attorney-General's Department in relation to the development of the bill, but the requirements of the Classification Board are a matter for that department. They now that this is coming.

Mr Cordina—A request for classification also has to be accompanied by a fee, which—

Dr Pelling—That is correct.

Senator WEBBER—And ACMA pays the fee?

Senator WORTLEY—Who pays the fee?

Mr Cordina—It would be whoever is asking for the content to be classified. If that was ACMA, then ACMA would pay.

Senator WEBBER—If the regulator says that it need to be classified, then it would be them paying the fee not the service provider.

Mr Cordina—If ACMA is requesting the classification, that is right.

Dr Pelling—A service provider can also request classification of their own material.

Mr Cordina—They would have to pay the fee.

Senator WEBBER—Absolutely.

Senator WORTLEY—Set out in section 81 of the bill is the fact that the trained content assessors who will classify this material will be engaged by the commercial content service providers. Is it intended that the commercial content service providers will meet the cost of training them?

Dr Pelling—Yes. All the bill basically says is that they must engage trained content assessors and that they must ensure that certain content is assessed by those trained content providers. That would be at their own expense.

Senator WORTLEY—What will the cost be for each trained content assessor?

Dr Pelling—I have no idea.

Senator WORTLEY—I am asking how much it will cost for them to be trained, not how much it will cost to employ them to do the assessment.

Dr Pelling—I do not know.

Dr Badger—Just to go back a step, there is a principle behind the activity. It is that if you are providing content to users then you should take reasonable steps to ensure that you are not providing content that may be accessible by children that is likely to cause a problem. That is the fundamental driver of everything. You come back to that. In this case, the judgement about the bill is that is a shared responsibility and if you provide content you need to take part of the responsibility.

Senator WORTLEY—Who will train the content assessors?

Mr Cordina—They have to undertake a course which has been approved by the director of the Classification Board.

Dr Badger—Aren't there training programs associated with the broadcasting industry, for example?

Dr Pelling—Yes. There are people who do this training. I am sure that the Classification Board could refer people to those specialists.

Dr Badger—That part of the act sets a standard for the type of training program that they can use. It has to be one approved by the director.

Dr Pelling—The board. I would also point out that many major content providers—such as some who have already been witnesses before the committee, such as the mobile service providers—already have trained content assessors operating. The broadcasters do. In fact, my recollection is that it is a requirement under the Telecommunications Service Provider (Mobile Premium Services) Determination code of conduct that people have appropriate means of assessing content.

Mr Cordina—And we are talking about commercial content service providers here in terms of the requirement to have a trained content assessor, not someone who is providing it on a non-commercial basis.

Dr Pelling—It is where the service is available for a fee.

Senator WEBBER—But there are new and emerging ways of doing this. Obviously, the broadcasters and so on do, but it is a matter of making sure that the system will pick up the next step—

Dr Badger—Yes, that the system works in practice.

Senator WEBBER—rather than all of us having to come back in six months time, when someone has developed something new yet again. As I say, I cannot even make my laptop work half the time, so obviously I am not someone who should be involved in this industry. If we will need new assessors and will need to train them, is the system ready to go? Is there a curriculum?

Mr Cordina—We have liaised with the Classification Board and they are aware of the need to have an approved course up and running. We do not think there will be any problem in having that course ready to go by the time that legislation comes into effect.

Senator WEBBER—So they are looking at the kinds of curriculum and what have you that they need in order to train content assessors for this brave new world. Going back to the restricted access systems—I could have this all wrong—as I understand it, the bill provides that content classified as MA15+ that is not text or still images must have an age verification system in place. Is that right?

Dr Badger—Where it is a commercial service.

Mr Cordina—For commercial services, yes.

Senator WEBBER—For example, would a website that has moving images classified as MA15+, such as the preview of a movie or something like that, be subject to an age verification system?

Dr Pelling—Where the service is available for a fee, any content that is MA15+ is prohibited unless it is subject to an age verification system.

Senator WEBBER—So it is the fee. Must the whole of that website therefore be subject to an age verification system?

Dr Pelling—No, just the content.

Senator WEBBER—So, with a website that you access for a fee, from which you can download a clip of some extraordinary film—which even for free I would never watch, let alone pay money to do so—the age verification system would need to be triggered when you accessed that bit rather than when you accessed the website generally.

Dr Pelling—I do not know about the technical practicalities of that, but essentially the content concerned must be aged restricted.

Mr Cordina—You can quarantine it so that only the MA15+ content has to be subject to age restriction. If other content on there is not MA15+—

Senator WEBBER—Sometimes there is. I just wonder how that would work.

Dr Pelling—Typically, it already has to operate with mobile phone services because already they operate down to a MA15+ scheme. I imagine they would have to age restrict access to an entire service where some or all of the content was MA15+ or above. It might be that not every bit of content in an age restricted service is MA15+; it is a matter for—

Senator WEBBER—But, if it has anything that is MA15+ attached to it, the whole service then will become age restricted.

Dr Pelling—It is a matter of what the technology allows them to do as to whether they are able, as Simon says, to quarantine out a particular part of the service or whether a whole stream of content—say, a channel or a set of information that is being provided by a service provider—has to be age restricted.

Dr Badger—It is fundamentally up to the commercial provider to establish a service consistent with the regulatory environment that allows them to maintain their major business. If the MA15+ content forms only a small part of their activities, they will have an incentive to put in place a subset restricted-access part of their service.

Dr Pelling—I would emphasise again that this is not a prima facie offence scheme; in other words, people are not committing an offence by providing prohibited content per se. The requirement under the scheme is that, when they are issued a notice by the regulator to take down content, they take it down. Failure to comply with the notice is a civil or criminal offence.

Senator WEBBER—Absolutely, but I find most people in life want to get the system right first so that regulators have as little to do with the way they live their life as possible.

Dr Badger—Yes. Here we are drawing out the complexity of the issues and how rapidly technology is changing.

Senator WEBBER—And trying to anticipate change, which is difficult.

Dr Badger—Yes.

CHAIR—I notice some of these questions are technical amendments which we can put on notice.

Senator WORTLEY—I have some other questions.

CHAIR—All right.

Senator WORTLEY—Are you aware of the 2006 US judgement in *ACLU v Gonzales* where the federal court judge found that credit cards, debit accounts, adult access codes and adult personal identification numbers do not in fact verify age, and, as a result, their use does not, in good faith, restrict access to minors?

Dr Badger—I am not aware of it. I do not know whether in the legal environment it has been looked at but we will have a look.

Senator WORTLEY—It was raised this morning by some of the people here.

CHAIR—The New South Wales Council for Civil Liberties.

Dr Badger—We will examine what they have said.

Senator WORTLEY—On what basis does DCITA consider that restricted access systems will prevent children from accessing such content? What studies have you considered and with whom did you consult?

Dr Pelling—Essentially we are building on schemes that exist already. Under schedule 5 of the act, which schedule 7 absorbs a large part of, and the premium services determination, there is a requirement that certain content be age-verified. We have continued that requirement in here and we have given the regulator a broad power to work with the industry to determine what the most appropriate restricted access systems for their particular services might be. We do not make any judgements about what a preferred restricted access system is or even the efficacy of a particular restricted access system. That is a matter for the regulator to work out in relation to the industry—to determine what, under the take-down scheme, they would consider to be an effective system.

Senator WORTLEY—So there are no studies that have been done at this stage? Would you expect some to be undertaken by the regulator?

Dr Pelling—We would expect the regulator to determine a suitable set of restricted access systems that it will take into account under the scheme.

Senator WORTLEY—I understand that, but what will it be based on? Where will the decisions come from?

Dr Badger—As Dr Pelling said earlier, there are systems in place where there are age-restricted access systems being utilised already. The regulator will no doubt lean on the experience with those to take the issue forward and in the process consult with industry. We have the schedule 5 experience and the mobile phone determination that requires the establishment of age-restricted access systems, so we know that there are systems there that work in that environment and that is the reference point, if you like.

Dr Pelling—This will be a very similar environment, and indeed the Australian Communications and Media Authority regulates those schemes as well as this scheme.

Senator WORTLEY—Is there one type of restricted access system that will adequately achieve the bill's objective?

Dr Pelling—Not that I am aware of.

Dr Badger—Not a particular one. There are a range available that will achieve the bill's objectives in the context of the particular arrangements for the service that a commercial service provider will establish.

Senator WORTLEY—Would you be able to describe some of the options available?

Dr Badger—I would sooner give you a more technical description. I can tell you that there are systems, for example, on pay TV. If you have a pay TV service, you can set up within that system a system such that, if you do not want to have access to certain types of content, you can put a PIN in it and then the only person who can access above that particular level is you. That is an example of one that operates in the pay TV industry. I am not familiar with the mobile phone ones. I think we should get you the details of how they operate.

Senator WEBBER—Are we sure the mobile phones are actually effective?

Dr Pelling—That is a matter for ACMA to determine in its assessment of the scheme.

Dr Badger—But they certainly operate at the moment, and the evidence so far in terms of the way the process has gone under schedule 5, those systems perform the job they were intended to do. But I think the important thing about this has come back to the same issue, that because it is a changing environment we give the power to the regulator to be able to keep track of things, what is happening, and work with the industry to ensure that there are systems in place which allow the objectives the bill to be met.

Senator WEBBER—When you say we have got systems in place and they do the job they are set up to do, how do we know that? We are looking at a piece of legislation to set up a new system and I want to be sure it is going to work.

Dr Badger—The regulator deals with the schedule 5 activities, and we have no evidence from the activities of the regulator or from the community or consumers that those systems do not work. I am afraid that is the only—

Dr Pelling—In the premium services determination, there are a series of parts which actually set out the way in which a mobile carriage service provider is required to comply with age verification systems. There are several pages dealing with age verification.

Mr Cordina—I think that involves requiring appropriate identification and details of age and also the use of a confidential PIN or password. There are different mechanisms which could be used. You could have a combination of credit cards and a PIN and so forth.

Senator WEBBER—We have all sorts of mechanisms, I have no doubt about that, but it is a judgement call about whether they work or not. We are looking at creating a new system so I want to be sure that what we put in place actually works. There is no point in saying it works if we are not quite sure. Given the fact that there are a number of players in this industry that go across the sector, has any consideration been given for just one access control system to be used by the industry?

Dr Pelling—I think the concern there is that we regulate content potentially delivered across a variety of different types of devices. So what is appropriate for a mobile device might not be appropriate for a fixed device like a personal computer. The access system for an internet service delivered over a personal computer might be different from the access system needed for somebody who accesses a 3G service over a mobile device or some other device that is yet to be determined. So I do not think it is technically possible to have a single system that operates on everything because the operating systems and hardware and software in these devices are all different. It is the outcome which should be important.

CHAIR—Did you have some questions about filtering technology?

Senator WEBBER—I was going to come to that. You go for it.

CHAIR—Content filtering technology is not currently available for devices like mobile phones. Some submissions have argued that parents have the choice of disabling internet access on such devices and content delivery is thereby effectively self-regulated through payment for such services. Do you have any comments on that approach?

Dr Pelling—The only comment I would make is that, as far as my knowledge goes, I am not aware that there are any filters commercially available on mobile phones; so I think that is correct.

CHAIR—They are not currently available; that is true.

Dr Pelling—They are not currently available, although I have seen some experimental technology.

Dr Badger—The whole issue of security on mobile phones is not terribly helpful at the moment but it is a very large research topic because it is needed not only in the context of this type of access requirement but also as people increasingly use mobile phones for electronic transactions, banking et cetera; there is a whole area of activity which will be needed to get that system right for commercial purposes. It goes without saying that, as those things are developed, you get much better access to a range of ways of more effectively providing these sorts of access regimes. At the end of the day, the big thing in a lot of these issues is that, when you are talking about access to content for children, there is a significant requirement on behalf of parents and guardians to take an active role. If, for example—no, it doesn't matter.

CHAIR—Go on.

Dr Badger—No, I suddenly decided it was not terribly relevant.

Senator WEBBER—A bit of self-regulation there, Dr Badger!

CHAIR—So you think content filtering technology for convergent devices is being developed anyway?

Dr Badger—It is a whole area of research activity. It is not just what we are talking about. Filtering technology is a software problem, essentially, and, as there are particularly requirements, the industry develops them for specific purposes. So that is the general issue to do with filtering. The government has put in place the Protecting Australian Families Online program, which will essentially take the issue of filtering content in the home a considerable number of steps further and draw much greater attention to it. At the same time we know that convergent devices are evolving as much more significant players enter the marketplace. This legislation is recognition of that. We also know that at the same time there is a whole lot of activity underway to try and put facilities on mobile phone and conversion devices to make them much more amenable to security and other aspects.

CHAIR—What about the effects on artists; have we discussed that?

Senator WEBBER—No, but we were going to.

Senator WORTLEY—We were going to.

Senator WEBBER—You lead on, Chair.

CHAIR—The Arts Law Centre argued:

... the proposed legislation does not adequately take into account the needs of filmmakers, multimedia and digital artists ... The broad scope of the discretion available to ISP's for the refusal of access to certain material is likely to detrimentally affect both artistic expression and dissemination. The proposed legislation ... fails to provide an appeals or revocation avenue to content creators, against whom an access decision has been made.

What is the department's response to those statements and why is there no avenue of appeal for the creators of this kind of content?

Dr Badger—We discussed earlier the process that is involved in the classification, and you can appeal against that process if you believe that your material has been incorrectly classified. The artist, the original content creator, will need to work with the people who actually make their content available to the public to set up their relationship there. At the end of the day, the bill comes down to a judgement about the extent to which we can put procedures in place to protect children in particular from accessing unsuitable content and also establish procedures that will prevent children being put in potentially dangerous environments like chat rooms et cetera. The objective of the bill is to do that while trying to provide an environment for content creators and content developers where there is incentive to continue to work with new media. It will always be a balancing act. While we are conscious of the concerns of the group you talked about, there does not seem to be, in the way we intend the system to operate, something which could cause enormous constraints.

Senator WORTLEY—Just in that area, the concern was also raised this morning that the industry was not consulted at all in relation to this bill. Do you know why that was?

Dr Badger—We have already said we will take on notice the issue of the consultation and who was consulted et cetera.

Senator WORTLEY—I wonder why the arts industry was not consulted—or were you not aware that they were not, at this stage?

Dr Badger—I do not know. We will have to check. There has been no deliberate decision, if you like, to not consult the artistic community or whatever. We know that people that use their content have certainly been consulted as part of the process—publishers and others.

Senator WORTLEY—Can I just go back to an issue that we were speaking about before we got onto the arts? I just want a clarification about the limitations relating to prohibited content and age verification mechanisms. Will they also apply to live stream services?

Dr Pelling—Yes. Live stream services will still have to have age verification mechanisms for R18+ material generally and for MA15+ material if it is available on a commercial basis.

Senator WORTLEY—The bill would also appear to ban material that is now legitimately sold in the ACT and the NT in adult stores and online. Is that correct?

Dr Pelling—Insofar as X-rated material is sold in the ACT at the moment, the bill has a general exclusion for X-rated material. X-rated material is prohibited content.

Senator WORTLEY—So there are businesses that lawfully sell this material, but they will be prohibited from running online enterprises on Australian websites. Is that correct?

Dr Pelling—All I can say is that X-rated material will be prohibited material under the scheme. So, to the extent that there are in that situation slightly different environments in different spaces, consistent with existing schemes under the act—the schedule 5 scheme and, indeed, the Premium Services Determination, which both currently make X-rated material prohibited material and, in the case of schedule 5, have done so for a number of years—this schedule will also make X-rated material prohibited material. So if somebody wants to

provide X-rated material using a content service as defined in the act, then it will be prohibited.

Senator WEBBER—So I can go to the shop and get it but I cannot buy it online?

CHAIR—That is what it seems.

Senator WEBBER—I want to go back to the whole magazine issue, too, because it seems to me that I can go to the shop and buy the magazine but I cannot view it online. Not that I want to do any of this, but—

Senator WORTLEY—Just for the record!

Dr Badger—You can go to the shop in certain places.

Senator WEBBER—Yes.

Dr Pelling—If material is available from overseas, for example. This content regulatory scheme relates to material which is based in Australia.

Senator WEBBER—I understand that, but I am living here in Canberra, so I can hop in my car and go and get it but I cannot use my laptop out of hours and have it sent to my home?

Dr Pelling—I think that would be an effect of the scheme, yes.

Dr Badger—And that is the judgement that has been taken in the bill. Because of the nature of that content, making it available electronically makes it much more freely available than it does potentially in hard copy. That is the policy judgement that is contained in the bill. That is the way that the government has moved.

Senator WEBBER—In part of the consultation process, did anyone submit that that should become age restrictive rather than just a blanket ban? Because it seems to me quite extraordinary that I can hop in my car but I cannot download it. It is quite bizarre, really.

Dr Pelling—I know that there were consultations with two groups who were potentially affected, and they were TransACT, in the ACT, and the Eros foundation. I do not recall that I was at any of those discussions, but I presume that they raised those sorts of issues with the minister.

Mr Cordina—Consistent with how schedule 5 currently works is that X-rated material is prohibited online; therefore, that is what we have now extended into this extended regime.

Senator WEBBER—It is a matter of purchasing the material. I mean it would be a commercial transaction.

Dr Badger—As Mr Cordina says, the judgement essentially is that the making available of material online or in electronic form makes it more easily accessible, and in that context the decision has been taken, both with the history of schedule 5 and in this bill, that it will not be available electronically.

Senator WEBBER—I am sorry to labour this point, but can I just clarify: if I live in Canberra—which I do not—I can go to certain places and buy it or I can access it online offshore, but I cannot access it online here?

Dr Pelling—That is the situation at the moment.

Dr Badger—It is the same situation as applies to schedule 5.

Senator WEBBER—I just want it to be abundantly clear.

Mr Cordina—In terms of accessing X-rated and prohibited information offshore, there is also the possibility of referring that to ACMA to place on a black list so that it can no longer be accessible to people who are using filters.

Senator WEBBER—It begs the question of why the government chooses to allow people to purchase it at all. If we are going to say that they cannot purchase it online, why not just put a blanket ban on it?

Senator WORTLEY—The bill restricts the use of computer games by banning those that are classified R and X. Can you explain why this is, given that adults are also consumers in the computer game market and, as has been put in other submissions, should be able to access such games if they choose to?

Dr Pelling—Computer games which would be classified R and X are prohibited in this country already, so we are merely adopting the classification scheme that already exists. MA15+ is the highest classification you can currently have for a computer game.

CHAIR—Are there other issues about content?

Senator WORTLEY—Yes. The bill could arguably be seen to discriminate against artists who use media technology for the creation and dissemination of their work. Was this considered by DCITA?

Dr Pelling—We did not specifically focus on individual groups in that way except that the government policy has sought to implement a content neutral approach. So the regulatory scheme is aimed at content services in a fairly generic sense without identifying particular groups of the community who might be treated differently from other groups. If artistic content or any other content meets the criteria of prohibited content, it will be considered prohibited content; if it does not then it will not. We do not treat ‘artistic content’ any differently from any other form of content.

Senator WORTLEY—Can you explain why section 55 relates only to internet content? Should it also relate to mobile services?

Dr Pelling—I might take that on notice because I think the answer is fairly technical and relates to the interaction between schedule 7 and the old schedule 5 and is a drafting link. If I can take that on notice and get an answer back to you that would be the best thing, rather than speculating.

Senator WORTLEY—I would appreciate that. In their submission, ASTRA raised the point that on-demand services such as Foxtel IQ could be subject to one level of regulation while the remainder of Foxtel services are subject to another. Is this correct?

Dr Pelling—The particular issue, as I understand it, relating to Foxtel is that they have a service which distributes material on a point to multipoint basis to the hard drive in an IQ box and then people can access it at that particular time. Whether or not that is a prohibited service would hinge on whether or not it constitutes a broadcasting service or not. There are specific definitions in the Broadcasting Services Act about what is and is not broadcasting. The first decision would be about whether or not that is a broadcasting service. If it is a broadcasting service, it is outside the regulatory framework in schedule 7. If it is not a broadcasting service

and it is a point-to-point download service then it would fall within the regulatory framework within schedule 7 and it would be subject to the age restriction rules that exist.

Senator WEBBER—As someone who has one of them, is it or is it not broadcasting? I view it as watching television.

Dr Pelling—It is very difficult to make judgments of these things on the spot, but my understanding is that it is a broadcasting service.

Senator WORTLEY—Is that a definitive answer or does the government intend to clarify this?

Dr Badger—We are in discussion with ASTRA about the interpretation of ‘broadcasting service’ around that. The initial advice we have is that it is a broadcasting service, but we will continue to look at the ramifications of that to ensure that services that are essentially designed to be part of, say, the Foxtel pay TV service, for example, or the other pay TV service operators, and are designed to operate in that regulatory environment, are not inadvertently caught up in this regime.

Senator WORTLEY—Given the pace of technology, can you tell us today how the bill proposes to deal with new and emerging types of media so that they are also regulated in accordance with the provisions of the bill?

Dr Pelling—The bill focuses—

Senator WORTLEY—Was that a sigh I heard?

Dr Badger—If I had the answer to that I would not be here!

Dr Pelling—If I can attempt a general answer, the bill essentially focuses on content rather than delivery technology. In other words, provided the service falls within the fairly broad definition of ‘content service’ as set out in the bill—which is a service which delivers content or makes available content using a carriage service, which, again, is a very broad concept—then it is potentially regulated by this. Whether or not a particular type of service or a particular type of device falls under that would be a matter to be determined.

Dr Badger—The objective of the bill is to establish an environment for regulation which is not dependent on the nature of the technology used to deliver the services. That is probably your best way of dealing with new services as they emerge. However, as we all know, you cannot ignore the fact that, as technology changes, you may get different approaches. The approach has been to keep all these operations under review to ensure that the legislation and the intent of the legislation remains consistent with new types of service delivery systems as they emerge. But I stress that the objective behind this particular bill is to regulate the content service rather than the content service delivered in a particular fashion, which would bring you into the technology-specific activity.

Senator WORTLEY—Some submissions argue that the proposed regulatory regime is deficient in that it cannot prohibit or restrict content that is unsuitable for children that is hosted overseas. The Council for Civil Liberties and Electronic Frontiers raised those issues. What is the department’s response to that?

Dr Pelling—I think the regulation of content needs to be seen as a holistic exercise which is tackled on a number of fronts. While there are obvious jurisdictional issues in terms of us

regulating content that might come out of, say, the United States or Russia, the government's other arm to this is the use of filtering technology, through Protecting Australian Families Online, which empowers people to filter out overseas content. It is a multifaceted content strategy which is a mixture of regulatory tools and empowerment of families to take steps to protect themselves against technology. Then there are things like spam and that sort of stuff, which also deal with content related issues.

Dr Badger—There is also an emerging concern internationally about the need to try and get more cross-border understanding of these issues. Australia is one of the leading countries in dealing with the problem as we see it here. As Dr Pelling said, the government's approach to the whole issue has a hands-on practical side in terms of filters but also has the broader regulatory environment. What we are trying to do is also stimulate a much greater involvement in concerns over the issue in international forums.

Dr Pelling—The other thing I would mention is that under the scheme there is a requirement for ACMA to refer material of a sufficiently serious nature to warrant referral to a law enforcement agency to a law enforcement agency. ACMA also has links with overseas organisations to provide information on particularly abhorrent content they get. There are mechanisms in place where international collaboration can be established. As Dr Badger says, this is a growing area of interest for a number of governments—trying to find better ways of collaborating.

Dr Badger—Essentially, governments learnt to work together over spam issues and you are now getting people being taken to court over spam, whether it be in Australia or in the United States, whereas four or five years ago that was not an issue that governments could deal with.

Senator WORTLEY—The Internet Industry Association argued 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. What is the department's view on that?

Dr Pelling—I cannot really comment on whether services will be economic or not. If by 'ephemeral' they mean live content service, the scheme regulates live content services. In fact, that was quite explicitly seen by the government as, if you like, a loophole in the current system of content regulation, which is in schedule 5 and focused very much on hosted, stored content. So a key policy point in this regulatory framework is to provide a mechanism whereby live streamed content can also be regulated.

Dr Badger—Once again we come back to a bit of a prevailing theme. The regulatory environment does not do anything about ephemeral content per se. It deals with particular forms of ephemeral content that people wish to restrict particularly children having access to. If you are designing a commercial business around a form of content called ephemeral, there is no particular impact from this regulatory environment unless the content is regarded as objectionable. The process that is involved in the system is one of reaction to complaints. So while there are not highly significant onuses placed—if that is the right word—on the commercial operators to do a whole lot of checking on the off chance, the regulatory environment is attempting to strike a balance between one lot of concerns, recognising that

there is a whole new industry waiting to develop out there related to the ephemeral content issue, for example.

Senator WORTLEY—Moving on from that, DMG Radio argued that user-generated content should be exempted from the bill, as commercial radio providers do not control that content and any requirements for them to pre-vet that content would lessen their ability to communicate with users live and in real time. What is the department's response to that?

Dr Badger—I am not quite clear what they are getting at. For a start, broadcasting services are not picked up, but I presume they are talking about their own websites. Are they not suggesting that they would have to, if you like, pre-classify or pre-assess all the content, when in fact they do not have to?

Senator WORTLEY—The concern is that it is live or in real time.

Dr Badger—But the fact that it is live does not mean they have to pre-assess it, do they?

Dr Pelling—No. Pre-assessment of content is only required for the narrow category of commercial services, and these sorts of things are not normally done on a fee basis. They are open to chat about a particular radio program or a particular issue or something like that. It is the same as the *Big Brother* example I used earlier. Content that is put on those systems that is available to the public—for example, on an open kind of chat service—is potentially subject to a take-down notice but it would have to be the subject of a complaint and action by the regulator.

Senator WORTLEY—Could you have a look at their submission and the concern that was raised, because it did actually go further than that. Could you take it on notice to respond to that.

Dr Badger—We will have a look at that. As is quite evident, this is not a straightforward thing and there are judgements to be taken all the way through. Certainly, the intent of the bill is to do the protection side of it without placing excessive costs on industry; that is certainly behind the design. In most cases, unless somebody is providing access to content that is really on that edge where they are likely to be worried about it then it should not be of any concern to them whatsoever. But we will have a look at that particular thing.

Senator WORTLEY—I would appreciate that. Thank you.

CHAIR—We have a list of technical amendment questions which we will place on notice for you; there are several of them. We would be grateful to get replies by Monday. Is that too late?

Dr Badger—We will get them to you as soon as we possibly can.

CHAIR—We are on a tight deadline.

Dr Badger—We understand that.

CHAIR—If you could do that, we would be very grateful. I thank the department and officials for being here. I thank Hansard, the staff and everybody involved, and I close this hearing.

Committee adjourned at 1.47 pm