

Microsoft Corporation

Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Provisions of the Communications Legislation Amendment (Content Services) Bill 2007

Microsoft Corporation (“Microsoft”) appreciates the opportunity to comment on the *Communication Legislation Amendment (Content Services) Bill 2007* (Cth) (“Content Services Bill”).

At the outset, Microsoft notes that this submission is not made on behalf of ninemsn, the Australian joint venture between Microsoft and Publishing and Broadcasting Limited. The Content Services Bill is likely to regulate Microsoft and ninemsn rather differently, given that ninemsn hosts content in Australia and Microsoft does not. Consequently, the views expressed in this submission are Microsoft’s and should not be taken to represent those of ninemsn.

1 Microsoft’s perspective on the Content Services Bill

- 1.1 Microsoft has reviewed the Content Services Bill from its perspective as a global provider of content services. The vast majority of Microsoft’s content services are provided from the United States and, although Microsoft does not host any content in Australia, many of our content services are made available to users based in Australia. These services are currently used by hundreds of thousands of Australians everyday. In these circumstances, Microsoft is concerned to ensure that, to the greatest extent possible, Australia’s approach to the regulation of internet content is harmonised with that enacted or proposed in other jurisdictions around the world. This harmonisation assists offshore content providers, such as Microsoft, to make available their services to consumers in Australia and around the world on substantially the same terms.
- 1.2 Microsoft’s perspective on the Content Services Bill is also informed by its support for the Australian Government’s existing approach toward the extra-territorial application of Australian internet content regulation, as embodied in Schedule 5 of the *Broadcasting Services Act 1992* (Cth) (“Broadcasting Services Act”). That Schedule regulates offshore content providers to the extent that they host content in Australia. Microsoft believes that this approach is reasonable and pragmatic, and strongly supports its preservation in the Content Services Bill.
- 1.3 Finally, Microsoft’s views on internet content regulation in Australia and around the world are influenced by Microsoft’s commitment to creating a safer online experience for our users. As described more fully in section 6 below, Microsoft has made a number of significant technological and organisational investments toward ensuring that objectionable and/or illegal content is not made available using our services. Microsoft has made these investments even in the absence of legislative requirements to do so, and considers that this proactive approach to online safety demonstrates the importance that Microsoft ascribes to it.

2 Microsoft’s concerns with the Content Services Bill

- 2.1 Microsoft wishes to draw to the Committee’s attention three key concerns that it has in relation to the Content Services Bill:

- (a) the potential application of the Bill to offshore “links service” providers, particularly in its application to user generated content;
- (b) the uncertain application of the “live content” limb of the definition of “Australian connection”; and
- (c) the structure of the definition of “content services”.

3 Links services and user generated content - links from websites hosted outside Australia to prohibited content hosted in Australia

- 3.1 Microsoft understands that the Australian Government’s motivation for introducing the Content Services Bill was to extend Australia’s existing internet content regulation (as embodied in Schedule 5 of Broadcasting Services Act) to ephemeral content and other services delivered over convergent devices. However, Microsoft is concerned that, in seeking to do so, the Bill as currently drafted unintentionally departs from the Government’s stated position on the extra-territorial application of Australia’s internet content regulation.
- 3.2 Consider, for example, the likely position of offshore providers of “links services”. As the Bill is currently drafted, service providers such as Microsoft would be classified as offshore links service providers and fall within the scope of regulation whenever the content that they link to is hosted in Australia. For example, Microsoft will fall within the scope of the proposed regulation when a user of Windows Live Spaces¹ - Microsoft’s social networking site (another similar site is MySpace) - creates a link to prohibited content that is hosted in Australia. This result follows despite the fact that Windows Live Spaces is hosted in the US, and Microsoft did not itself create the offending link - a user of Windows Live Spaces did.
- 3.3 Microsoft considers that it is inappropriate and unnecessary to regulate offshore links service providers in these circumstances. Australia already has clear jurisdiction over the person(s) in Australia who host the prohibited or potential prohibited content, and it would represent a significant departure from the Australian Government’s current stance on the extra-territorial application of its internet content regulation if offshore content providers were subject to Australian regulation merely because the content that they link to is hosted in Australia.
- 3.4 Furthermore, the application of the Content Services Bill to user generated content, such as a link created by a user of Windows Live Spaces, represents a significant departure from the approach taken in other jurisdictions. For example, under the European Commission’s proposed Audiovisual Media Services Without Frontiers Directive,² “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. On this question, Microsoft strongly supports the European Commission’s proposed approach, and notes that it is consistent with Microsoft’s understanding of the Australian Government’s policy intent in relation to the Bill.
- 3.5 To address these concerns, Microsoft recommends that the Australian Parliament:

¹ See <http://spaces.live.com/>.

² See Commission of the European Communities, *Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC* (29 March 2007) Available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0170en01.pdf.

- (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.

3.6 By adopting the recommendations in paragraph 3.5 above, the Australian Parliament will further the important goals of targeted regulation and harmonisation with the laws of other jurisdictions.

4 Origination of live content - definition of “Australian connection”

4.1 Microsoft is also concerned 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 Australian Government. Paragraph (b) of the definition of “Australian connection” in proposed section 3(1) of Schedule 7 provides that "a content service has an Australian connection if, and only if, (b) any live content provided by the content service originates in Australia". Microsoft's concern with this paragraph is that it does not specify how to identify the place where the live content originates. This is particularly problematic where live content is generated interactively by a number of people located in different parts of the world. For example, Microsoft's Xbox Live service³ allows users around the world to play online computer games with each other. In doing so, an Australian based player of Xbox Live may execute a move that affects the content streamed to the other non-Australian players of the game. In our view, it would be inappropriate to characterise such content as originating in Australia (and hence falling within paragraph (b) of the proposed section 3(1) definition of "Australian connection"), but it seems to us that it is a plausible interpretation of the Bill.

4.2 Even where live content is not determined interactively, we consider that the application of paragraph (b) of the definition of “Australian connection” remains uncertain. For example, it is unclear to us whether jurisdiction will exist under paragraph (b) of the definition of “Australian connection” when a Japanese user of Microsoft’s MSN Video service watches a live video of a Wallabies rugby match played in Australia that is licensed and served to Japan by MSN Video whose business and facilities reside in the US. We consider that, in these circumstances, the video should not be taken to originate in Australia, but this result is not clear from the terms of proposed section 3(1)(b) of Schedule 7.

4.3 Microsoft suggests that this uncertainty could be overcome by stating that live content only originates in Australia when its transmission commences from a server located in Australia. So a live stream of a Wallabies game played in Australia that is transmitted to Japanese rugby fans from a server located in Australia would be regulated. By contrast, a live stream of a Wallabies game played in England and transmitted by a server located in England, but that is accessible by fans located in Australia, would not be regulated by this legislation.⁴

³ See <http://www.xbox.com/en-AU/live/multiplayer.htm>.

⁴ Of course, it is likely that English law would apply to this scenario.

5 Definition of “content service”

- 5.1 Given the nascent state of the content services industry in Australia and around the world, Microsoft queries the suitability of a broad basic definition of “content service” that has 22 specific exceptions to it. In Microsoft’s opinion, 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. In the present context, the prospect of new, unforeseen services evolving is real: the content services industry is currently experiencing an extraordinary period of dynamic technological change and market convergence, with the result that industry participants cannot predict with any certainty how the market will evolve and what their service offerings will be.
- 5.2 In deference to this dynamic environment and the goal of regulatory certainty, Microsoft suggests as a first option that the Australian Parliament 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 Microsoft’s view, this approach is preferable to defining what constitutes a content service by way of exception.
- 5.3 A separate concern that Microsoft has with the definition of “content service” is that it does not specify the granularity with which services should be identified for the purpose of applying the definition. For example, is Windows Live Messenger, the Microsoft service comprising instant messaging, voice and video call, and file-sharing facilities, considered a single service for the purposes of the definition of content service, or are each of its component parts considered to be single services? Similarly, does Microsoft’s provision of Windows Live Spaces constitute a single service, or does the provision of each and every forum on Spaces amount to a single service?
- 5.4 If the Australian Parliament decides to proceed with a broad basic definition of “content service” coupled with 22 specific exceptions, Microsoft suggests a second option to the Australian Parliament to include in the Content Services Bill a provision that guides regulated entities as to how to identify a service for the purposes of the applying the definition of “content service”, including its 22 exceptions. Microsoft suggests that this provision should provide that, in characterising a service with multiple features, regard should be given to the dominant feature for which end users acquire the service. That dominant feature should be treated as the service for the purpose of applying the definition of “content service”, including its 22 exceptions. Applying this test to some of Microsoft’s online services, we envisage that Windows Live Messenger would be considered an instant messaging service, while Windows Live Hotmail would be considered a service that enables end-users to communicate by email.

6 Microsoft’s commitment to safer content

- 6.1 Microsoft wishes to highlight to the Committee some of the steps that it has taken to ensure that objectionable and/or illegal content is not made available using its services. Microsoft considers that these steps demonstrate Microsoft’s leadership in this area and its commitment to providing a safe online experience for its users.
- 6.2 The following list represents the technology-related investments Microsoft is making across all forms of content:

- (a) **Content Sharing:** Windows Vista (recently launched PC operating system) provides the ability to restrict downloads. Zune (portable music/content player) can block all other devices (or a specific device) from sending you content.
- (b) **Games:** Both Windows Vista and Xbox 360 provide parents with the ability to select which games their children can play on and offline by industry game rating systems. (The prevailing rating system is used for each geographic market.)
- (c) **Music:** Zune provides families with the ability to block the browsing or purchasing of music flagged as having adult content by the publisher.
- (d) **Search:** Windows Live Search has a “safe search” mode which allows users to self filter search results for sexually explicit images and text.
- (e) **Television:** Microsoft TV IPTV Edition and Foundation Edition, as well as Windows Vista Ultimate Edition, support industry standard parental controls (e.g., PIN based locks) that families can use to restrict access based on program ratings and channels.
- (f) **Video:** Windows Media Player 11 and Xbox 360 provide parents with the ability to restrict viewing of content by industry (Motion Picture Association) ratings.
- (g) **Websites:** Windows Vista and Windows Live OneCare Family Safety both provide families with the ability to filter web content within defined subject categories, or restrict access to websites specifically designed (and appropriate) for children.

6.3 In addition to these technology-related investments, simple reporting mechanisms for Microsoft products and services – where Microsoft has substantial editorial discretion – are in place to report objectionable and/or illegal content to Microsoft for action or possible referral to law enforcement. Microsoft also seeks to enforce its terms of use and proactively moderate content posted to Windows Live services on a “notice and takedown” basis.

7 Further consultation

7.1 Microsoft thanks the Committee for considering its views on the Content Services Bill and would welcome the opportunity to further discuss the matters raised in this submission. To do so, please contact Julie Inman Grant, Director, Internet Safety and Security, Microsoft Asia Pacific on phone +61 3 9286 3251 or email juliei@microsoft.com.