

The Senate

Standing Committee on
Environment, Communications,
Information Technology and the Arts

Communications Legislation Amendment
(Content Services) Bill 2007 [Provisions]

June 2007

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Abbreviations

AAT	Administrative Appeals Tribunal
ACMA	Australian Communications and Media Authority
AMTA	Australian Mobile Telecommunications Association
ASTRA	Australian Subscription Television & Radio Association
BSA	<i>Broadcasting Services Act 1992</i>
CSPs	Carriage Service Providers
DCITA	Department of Communications, Information Technology and the Arts
EC	European Commission
MPSD	Mobile Premium Services Determination
MPSI	Mobile Premium Services Industry (MPSI) Scheme
NSWCCL	NSW Council for Civil Liberties
IIA	Internet Industry Association

Recommendations

Recommendation 1

The committee recommends that the bill be passed.

Chapter 1

Referral to the Committee

1.1 On 10 May 2007, the Senate referred the Communications Legislation Amendment (Content Services) Bill 2007 (hereafter 'the bill') to the Senate Environment, Communications, Information Technology and the Arts (ECITA) Committee for inquiry and report by 12 June 2007.

1.2 In accordance with the usual practice, the committee advertised the inquiry in *The Australian*, on 16 May 2007 calling for submissions by 28 May 2007. The Committee also directly contacted a number of relevant organisations and individuals to invite submissions.

1.3 Submissions were received from eleven organisations and individuals, as listed in Appendix 1. The committee also held a public hearing in Canberra on Friday, 1 June 2007. A list of those who gave evidence at this hearing is at Appendix 2.

Acknowledgments

1.4 The committee thanks all those who contributed to its inquiry by preparing written submissions. Their work has been of considerable value to the committee. The committee would particularly like to thank representatives of DCITA and ACMA for their cooperation in providing additional information.

Background to the bill

1.5 Increasingly, consumers are using mobile phones and subscription Internet sites to deliver ever increasing types of entertainment and information. Mobile phones and other hand-held devices now offer access to a range of media-rich services including broadcasting, Internet and telephone content. New content services such as live streamed services are also being delivered through subscription Internet portals. Such services while offering the potential to provide substantial benefits for consumers and new business opportunities for carriage service providers (CSPs) and content service providers, may also carry potentially offensive or harmful content.

1.6 Existing arrangements for content regulation in Australia have been based on certain assumptions about how that content is accessed and viewed. For example, broadcasting content was watched via television set, enabling relatively easy parental supervision. Until now, mobile phones were unable to provide access to audiovisual material. CSPs can now offer access to broadcasting, Internet and telephone content on a single, mobile device. The technological advances have given rise to uncertainty about the extent to which convergent content services are already regulated and concern about the potential for inconsistent regulatory treatment of essentially the same content. The technical features of the devices have also given rise to concern

about their potential misuse to facilitate inappropriate contact, for example, via interactive services such as chat rooms, especially with children.

1.7 The Second Reading Speech stated that:

The Australian Government takes very seriously its responsibility to protect Australian citizens, particularly children, from exposure to illegal and highly offensive content delivered over convergent devices such as mobile handsets, and over the Internet more generally.¹

1.8 The bill gives effect to the Government's commitment to put in place new measures to protect consumers from inappropriate or harmful material on convergent devices such as 3G mobile phones and through subscription internet portals:

The Bill establishes a framework which aims to regulate emerging content services in a platform and technology neutral manner—it strengthens the regulation of 'stored' content where this is delivered on a commercial basis and establishes new rules to address 'live' and interactive content services such as chat rooms. The immediate effect of this will be that service providers supplying content services including live, streamed services over a carriage service such as a mobile phone will be subject to these new obligations.²

1.9 The main focus of the bill is to extend the general approach adopted by the Government in relation to content regulation to those services where it considers adequate safeguards are not currently in place.

1.10 The proposed changes were based on the findings of the Review of the Regulation of Content Delivered over Convergent Devices ('the DCITA review') conducted by the Department of Communications, Information Technology and the Arts (DCITA) which was released in April 2006. The review found that there may be a lack of appropriate protections for users, particularly children, from inappropriate audiovisual content on mobile devices and existing regulatory frameworks may not provide an effective response.³

Outline of the bill

1.11 The bill amends the *Broadcasting Services Act 1992* (BSA) to provide for the regulation of content services delivered over convergent devices, such as broadband services to mobile handsets, and new types of content provided over the Internet.

1.12 The main elements of the proposed new framework are:

- content that is, or potentially would be rated X 18+ and above must not be delivered or made available to the public, and access to

1 Second Reading Speech, p. 1.

2 Second Reading Speech p. 1.

3 DCITA, *Review of the Regulation of Content Delivered over Convergent Devices*, April 2006.

material that is likely to be rated R18+ must be subject to appropriate age verification mechanisms;

- where access to content is provided by a content service to the public for a fee (other than news or current affairs service), and the content does not wholly consist of text or still visual images, and is likely to be classified as MA 15+ or above, access to that content must be subject to appropriate age verification mechanisms. Similar arrangements will apply to content provided by premium mobile services.
- the above limitations relating to prohibited content and age verification mechanisms will also apply in relation to live streamed services;
- electronic editions of publications such as books and magazines which have been classified 'Restricted-Category 1', 'Restricted-Category 2' or 'Refused Classification' will be prohibited;
- certain types of content service, including those which provide content regulated under existing broadcasting regulatory frameworks, and the content of private users' personal communications will be excluded from the scope of the new regulatory framework;
- carriage service providers who do no more than provide a carriage service that enables content to be delivered or accessed are not providing a content service, but may be required to remove access to a service where it is considered to contain prohibited material;
- the scheme will be based on a model which removes access to prohibited content or potential prohibited content via the issuing of 'take-down' notices for stored or static content, or 'service-cessation' notices for live content and 'link deletion' notices for links to content;
- to strengthen the ability of the scheme to respond to repeated and deliberate offences, the Bill proposes to enable the Australian Communications and Media Authority (ACMA) to issue a notice to a content service provider to remove content that is substantially similar to content already subject to a take-down notice;
- where a content service provider fails to comply with a take-down, service cessation or link deletion notice, including where, in ACMA's opinion it supplies content that is substantially similar to content which is already subject to such a notice, civil or criminal penalties may be pursued;
- industry codes of practice will be required to give effect to certain content service provider obligations, such as engaging appropriately trained assessors to provide advice on the likely classification of consumer information and awareness mechanisms;
- where appropriate, ACMA will have the power to determine industry standards where it considers that industry codes are

deficient in ensuring that content services are provided in accordance with prevailing community standards.⁴

Regulatory framework

1.13 The BSA sets out the regulatory framework for broadcasting, datacasting and Internet content in Australia. The approach to content regulation under the BSA is co-regulatory. The proposed bill continues this approach. Legislation underpins the development of industry codes of practice that are registered and enforced by Australian Communications and Media Authority (ACMA), which is the independent statutory regulator.

1.14 While there are variations in the regulatory obligations on different types of broadcasting services under the BSA, certain objectives apply across all broadcasting services regulation, including encouraging providers of broadcasting services to respect community standards in the provision of program material; and ensuring that providers place a high priority on the protection of children from exposure to program material which may be harmful to them.

1.15 Under the BSA, all broadcasting industry sectors are prohibited from providing content that has been classified X18+ or refused classification by the Classification Board. Additional requirements that have to be addressed in the development of all industry codes of practice include preventing the broadcast of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry; methods of ensuring that the protection of children from exposure to program material which may be harmful to them; and methods of classifying programs that reflect community standards.⁵

Content regulation in Australia

1.16 The *Classification (Publications, Films and Computer Games) Act 1995* establishes the classification system for film, computer games and certain publications including the National Classification Code.⁶ The Classification Act is designed to:

provide for the classification of publications, films and computer games for the Australian Capital Territory, and is intended to form part of a Commonwealth/State/Territory scheme for the classification of publications, films and computer games and for the enforcement of those classifications.⁷

4 Explanatory Memorandum, pp 1–2.

5 Explanatory Memorandum, p. 6.

6 Internet Industry Association, *Internet Industry Codes of Practice Codes for Industry Coregulation in Areas of Internet and Mobile Content*, Version 10.4 Registered by the Australian Broadcasting Authority, pp 5, 8.

7 *Classification (Publications, Films and Computer Games) Act 1995*, p. 1.

1.17 The Classification Board and the Classification Review Board are the statutory bodies that, under the Classification Act, respectively classify and review classification decisions in relation to films, computer games and certain publications.

1.18 The Classification Act outlines the following different types of classifications for publications, films and computer games:

Publications:

- Unrestricted
- Category 1 restricted
- Category 2 restricted
- RC Refused Classification.

Films:

- G General
- PG Parental Guidance
- M Mature
- MA 15+ Mature Accompanied
- R 18+ Restricted
- X 18+ Restricted
- RC Refused Classification.

Computer games:

- G General
- PG Parental Guidance
- M Mature
- MA 15+ Mature Accompanied
- RC Refused Classification.

1.19 The National Classification Code (see Appendix **) is scheduled to the Classification Act and outlines the specific content of the material to which various classification decisions are given effect under the above listed categories. These classifications are given attribution, as far as possible, to the following principles:

- adults should be able to read, hear and see what they want;
- minors should be protected from material likely to harm or disturb them;
- everyone should be protected from exposure to unsolicited material that they find offensive;
- the need to take account of community concerns about:
 - depictions that condone or incite violence, particularly sexual violence; and

- the portrayal of persons in a demeaning manner.⁸

1.20 The Content Services Bill makes use of the pre-existing classification structure as outlined in the Classification Act and National Classification Code. However, because the nature of some newer technology mediums means that content may be transmitted via means other than film, publications or computer games, clause 25 of the bill provides for the classification of content other than that which falls into those three distinct categories.

1.21 Content falling outside the three categories will be classified using the classification rules that apply to a film under the Classification Act. An example of how this would apply is if, for example, the content consists of a webpage containing a mixture of text and moving images, and will allow such content to be classified as if it were a film. Similarly, an edited film that is unable to be classified under clause 24 would be classified under this clause.⁹

Stored and ephemeral content regulation

1.22 The existing Schedule 5 to the BSA provides a regulatory framework for stored content made available over the Internet. However, this framework does not currently extend to ephemeral content such as live streamed audiovisual services, nor to services over other types of networks such as the mobile telephone network. The bill, therefore, establishes a new regulatory framework for content that will be provided by a new Schedule 7 to the BSA. The new Schedule will replace Schedule 5 to the extent that it regulates Internet content hosts, and will in addition regulate live streamed content services, mobile phone-based services, and services that provide links to content.

1.23 The lack of focus on regulating ephemeral content services is partly explained by the inherent difficulty of regulating live content. It also reflects the fact there has not been, until now, a significant market for ephemeral content that is offered on a commercial basis.¹⁰

1.24 The regulation of ephemeral content is intended to address the concerns raised that children may be exposed to inappropriate or harmful material or that they may be lured into unsafe contact as a result of accessing ephemeral content. The bill proposes that commercial ephemeral services will be co-regulated and involve the pre-assessment of content, access restrictions and access to complaints mechanisms. The Explanatory Memorandum stated that:

8 Office of Film and Literature Classification web site, *Current Legislation*, 'National Classification Code', Federal Register of Legislative Instruments F2005L01284, Accessed 22 May 2007, p. 1.

9 Explanatory Memorandum, p. 51.

10 Explanatory Memorandum, p. 14.

...the DCITA review has found that it would be feasible to develop a co-regulatory framework for the regulation of commercial ephemeral content services that requires pre-assessment of content, access restrictions or prohibition where appropriate and complaints handling processes. The DCITA review also found that it would be desirable to align this framework with that proposed for commercial stored content where practicable.¹¹

Role of ACMA

1.25 The proposed new regulatory framework for emerging content services includes a significant role for ACMA, including registration and approval of industry codes of practice, and the determination of industry standards and service provider rules.

1.26 Under the bill, ACMA's existing role as a complaints handling body in relation to broadcasting and online content regulation would be expanded to include complaints relating to new content services. Under the new arrangements for new content services, ACMA will be empowered to receive direct complaints relating to possible breaches of content service provider rules, as well as possible breaches of code of practice requirements.¹²

1.27 Under the co-regulatory approach adopted, industry participants will be required to develop a code of practice or standards for handling complaints. In the first instance, consumer complaints will go to industry participants who have a complaints handling mechanism under their binding industry code of practice. If they are not signatories to a code of practice, or the matter is unresolved, complaints can be referred to ACMA. The Explanatory Memorandum outlined the benefits of this approach:

By utilising the expertise of ACMA in relation to broadcasting and online content regulation, the proposed framework can be expected to generate regulatory efficiencies and to be aligned to the greatest extent possible with broadcasting content regulation which is generally well understood by consumers and industry alike.

Providing scope for complaints to be directed to ACMA where a content service provider has not established a complaints handling mechanism strikes an appropriate balance between allowing for flexibility in industry self-regulation and ensuring that the consumer complaints are always dealt with appropriately.¹³

11 Explanatory Memorandum, p. 17.

12 Explanatory Memorandum, p. 2.

13 Explanatory Memorandum pp 13, 18.

Chapter 2

Introduction

2.1 Industry groups were generally supportive of the bill, arguing that it provides an appropriate regulatory framework for regulating content services across convergent devices, and provides sufficient flexibility to accommodate changing technological developments in the sector.¹ These groups suggested that specific areas of concern relating to particular parts of the bill could be addressed through minor amendments to the bill.

2.2 Other groups such as the NSW Council for Civil Liberties and Electronic Frontiers Australia opposed the bill on civil liberties grounds.² The Festival of Light supported the protections for children in the bill but pointed to inadequacies in the policy approach adopted by the bill.³ The Arts Law Centre of Australia argued that bill does not adequately take into account the needs of filmmakers, multimedia and digital artists.⁴

Issues

The general approach to restricting access to services

2.3 The main focus of the bill is to extend the general approach adopted by the Government in relation to content services to those services where it considers adequate safeguards are not currently in place. Much of the content for these new services is likely to be based on content created for supply in relation to a range of other existing media services. The new regulatory regime will be aligned, as far as possible, with the regulation of traditional media content. At the same time, the framework takes account of the technical and other differences applying to the delivery of content on these new platforms. The proposed regulatory framework requires pre-assessment of content, access restrictions or prohibition where appropriate and complaints handling processes.⁵

2.4 Some submissions argued that the proposed regulatory regime will prove ineffective in preventing children from gaining access to unsuitable content. These

1 AMTA, *Submission 6*, p. 2; Communications Alliance, *Submission 7*, pp 1–3; Microsoft, *Submission 9*, p. 1.

2 NSWCCCL, *Submission 3*, p. 4; Electronic Frontiers Australia, *Submission 5*, p. 3.

3 Festival of Light, *Submission 1*, pp 1–4.

4 Arts Law Centre, *Submission 4*, pp 2–3.

5 Second Reading Speech, pp 1–2; Explanatory Memorandum, pp 8, 17.

submissions argued that the only effective technology available to protect children from unsuitable content is filtering on end-user devices, such as home computers.⁶

2.5 The NSW Council for Civil Liberties cited evidence from the United States in support of the use of filters:

We base that on a recent US decision where...his Honour Judge Lowell Reed of the District Court in Philadelphia undertook a trial...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.⁷

2.6 The Government is supporting initiatives in this area, complementing the approach in the bill. DCITA noted that:

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.⁸

2.7 Filtering technology is not currently available for devices like mobile phones. DCITA noted, however, that:

...as those things [security on mobile phones] are developed, you get much better access to a range of ways of more effectively providing these sorts of access regimes...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.⁹

2.8 The committee recognises that home filtering will be an important vehicle for users managing content. However, this scheme in the bill is also consistent with accepted community expectations about regulating content, reflected in the longstanding practices of film and literature classification and existing schemes for other media.

6 NSWCCCL, *Submission 3*, p. 3; Electronic Frontiers, *Submission 5*, p. 3.

7 NSWCCCL, *Committee Hansard*, 1 June 2007, pp 20–21.

8 Dr Badger, DCITA, *Committee Hansard*, 1 June 2007, p. 47.

9 Dr Badger, DCITA, *Committee Hansard*, 1 June 2007, p. 47.

2.9 Some submissions also argued that the proposed regulatory regime is deficient in that it cannot prohibit or restrict content that is unsuitable for children that is hosted overseas.¹⁰ DCITA noted, however, that regulation of content needs to adopt a multi-faceted approach, including international initiatives:

...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.

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.¹¹

Operation of take-down notice scheme

2.10 Schedule 1, Part 3, Division 3 of the bill sets out actions that can be taken in relation to hosting services and provides the Australian Communications and Media Authority (ACMA) with the necessary powers to issue hosting services with a 'take-down notice'. This notice directs them to remove material that has been judged to be prohibited content under the classification guidelines (see chapter 1 for overview). The provisions of the bill only relate to hosting services with an 'Australian connection', and Clause 3 provides that a hosting service has an 'Australian connection' if and only if any of the content hosted by the hosting service is hosted in Australia.¹²

2.11 Alternatively, where content has not yet been classified, but is considered to be 'potential' prohibited content, ACMA has the authority to determine that, if the material in question were to be classified by the Classification Board, it would be likely to be classified as RC, X18+, category 2 restricted, R18+ or MA15+. If ACMA makes an assessment that it could be classified as such, it must issue the hosting service with an interim take-down notice. This interim notice will apply until the Classification Board has given the content a classification.¹³

2.12 If the material is subsequently classified as prohibited content, ACMA is then required to issue the hosting service with a final take-down notice. However for lower

10 NSWCCCL, *Submission 3*, p. 2; Electronic Frontiers, *Submission 5*, p. 4.

11 Dr Pelling/Dr Badger, DCITA, *Committee Hansard*, 1 June 2007, pp 50–51.

12 Bills Digest, *Communications Legislation Amendment (Content Services) Bill 2007*, Parliamentary Library, 23 May 2007, no. 158, 2006-07, p. 15.

13 Bills Digest, *Communications Legislation Amendment (Content Services) Bill 2007*, Parliamentary Library, 23 May 2007, no. 158, 2006-07, p. 15.

classifications of R18+ or MA15+ host providers may be allowed to continue hosting the classified material provided it is subject to a restricted access system.¹⁴

2.13 The bill provides for anti-avoidance measures to ensure that a hosting service that is the subject of an interim or final take down notice, does not host content that is the same as or similar to the prohibited content. ACMA may issue a special take down notice if they believe that the hosting service is hosting, or intending to host, such content, directing the service provider to take down the material as in the earlier provisions of the bill.¹⁵

2.14 If a hosting service is issued with either an interim, final, special take-down or link-deletion notice by ACMA then, under Part 8 of the bill, the host can choose for ACMA's decision to be reviewed by the Administrative Appeals Tribunal (AAT).¹⁶ This gives the service provider some recourse if they feel that the original decision to issue a notice by ACMA was inappropriate.

2.15 A hosting service may voluntarily stop hosting content while subject to an interim take-down order, and in this case ACMA may accept this course of action by the hosting service and may decide to revoke the interim notice and not proceed with seeking a classification of the content.¹⁷

2.16 Similar provisions apply for live content services and links services. In the case of prohibited or potentially prohibited live content, ACMA may issue final or interim service-cessation notices, however there are no anti-avoidance measures (i.e. no special take-down notices) applicable to live content services like there are for non-live and links services. In relation to links services, ACMA may issue an interim or final link-deletion notice where the link is provided by a links service with an Australian connection, and these actions are subject to the same classification assessments and AAT review mechanisms applied to content hosting services.¹⁸

2.17 In the event that a content service provider fails to comply with a take-down, service cessation or link deletion notice (including where, in ACMA's opinion, it supplies content that is substantially similar to content which is already subject to such a notice), civil or criminal penalties may be pursued.¹⁹

14 Bills Digest, p. 16.

15 Bills Digest, p. 16.

16 Bills Digest, p. 16; See also *Communications Legislation Amendment (Content Services) Bill 2007*, pp 99–101.

17 Bills Digest, p. 16.

18 Bills Digest, pp 16–17.

19 Explanatory Memorandum, pp 1–2.

2.18 AMTA and the IIA expressed some concern about the operation of special take-down notices.²⁰ They sought more clarity about how they would operate, particularly in terms of what would be the meaning of 'similar content', and queried the practical operation of the system in regard to user-generated content:

Satisfying a special take-down notice will be difficult without the content service provider having to monitor the service to ensure that it has not been reposted by the user or another user under a different guise; the threshold for substantially similar content is potentially very low and we are concerned that content service providers will be forced to implement monitoring and examination of all content after a special takedown notice has been issued.²¹

2.19 ACMA responded that its understanding was that special take-down notices were meant to be highly targeted, rather than set in the broad terms that appeared to be causing concern to industry participants.²² ACMA drew attention to the second reading speech, which noted the intention of making it possible to deal with 'repeated and deliberate offences'.²³ ACMA also pointed out that subclause 53(4) of the bill 'provides a defence if the hosting service provider proves that it did not know and could not, with reasonable diligence have ascertained that the content was prohibited or potential prohibited content'.

Implementation of remedial situations (clause 47)

2.20 Under clause 47 of the bill, ACMA can, following an investigation, direct a hosting service provider to take steps to remove content from being publicly available: what are known as either Type A or Type B remedial situations. The Internet Industry Association (IIA) and the Australian Mobile Telecommunications Association (AMTA) argued that the definitions of these situations, contained in clauses 47(6) and (7) of the bill, do not make clear what needs to be done to ensure compliance.²⁴ They suggested that the requirement in both cases that the provider not 'host' the content lacks a definition of 'hosting'. They argued that this could be taken to imply that a 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'. The industry associations suggested this could be difficult to satisfy, as any given hosting service provider can only cease to provide the material itself – it cannot stop

20 AMTA, *Submission 6*, p. 7; IIA, *Submission 8*, pp. 11–12; Mrs van Beelen, AMTA, *Proof Committee Hansard*, 1 June 2007, p. 12.

21 IIA, *Submission 8*, p. 12.

22 ACMA, Correspondence to the committee, 4 June 2007.

23 Cited in ACMA, Correspondence to the committee, 4 June 2007.

24 IIA, *Submission 8*, pp 12–13; AMTA, *Submission 6*, p. 8.

the content creator from seeking another service provider to host their material on the Internet.

2.21 DCITA responded pointing out that, though the term 'host' may not be defined in clause 47, clause 4 makes the intent clear by defining a hosting service as one in which content is provided 'to the public'. As a consequence, the department argued, 'there is nothing in clause 47(6) or (7) that would prevent a hosting service provider from retaining the potential prohibited or prohibited content for the purposes of evidence'.²⁵ DCITA also stated that any ACMA notice 'would apply only to the hosting service provider in relation to the content hosted by its hosting service which is the subject of the notice'.²⁶

Content creators

2.22 Some evidence expressed concern at the likely impact of the bill on content creators. In relation to artists, the Arts Law Centre stated that the bill is likely to detrimentally affect artists' use of convergent content technologies for the purposes of artistic expression as well as their ability to disseminate such works through that technology.²⁷

2.23 The Arts Law Centre pointed to some of the potential problems for 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 and 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?²⁸

2.24 The Arts Law Centre added that:

...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...the present system which is put forward in the bill would be difficult for them to negotiate. The lack of an appeals

25 DCITA, Correspondence to the committee, 4 June 2007.

26 DCITA, Correspondence to the committee, 4 June 2007.

27 Arts Law Centre, *Submission 4*, p. 2.

28 Ms Giles, Arts Law Centre, *Committee Hansard*, 1 June 2007, p. 2.

procedure would mean that they may have no recourse if their work is taken down.²⁹

2.25 DCITA argued that artists as content creators will need to work closely with content deliverers but it is not envisaged that the processes will be excessively onerous:

We discussed...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...The objective of the bill is to do that [protect children] 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.³⁰

2.26 Microsoft argued that the application of the bill to user-generated content represents a significant departure from the approach taken in other jurisdictions. In particular, Microsoft pointed out that under the European Commission's (EC) *Audiovisual Media Services Without Frontiers Directive*:

..."private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest" fall outside the scope of regulation.³¹

2.27 The EC's *Audiovisual Media Services Without Frontiers Directive* was agreed to on 24 May 2007. The Directive will replace the former *Television without Frontiers Directive*, and aims to provide a modern pro-competitive legal framework that covers audiovisual media services, while at the same time continuing to ensure a high level of consumer protection, including appropriate measures to protect minors.³² As Microsoft has pointed out the new Directive limits the scope of the definition of audiovisual media services. In particular, the definition does not cover:

29 Ms Giles, Arts Law Centre, *Committee Hansard*, 1 June 2007, p. 4.

30 Dr Badger, DCITA, *Committee Hansard*, 1 June 2007, p. 48.

31 *Submission 9*, p. 2.

32 See further European Union, 'Commission welcomes political agreement on new Directive for Europe's audiovisual media' at: http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3430 (accessed 4 June 2007) and also *Presenting the new Audiovisual Media Services without frontiers Directive: Frequently asked questions*, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/206&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 4 June 2007).

...activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.³³

2.28 In its submission, Microsoft strongly supported the EC's approach. To ensure consistency with the EC, Microsoft suggested that the bill be amended to 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.³⁴

2.29 DMG Radio also 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'.³⁵

2.30 DCITA noted that 'artistic content' will be treated no differently to other forms of content under the bill:

...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.³⁶

Restricted access system

2.31 The use of restricted access systems is required where content is, or is likely to be, classified R18+. It is also required where content is, or is likely to be MA15+, subject to certain exemptions.

2.32 ACMA may by legislative instrument declare a specified access-control system to be a restricted access system for the purposes of Schedule 7. The instrument may make different provision about R18+ content, and MA15+ content. ACMA must

33 Consolidated text of the *Audiovisual Media Services Without Frontiers Directive* available at: http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=312 (accessed 4 June 2007).

34 Microsoft, *Submission 9*, pp 2-3; see also Ms Inman-Grant, Microsoft, *Committee Hansard*, 1 June 2007, p. 19.

35 DMG Radio, *Submission 11*, p. 1.

36 Dr Pelling, DCITA, *Committee Hansard*, 1 June 2007, p. 49.

have regard to the objective of protecting children who have not reached 15 years of age from exposure to unsuitable content.³⁷

2.33 AMTA and IIA argued that a 'restricted access system' is not defined in the bill although clause 14 gives powers to ACMA to declare that a specified access-control system is a restricted access system for the purposes of the Bill.

The problem for industry is that there is no certainty as to what ACMA may declare as a suitable access-control system. In effect, industry must obtain ACMA's approval to whatever system industry wishes to use. There is also no requirement for ACMA to consider the practicality of the system it endorses nor the suitability of access-control systems already implemented by industry, for example, as a result of the MPSI scheme or, by most ISPs, through requiring a credit card to be used for on-line services.³⁸

2.34 AMTA and IIA suggested that ACMA should be required, under the bill, to approve an access-control system that is consistent with current industry practice, is easily understood by consumers and can be readily implemented by industry.³⁹ Currently, the only way to pragmatically restrict access to Internet content services to persons over 18 years, and thus achieve the policy objectives of the bill, is to require production of a credit card. ASTRA also argued that ACMA needs to clarify what progress it is making with the development of the instrument that will define 'restricted access systems'.⁴⁰

2.35 In response to these concerns ACMA advised that:

In developing a restricted access system declaration, ACMA will consider the requirements of the legislation, take into account the different business practices of service providers affected by the declaration, and take into account the methods they currently employ for age verification. As is its usual practice, ACMA will consult closely with industry in developing the declaration.⁴¹

2.36 DCITA noted that it would 'expect ACMA to consult with the industry prior to the making of the legislative instrument. Note, however, that a failure to consult will not affect the validity or enforceability of a legislative instrument'.⁴²

37 Explanatory Memorandum, p. 47.

38 AMTA, *Submission 6*, p. 7.

39 IIA, *Submission 8*, pp 9–10; AMTA, *Submission 6*, pp 6–7.

40 ASTRA, *Submission 10*, p. 3.

41 ACMA, Answer to question on notice, 4 June 2007.

42 DCITA, Answer to question on notice, 4 June 2007.

Relationship to the Mobile Premium Services Determination (MPSD)

2.37 AMTA and IIA argued that it is unclear how the bill will affect the regulatory scheme operating under the MPSD. It was argued that certain provisions of the bill conflict with the MPSD and would override the relevant MPSD provisions to the extent of the inconsistency.⁴³

There are no provisions addressing transition from the MPSD (and the related industry Mobile Premium Services Industry (MPSI) Scheme). This leaves as uncertain the regulatory status of a number of services that are not covered as comprehensively in the Bill, such as chat services. In addition, unlike the MPSD, the Bill is not limited to mobile content provided via premium services or proprietary network services.⁴⁴

2.38 AMTA and IIA suggested that if there is to be one regulatory regime which governs both mobile and internet content, the Content Services Bill regime is preferable, in that it provides a comprehensive regime for all new media, including that transmitted over the internet and mobile networks.

2.39 ACMA stated that it is aware of industry concerns and would be reviewing the MPSD once the bill is passed:

We are aware of AMTA's 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.⁴⁵

2.40 DCITA stated that the MPSD was implemented as an interim regulatory measure pending the development and implementation of new legislation which is proposed through the Content Services Bill – 'the MPSD is a legislative instrument made by ACMA, and it is preferable to amend the instrument to comply with the new legislation rather than the other way round'. The Department noted that ACMA advised the committee that it would be reviewing the MPSD and its relationship to the requirements in the new legislation once it is passed – 'there is thus no need to amend primary legislation to ensure that it is compatible with the MPSI'.⁴⁶

43 AMTA, *Submission 6*, p. 4; IIA, *Submission 8*, pp 14.

44 AMTA, *Submission 6*, p. 4.

45 Ms O'Loughlin, ACMA, *Committee Hansard*, 1 June 2007, p. 32.

46 DCITA, Answer to question on notice, 4 June 2007.

Australian connection

2.41 The existence of an 'Australian connection' is integral to the terms 'content service' and 'hosting service'. A content service will only be subject to the Schedule 7 regulatory scheme to the extent that it has an Australian connection.

2.42 An Australian connection is established if one or more of the following situations exists (clause 3):

- (a) any of the content provided by the content service is hosted in Australia;
- (b) any live content provided by the content service originates in Australia;
- (c) in the case of a content service supplied by way of a voice call or video call using a carriage service, any of the participants in the call, other than an end-user of the service, are physically present in Australia.⁴⁷

2.43 The Explanatory Memorandum stated that live content originates in Australia if the content is located in Australia. A hosting service has an Australian connection for the purposes of the Schedule if, and only if, any of the content hosted by the hosting service is hosted in Australia.⁴⁸

2.44 AMTA and IIA argued that the application of the 'Australian connection' test in relation to links services is unclear:

On looking at the interaction between the definition of links services (i.e. a content service that provides one or more links to content and is provided to the public whether on payment of fee or not) and Australian connection, it would seem that the content it is linked to has to be hosted in Australia for there to be an Australian connection. Accordingly, if the link is on an Australian-hosted site, then the link-deletion notice should be addressed to the host of that site.⁴⁹

2.45 AMTA and IIA suggested that for clarity, it would appear more reasonable if the links themselves had to be hosted in Australia, irrespective of where the linked content is hosted.⁵⁰

2.46 DCITA stated that 'the existing provisions achieve what is being suggested' by AMTA and IIA. The Department noted that:

There are two elements that need to be satisfied to establish an Australian connection with respect to a links service.

Firstly, in accordance with clause 3(a), the link (which would fall within the definition of 'content' under clause 2) to the content will need to be hosted in Australia.

47 Explanatory Memorandum, p. 44.

48 Explanatory Memorandum, p. 44.

49 AMTA, *Submission 6*, p. 9.

50 AMTA, *Submission 6*, p. 9; IIA, *Submission 8*, p. 15.

Secondly, to be subject to an ACMA notice, the links service must provide end-users in Australia with a link to another content service which specialises in prohibited or potential prohibited content (refer clause 8). The prohibited content itself may be in Australia or overseas. The enforcement action taken by ACMA under Division 5 of Schedule 7 in relation to an Australian-hosted link to potential prohibited or prohibited content would be by way of a link deletion notice issued to the links service provider. However, if the prohibited content itself is hosted in Australia, ACMA can direct a take down notice to the hosting service (as opposed to the link provider) ie the server which actually hosts the content.⁵¹

2.47 Microsoft argued that the 'Australian connection' test for live content may operate to bring offshore content service providers within the ambit of proposed Schedule 7 in a manner that is not intended by the Government. Microsoft's argued that the bill does not specify how to identify the place where the live content originates.⁵²

Definition of 'content service'

2.48 'Content service' under the bill (Schedule 7, clause 2) is defined as:

- (a) a service that delivers content to persons having equipment appropriate for receiving that content, where the delivery of that content is by means of a carriage service; or
- (b) a service that allows end-users to access content using a carriage service.

2.49 The definition of 'content service' is broad in scope to ensure that all of the categories of content providers are covered. The bill also provides for 22 specific exemptions. In addition to the specified exemptions, the definition of 'content service' is further narrowed by reference to its Australian connection (clause 3); the provision of content by a content service (clause 6); and the provision of a content service to the public (clause 7).⁵³

2.50 AMTA and IIA argued that by referring to a service that 'delivers' content to end-users, the definition of a content service appears to confuse the roles of a content service provider and a carriage service provider.⁵⁴ AMTA and IIA considered that the definition is confusing in the context of new media technologies where there is clear distinction between content and carriage:

In industry's view, a content service provider is not responsible for the delivery of content but rather it makes content available to the public. This

51 DCITA, Answer to question on notice, 4 June 2007. See also Mr Humphries, ACMA, *Committee Hansard*, 1 June 2007, p. 33.

52 Microsoft, *Submission 9*, p. 3.

53 Explanatory Memorandum, p. 40.

54 AMTA, *Submission 6*, p. 6; IIA, *Submission 8*, pp 7–8.

is distinct from a carriage service provider which has no control over the content which it carries over its network. The definition of a content service in the Bill could potentially include activities of carriage service providers, Internet service providers, premium service providers and content hosts. In this context, the carriage service provider exception in clause 5 gives no protection for a carriage service provider who may provide more than a mere carriage service eg. billing of services, collection of revenues or accepting advertising in conjunction with a content service, but nonetheless has no role in securing that the content is made available.⁵⁵

2.51 AMTA and IIA suggested that the word 'delivers' in paragraph (a) of the definition of content services should be replaced with the words 'makes available'. This adopts the technology-neutral concepts in the *Copyright Act 1968* in relation to communicating content to the public.

2.52 DCITA stated that it is further considering the definitional issues around 'content service':

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.⁵⁶

2.53 DCITA further advised that the definition of 'content service' has been drafted broadly 'to capture all possible categories of content services. The definition is then limited by certain exemptions and by reference to clauses 3, 6 and 7'.

The definition of 'content service' may extend to certain carriage service providers that are in the business of both providing a carriage service and also providing a content service. These types of carriage services will be subject to Schedule 7 to the extent that they provide content services. The intent of the scheme is to regulate all content services irrespective of whether or not they are also carriage services.

Schedule 7's application, however, is limited by clause 5, which provides that, for the purposes of Schedule 7, a person does not provide a content service merely because the person supplies a carriage service that enables content to be delivered or accessed. Clause 5 does not exclude a carriage service that also collects revenue in relation to the provision of the carriage service. The issue that will trigger the application of Schedule 7 is whether the carriage service is also a 'content service', not whether the carriage service bills for its services.⁵⁷

55 AMTA, *Submission 6*, p. 6.

56 Dr Pelling, DCITA, *Committee Hansard*, 1 June 2007, p. 39.

57 DCITA, Answer to question on notice, 4 June 2007.

2.54 Microsoft argued that given the nascent state of the content services industry in Australia and around the world, it queried the suitability of a definition of 'content service' that has 22 specific exceptions. Microsoft argued that this regulatory approach is likely to have significant unintended consequences as new services evolve and attempts are made to apply to the definition of 'content service' to them.

2.55 Microsoft suggested that the government adopt a narrower basic definition of 'content service' that delineates the nature of the content services that are intended to be regulated, in addition to the means by which those services are delivered or made available. In its view, this approach is preferable to defining what constitutes a content service by way of exception.⁵⁸

2.56 As discussed above, DCITA stated that the definition of 'content service' has been drafted broadly to capture all possible categories of content services. There is also the ability to add new types of services:

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.⁵⁹

2.57 ASTRA raised the concern that subscription TV's 'on-demand' services, which is available on the FOXTEL (and OPTUS) digital platform and will be available on AUSTAR after it is deployed, may fall into the definition of a 'content service' and that this may be an unintended consequence of the bill.⁶⁰

2.58 DCITA stated that it appears to be a broadcasting service and therefore outside the regulatory framework of the bill:

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.⁶¹

58 Microsoft, *Submission 9*, p. 4.

59 Dr Pelling, DCITA, *Committee Hansard*, 1 June 2007, p. 41.

60 ASTRA, *Submission 10*, pp 4–5.

61 Dr Badger, DCITA, *Committee Hansard*, 1 June 2007, p. 50.

Conclusion

2.59 The committee believes that young and vulnerable children must be protected from unsuitable content available on the internet and via mobile phones and other technologies. The committee believes that the bill strikes a balance between adequate protection of consumers, especially children and fair access rights for adults.

2.60 The committee is satisfied with the bill as a whole. The committee is pleased to note that certain technical amendments proposed by industry stakeholders are being considered by the government, and is confident that these proposals will be addressed in any instances where fine-tuning to the bill is needed.

Recommendation 1

2.61 The committee recommends that the bill be passed.

Senator Alan Eggleston

Chair

Australian Labor Party Minority Report

Procedural failings of the inquiry

Labor Senators note certain concerns regarding the conduct of this inquiry.

The Bill was referred to the ECITA Committee for inquiry on 10 May 2007. On 16 May 2007, the Committee advertised for submissions to be received by 28 May 2007.

Labor Senators do not consider that the Committee had sufficient time to adequately review each of the submissions.

Only 4 submissions had been received by 28 May 2007. These 4 submissions were from Festival of Light, NSW Council for Civil Liberties, Mr David Bath and The Arts Law Centre of Australia.

On 29 May 2007, 2 submissions were received from Electronic Frontiers Australia Inc and Australian Mobile Telecommunications Association. It was then agreed by the Committee to hold an inquiry on 1 June 2007. Later that day, a further submission was received from Communications Alliance.

On 30 May 2007, 4 further submissions were received from Internet Industry Association, Microsoft Corporation, DMG Radio and Australia Subscription Television and Radio Association (the latter 2 submissions being received after 6.00pm).

On 7 June 2007, 6 days after the Inquiry was held, a final submission by Free TV Australia was received from the Committee. This submission was dated 1 June 2007.

The method by which this inquiry process was handled would appear to demonstrate the methods by which the Government will go to ensure that their bills are passed through Parliament with only limited external scrutiny of legislation.

Given the receipt of late submissions and no obvious time imperative to pass the Bill through Parliament, Labor Senators query why the inquiry process was so swift.

Legislative short-comings identified

The Submissions received raised a number of issues in relation to the Bill. The key issues were identified as follows:

- The Bill does not prevent prohibited material being accessed from overseas content providers.
- The use of restricted access systems for content that is, or is likely to be classified R18+ and MA 15+.
- This ensures that content that is classified MA 15+ that is now accessible to those aged 15 and over (such as movie previews/ trailers) cannot be hosted on an Australian website with out an age verification system.
- This disadvantages the internet vis-à-vis television. Further, Restricted access system is not defined in the Bill. As credit cards are not available to those under the age of 18, what method of age verification system can be used for those aged between 15- 17, who are entitled to view MA15+ content on television but who do not have a credit card to verify their age?
- The Bill prohibits content rated RC and X18+, the effect of this is that films rated RC and X18+ cannot be watched on the internet. Films that are rated X18+ are currently legally available in the ACT and NT and can be purchased interstate via mail order.
- Consultation with makers of content appears to have been deficient. The Bill discriminates against artists that use media technology for the creation and dissemination of their work (ie: video artwork, web and sound art and short film);
- ACMA may give a special take-down notice to a hosting service provider that hosts or is proposing to host content that is the same or substantially similar to content identified in the take-down notice. This raises issues such as how will ACMA know a content host was proposing to host certain content? How would ACMA or the content host know that content was sufficiently similar to prohibited content, that it would be subject to the interim or final take-down notice?
- The Bill provides for trained content assessors to be hired by commercial content providers to assess live content. This provision raises issues such as the cost of training such assessors and the level to which they must be trained.

- Definition of service cessation notice in relation to live content is unclear as to whether the notice be apply to an individual “stream” of live content or must it be for the service as a whole.
- Definition of content service, with its 22 exemptions, is confusing and would appear to confuse the role of content service provider and content carriage provider.

Labor Senators do not consider that the short time frame between receipt of the submissions and the Inquiry, combined with the length of the Inquiry permitted the Committee to consider these issues in detail.

Conclusion

Labor Senators do not consider that the inquiry process was sufficient. Insufficient time was allowed to review the submissions and to prepare for the inquiry.

Senator Kate Lundy

ALP, Australian Capital Territory

Senator Ruth Webber

ALP, Western Australia

Senator Dana Wortley

ALP, South Australia

Senator Stephen Conroy

ALP, Victoria

Appendix 1

Submissions

Submission

1. Festival of Light
2. Mr David Bath
3. NSW Council for Civil Liberties
4. Arts Law Centre of Australia
5. Electronic Frontiers Australia Inc
6. Australian Mobile Telecommunications Association
7. Communications Alliance Ltd
8. Internet Industry Association
9. Microsoft Corporation
10. Australian Subscription Television & Radio Association
11. DMG Radio (Australia) Pty Ltd

Appendix 2

Public Hearing

Friday, 1 June 2007 – Canberra

Arts Law Centre of Australia

Ms Katherine Giles, Solicitor

Australian Mobile Telecommunications Association

Mr Chris Althaus, Chief Executive Officer

Ms Debora Kanak, Manager, Policy

Mrs Jane van Beelen, Deputy Director, Telstra Regulatory

Ms Trudi Bean, Corporate Counsel, Optus

Microsoft Corporation

Ms Julie Inman-Grant, Regional Director, Internet Safety and Security

NSW Council for Civil Liberties

Mr Michael Walton, Committee Member

Mr Matthew Hallinan, Intern

Festival of Light

Mr Richard Egan, National Policy Officer

Australian Communications and Media Authority

Ms Nerida O'Loughlin, General Manager, Industry Outputs Division

Mr Vince Humphries, Manager, Education and Telephone Content Section

Department of Communications, Information Technology and the Arts

Dr Rod Badger, Deputy Secretary, Strategy and Content

Dr Simon Pelling, Acting Chief General Manager, Content and Media Division

Mr Simon Cordina, General Manager, Digital Content Branch, Content and Media Division