



## Communications Legislation Amendment (Content Services) Bill 2007

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## Communications Legislation Amendment (Content Services) Bill 2007

**Date introduced:** 10 May 2007

**House:** House of Representatives

**Portfolio:** Communications, Information Technology and the Arts

**Commencement:** There are various commencement dates (refer to the table on page 1 of the Bill). The bulk of the Bill, Schedule 1 Part 1, contains new Schedule 7 to the *Broadcasting Services Act 1992*, and is to commence on a date to be fixed by proclamation, or within six months of the date of Royal Assent.

### Purpose

The Communications Legislation Amendment (Content Services) Bill 2007 (Content Services Bill) seeks to amend the [Broadcasting Services Act 1992](#) (the 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.

The Bill also seeks to amend the [Telecommunications \(Consumer Protection and Service Standards Act 1999\)](#) to ensure that Australia's Indian Ocean Territories can be included in regular independent reviews of telecommunications services in regional, rural and remote Australia.

### Background

#### International concern

According to the United Kingdom organisation, Childnet, globally there are one and a half billion mobile phone subscribers. There are nearly 14 million mobile phones in Australia.<sup>1</sup> A significant proportion of mobile phone customers are young people who, with the advent of third generation technology, have access to photography, video, radio, music, games, Internet browsing and personal software applications, including SMS, MMS and video messaging, chat, contact, dating and adult subscription services.<sup>2</sup>

There has been increasing concern internationally that access to these services will compound risks for children and young people that had been previously identified with the advent of the Internet. Concerns range from fear young people will experience greater exposure to material that is pornographic, hateful or violent in nature or material that encourages dangerous or illegal activities, to milder concerns about access to material that is inappropriate, misleading or inaccurate.

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There is evidence to suggest that the possibility of threats to children from mobile phones has materialised in many instances. In Japan, for example, it is claimed that more than 90 per cent of child prostitution cases involve the use of Internet enabled mobile phones. It is also claimed that dating sites, while intended for adults, are increasingly used as covers for paedophilia.<sup>3</sup>

The United Kingdom's advisory body on the development of 'e-strategy', BECTA (Bringing Educational Activity to All), has emphasised that despite the existence of evidence about the dangers access to devices such as mobile phones carry for young people, it remains difficult for parents to supervise access and contacts. BECTA notes that mobile phones are mostly turned on 'and hence a child is always contactable and always vulnerable'.<sup>4</sup> It adds that the dangers are many in the development of mobile technology. The integration of cameras and mobile phones may result in photos of children being circulated without knowledge or permission, online bullying could be compounded and opportunities for legal and financial misuse increase.<sup>5</sup>

## Regulation options

Childnet argues that:

children and young people across the world have a right not only to be empowered through the use of these [mobile phone] technologies, but also a right to be protected as they seek to make the most of the benefits and opportunities which the mobile revolution offers them.<sup>6</sup>

A range of options available to address the issue of regulation of what have been labelled convergent devices, that is mobile phones and other mobile communications devices that can deliver audiovisual content, are currently being explored internationally. Principally, these fall into two camps, self-regulation and co-regulation.

**Self-regulation:** Self-regulation involves the development of rules and codes of conduct by industry. Industry then monitors and enforces those codes without government intervention. Supporters of self-regulation claim that this is the most effective and efficient form of regulation to suit the 'fast-paced and complex' mobile phone and Internet industries. Government interference, it is claimed, only adds to costs for business.

**Co-regulation:** co-regulation involves companies, government and user groups in jointly developing rules and regulations. There are different possible models of co-regulation which allow greater or lesser degrees of freedom to industry, more or less involvement from consumer bodies and government. For example, the United Kingdom Code<sup>7</sup> involves minimal government intervention, whereas there is more government involvement in regulation in Germany and Italy.<sup>8</sup>

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## Basis of Australian policy commitment

### Regulatory regime

The Australian system of media content regulation has principally been co-regulatory. Television, radio and the Internet are regulated jointly through legislation and through industry codes and standards.

### Radio and television

The Australian Communications and Media Authority (ACMA)<sup>9</sup> regulates radio and television content through means such as:

- broadcast licence conditions set out in the BSA
- mandatory program standards that outline the requirements for Australian content and children's programs on commercial television<sup>10</sup>
- industry codes of practice that cover most matters relating to the content and presentation of radio and television programs—including classification and the amount of advertising allowed.<sup>11</sup>

Media content policy principles and objectives upon which legislation and standards are based reflect respect for community standards and understanding of the importance of protecting children from exposure to harmful content.

### Internet regulation

Issues relating to regulation of new and emerging technologies surfaced as early as 1993, when a Senate Select Committee on Community Standards (SSCCS) noted that complex regulatory issues were associated with the availability of pornographic and violent material on bulletin boards, accessed from overseas sources via telephone lines. The Committee urged that consideration should be given to immediate remedial measures.<sup>12</sup>

In 1994, a taskforce investigated the possibility of regulation of computer bulletin boards, which was strongly opposed by industry. In July 1995, following release of a consultation paper on the regulation of on-line services, ACMA also investigated the possible regulation of online services. In June 1996, ACMA recommended that on line service providers develop codes of practice within a self-regulatory framework.

On 15 July 1997 the Government announced the principles for a national approach to regulation of the content of on-line services. These were that material accessed on line should not be subject to a more onerous regulatory framework than 'off-line' material and that a national framework would balance community concerns in relation to content with a need to ensure that regulation did not inhibit industry growth and potential.<sup>13</sup>

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In 1999 the Parliament passed legislation to establish a framework for the regulation of the content of online services. The legislation sought to:

- provide a means for addressing complaints about certain Internet content
- restrict access to certain Internet content that is likely to cause offence to a reasonable adult and
- protect children from exposure to Internet content that is unsuitable for children.<sup>14</sup>

The new regulatory regime placed certain obligations on Internet Service Providers and Internet Content Hosts and required the development of industry codes of practice.

The codes, which came into force on 1 January 2000, have since been revised to keep pace with changes in technology and emerging dangers for children. The most recent codes were approved by ACMA in May 2005.<sup>15</sup> These codes were in response to recommendations contained in the Government's May 2004 report on the operation of the co-regulatory scheme for Internet content, established under Schedule 5 to the BSA (see reference below). They include some protections for children in the mobile Internet environment.

Three codes of practice exist - one for Internet content hosts (ICHS) and two for Internet service providers (ISPs). The matters that must be dealt with in the codes, and the criteria for registration, are specified in Schedule 5 to the BSA. The Codes are registered with and monitored by ACMA. ACMA can seek enforcement action in the Federal Court. Penalties exist for non compliance.

As part of the co-regulatory scheme ACMA provides advice and assistance to families about a range of Internet safety matters, primarily through its Internet safety web site for families<sup>16</sup> and related printed resources. ACMA works with national and international bodies to raise awareness of Internet safety issues and provide parents with information that helps them supervise their children's Internet usage. In particular, ACMA works closely with the police to educate parents and children about Internet safety.

#### Regulatory review

On 13 May 2004, the then Minister for Communications, Information Technology and the Arts tabled the *Report of the Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* (Schedule 5 review).<sup>17</sup> In evaluating the online content scheme in place at the time, the Schedule 5 review considered the impact that convergent devices could have on its operation.

The Schedule 5 Review concluded that appropriate protections needed to be put in place to protect all users of audio visual content on convergent devices. It considered that in the short term rules imposed under the *Telecommunications Act 1997* could address this issue in relation to content delivered on SMS and MMS. In the longer term, however, it

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recommended that existing regulation be reviewed to take into account the nature of new and emerging devices

ACMA consequently established controls, in June 2005, under the Telecommunications Service Provider (Mobile Premium Services) Determination (No. 1) 2005<sup>18</sup> on access to adult content supplied via mobile phones, whether that content was supplied by premium rate SMS and MMS or on proprietary network content portals.

The purpose of the Determination was to provide a framework within which community safeguards relating to mobile premium services were established, and public interest considerations could be addressed, by imposing rules promoting the greatest use of industry self-regulation.

### Addressing emerging stored and ephemeral content issues

#### Regulation of ephemeral content

Despite the existence of the regulatory instruments noted, concerns have continued to be raised about the inability of existing regulation to deal with content issues in relation to mobile phones and live streamed content services.

Concern was particularly important in relation to the issue of regulation of what is labelled as ephemeral content. Ephemeral content is defined as live content. It includes streamed audio visual material and interactive chat services. Controversy surrounding the 'Big Brother' television show in 2006 involved the issue of how to deal with ephemeral content. Existing media regulation ensured that an incident, in which two male contestants allegedly sexually harassed a female contestant, was not shown on television. However, existing online content regulation was unable to prevent streaming on the Internet of video of the incident through Big Brother's web site.<sup>19</sup>

The incident prompted the Communications Minister, Helen Coonan to announce on 5 July 2006 that 'legislation will be introduced into Parliament to extend content regulation to video streamed on the Internet'.<sup>20</sup>

As the Government's Explanatory Memorandum to this Bill notes, new content services, as the Big Brother streaming incident helps to illustrate, 'are not pre-recorded or stored prior to delivery and so cannot be classified or pre-assessed in the same manner as stored content'.<sup>21</sup>

The Content Services Bill is intended to address the issues noted above in relation to 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.

As suggested by the Department of Communications Information Technology and the Arts Report, *Review of the Regulation of Content Delivered over Convergent Devices*,<sup>22</sup> the

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Bill proposes that commercial ephemeral services will be co regulated through processes of pre assessment of content, access restriction or prohibition and complaints handling.

#### Stored content regulation

The Content Services Bill also deals with issues raised by existing regulatory arrangements in relation to stored content. The Government has argued that interim regulatory arrangements ‘were either not designed for content regulation or cannot apply to the full range of convergent content service offerings’.<sup>23</sup> It has chosen to reject a self regulatory option for content and to continue a co-regulatory approach to regulation of new content services.

It has noted that while self-regulation would provide the mobile content industry with flexibility to introduce services, it may not result in consistency of protection for consumers.<sup>24</sup> According to the Explanatory Memorandum this Bill will provide certainty for content providers and ‘enable the responsible rollout of innovative services for consumers’.<sup>25</sup>

#### National Classification Scheme

When it initially introduced online content regulation, the Government was concerned that it should be consistent with other content regulation applied to offline services in Australia. To this end, Internet content regulation has been aligned with the regulation that applies to narrowcast subscription television services under the National Classification Scheme.

The **National Classification Scheme** is a cooperative arrangement between the Commonwealth, States and Territories established by the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act). The Classification Act provides that the Classification Board classifies films (including videos and DVDs), computer games and certain publications. As part of the National Classification Scheme, each State and Territory has enacted classification enforcement legislation that complements the Commonwealth Classification Act. State and Territory classification legislation prescribes penalties for classification offences and provides for enforcement of classification decisions in the particular jurisdictions.<sup>26</sup>

The **National Classification Code** exists as a separate document authorised by the Classification Act. It contains descriptions about the products which would fall within the classification types. For example, the Code sets out the level of depiction of sex and violence and other issues which would cause a film to be classified as G, PG, M etc. The criteria for classification are also contained in the *Guidelines for the Classification of Films and Computer Games* and the *Guidelines for the Classification of Publications*, the latest versions of which came into operation on 26 May 2005.

The Code sets out a number of principles for classification decisions. These include:

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- adults should be able to read, hear and see what they want
- all people should be protected from exposure to unsolicited material that they find offensive
- minors should be protected from material likely to harm or disturb them
- 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.

Under the Classification Act, the matters to be taken into account in making decisions on the classification of films or computer games include:

- the standards of morality, decency and propriety generally accepted by reasonable adults
- the literary, artistic or educational merit (if any) of the publication, film or computer game
- the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character
- the persons or class of persons to or amongst whom it is published or is intended or likely to be published.<sup>27</sup>

Classifications are ranked in a hierarchy of ‘impact’ that take into account the treatment of ‘classifiable elements’ such as violence, sex and language and their cumulative effect.

The Code and classification guidelines are reviewed periodically to ensure that they adequately reflect community standards.

### Position of significant interest groups/press commentary

To date, many industry and consumer groups have not yet commented on the Bill, however there may be comment in forthcoming submissions to the Senate committee inquiry into the bill, due to report on 11 June 2007.<sup>28</sup>

#### Internet Industry Association

The Internet Industry Association (IIA) opposes ‘content filtering’. It has argued that calls for forced network level filtering by ISPs represents ‘an inappropriate and heavy handed response to the important and complex issue of online child protection’ and considers that ‘current arrangements, are adequate to ensure that no Australian child need be exposed to inappropriate material on the Internet.’<sup>29</sup>

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In the IIA view, ‘mandatory solutions... cannot cope with multiple-user households or commercial situations – leaving Australians with a one-size-fits-all solution that takes no account of the different environments in which the internet is used’.<sup>30</sup>

Upon release of the Content Services Bill the IIA commented that it was considering ‘development of further industry codes of practice to form the implementation ‘arm’ of the legislation, to facilitate compliance by industry in a manner which will not impede the ongoing development of the internet in Australia, impose undue burdens on industry or restrict innovation of new content services’.<sup>31</sup>

Australian Mobile Telecommunications Association (AMTA)

AMTA has been supportive of the Government’s general proposal to implement safeguards for children from accessing offensive or harmful material on mobile phones. It has made no public comment since the Bill was introduced.<sup>32</sup>

Australian Consumers Association (ACA)

There appears to be no specific reaction to the Bill from the ACA. However, from previous comments made by the organisation, it appears that ACA supports an industry self regulatory environment, inclusive of community participation in developing and enforcing standards, coupled with a genuine commitment to seeking international standards of content rating as part of global consumer protection. It is also supportive of providing consumers with cost-effective methods to filter or block material that they might find offensive or which might be harmful or distressing to children.<sup>33</sup>

Young Media Australia (YMA)

In a 2004 submission to DCITA, Young Media Australia did not support self-regulation or co-regulation to regulate mobile phones. It called for more restrictive government regulation for mobile phones as this would better take into account that there is less parental control possible for these devices.<sup>34</sup>

Following introduction of this Bill, YMA commented that the new laws would make it more difficult for children to be exposed to violent, sexually explicit or inappropriate material.<sup>35</sup>

#### **ALP/Australian Democrat/Greens/Family First policy position/commitments**

There appears to have been no specific comment from any political parties on this legislation. However, the ALP National Platform and Constitution notes that Labor is supportive of strengthening legislation ‘to meet the challenges of adult and other materials being made available to children and young people on mobile phones’.<sup>36</sup>

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## Financial implications

The Explanatory Memorandum notes that under the proposed scheme the role of ACMA will be expanded, and that it will periodically be required to refer material to the Classifications Board for classification, and pay the associated fee. The 2007-08 Budget papers show that total resourcing for ACMA has increased from \$55.6 million in 2006-07 to \$64.9 million in 2007-08, and a staffing increase from 390 to 420.<sup>37</sup> However it is not stated if this increase is related to ACMA's expanded role under the new scheme set out in this Bill.

The financial impact for content service providers is not expected to be great, particularly given that the new regulations are similar to those imposed for mobile premium services, which the Explanatory Memorandum states have been accepted and implemented by industry.<sup>38</sup>

## Main provisions

### Schedule 1—General content amendments

The key amendment in Schedule 1 is the proposed insertion of a **new Schedule 7 – Content Services** into the BSA. New Schedule 7 has 9 Parts, some of which contain several divisions. The new Schedule outlines how content services to convergent devices (mobile phones, Blackberrys etc) are to be regulated. It is inserted by **item 77**.

**Items 1-76** make minor amendments to the *Australian Communications and Media Authority Act 2005* and the BSA.

#### Part 1: Introduction

**Part 1 of new Schedule 7** provides an overview of the new scheme for regulation of content services, and definitions.

#### Part 2: Classification of content

##### Prohibited content and potential prohibited content

Central to the regulatory regime established in **new Schedule 7** is the concept of 'prohibited content'. **Clause 20**, the key provision, sets out when content will be prohibited.

Content<sup>39</sup> (other than an 'eligible electronic publication') will be prohibited content if one of the following set of conditions apply:

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- the content has been classified RC (Refused Classification) or X 18+ by the Classification Board
- the content has been classified R 18+ and access is not subject to an age verification machine<sup>40</sup>
- the content has been classified MA 15+, access is not subject to an age verification machine, the content is provided by a commercial service (other than a news or current affairs service) and the content does not consist of text and/or still visual images
- the content has been classified MA 15+, access is not subject to an age verification machine, and the content is provided by means of a ‘mobile premium service’<sup>41</sup>.

Content that consists of an ‘eligible electronic publication’ (i.e. an electronic or audio book or magazine) is ‘prohibited content’ if:

- it has been classified RC, category 2 restricted, or category 1 restricted by the Classification Board<sup>42</sup> (**subclause 20(2)**).

Content will be *potential prohibited content* if:

- it has not been classified by the Classification Board and, if it were to be classified, there is a substantial likelihood that it would be prohibited content as defined by clause 20 (**clause 21**).

Classification of content

**Clauses 22–27** set out arrangements for classifying content for the purposes of Schedule 7. Content may be classified either by applications for classification made under this Schedule, or by applications made under the Classification Act.

**Clause 22** sets out the persons who may apply to the Classification Board for the classification of content under this Schedule, and the manner in which that application must be made. Persons who may apply include relevant service providers and the ACMA.

In response to applications for classification of content, the Classification Board is obliged to classify the content in accordance with whichever of clauses 24 and 25 is applicable (**new clause 23**). **Clause 24** deals with classifying films, computer games or electronic books and magazines. **Clause 25** deals with classifying content that does not fit any of these categories—for example content consisting of a webpage containing a mixture of text and moving images. Such material will be classified as if it were a film.<sup>43</sup>

Content may be classified either by applications for classification made under Schedule 7 of the BSA, or by applications made under the Classification Act. In cases where classifications are made under the Classification Act, they are deemed to be classifications for the purpose of this Schedule (**subclause 24(1)**). Where classifications have not been made under the Classification Act they are to be made under Schedule 7 according to the

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applicable rules in the Classification Act (**subclause 24(3)**). In the case of electronic publications they must be classified according to the same rules that would apply to the corresponding print publication (**subclause 24(4)**).

**Clause 26** is a consequential and transitional provision deeming classifications made under the existing Schedule 5 to be classified under the new Schedule 7.

#### Reclassification

**Clauses 28–29** deal with arrangements for the reclassification of content over time. The Explanatory Memorandum states that these provisions largely mirror the corresponding arrangements in the Classification Act.

If content has been classified under Schedule 7 by the Classification Board, then the Board must not reclassify the content within 2 years. After that 2 year period, the Board may reclassify the content if required to do so by the Minister, the ACMA, a designated content service provider or on the Classification Board's own initiative (**clause 28**). **Clause 29** would require the Board to give notice of its intention to reclassify and invite submissions on this matter.

#### Review of classification decisions

**Clauses 30–35** deal with the review by the Classification Review Board ('Review Board') of classification decisions that are made under this Schedule or under the Classification Act.

Persons who may apply to the Review Board for a review of a decision are the Minister, the ACMA, a designated content service provider and a person aggrieved by the classification (**clause 30**).

**Clauses 31** and **32** set out the formal requirements for an application for review of a classification.

**Clause 33** provides that for the purposes of reviewing a decision to classify content under this Schedule, the Review Board will be able to exercise all the powers and discretions that are conferred on it by this Schedule, and must make a written decision confirming the classification or reclassifying the content.

If the Review Board reclassifies the content, that decision will have effect under this Schedule and existing Schedule 5 as if the content had been reclassified by the Classification Board (**subclause 33(2)**). The Explanatory Memorandum explains that this means that references in this Schedule to content classified by the Classification Board also apply to content that has been reclassified by the Review Board.<sup>44</sup>

**Clauses 34** and **35** are provisions aimed at providing consistency of classification between review decisions made under the Classification Act and Schedules 7 and 5 of the BSA.

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**Clause 34** deals with the review of classification of content consisting of a film, or a computer game by the Review Board under the Classification Act. It provides that if the film or computer game has been classified under the Classification Act, and that classification is reviewed by the Review Board under that Act, the resulting classification decision will be effective for this Schedule and existing Schedule 5.

**Clause 35** deals with the review of classification of electronic publications by the Review Board. It provides that if a *print* publication has been classified under the Classification Act, and that classification is reviewed by the Review Board under that Act, the resulting classification decision will have effect in relation to the corresponding *electronic* publication under this Schedule and existing Schedule 5.

The Explanatory Memorandum cites the following example:

If the Classification Review Board reviews a decision under the Classification Act to classify a book of photographs as Unrestricted, and decides to re-classify that book as Category 1 Restricted, the latter classification will apply to the eligible electronic publication of that book.<sup>45</sup>

**Clause 36** would provide that section 57 of the Classification Act, (which deals with procedural matters relating to decisions of the Classification Board), will apply in the same way to the consideration by the Classification Board of a matter arising under this Schedule.

**Subclause 36(2)** clarifies that a number of provisions of the Classification Act will not apply to a classification under this Schedule. The particular provisions are spelt out in the Explanatory Memorandum.<sup>46</sup>

### Part 3: Complaints to, and investigations by, the ACMA

A major part of the Bill sets up a complaints handling system for convergent content services. The government has opted for a co-regulatory approach which will see industry participants 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. In the event that they are not signatories to a code of practice, or the matter is unresolved, complaints can be referred to the Australian Communications and Media Authority (ACMA). This reflects ACMA's existing role for Internet regulation. 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 practicable with broadcasting content regulation which is generally well understood by consumers and industry alike.

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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 consumer complaints are always dealt with appropriately.<sup>47</sup>

This part of the Bill sets out the ACMA complaints handling system.

Division 1: Making a complaint to the ACMA

**Subclause 37(1)** states that if a person has reason to believe that end-users in Australia can access prohibited content or potential prohibited content provided by a content service, the person may make a complaint to the ACMA about the matter. Similarly, under **subclause 37(2)**, if a person believes that a hosting service is hosting prohibited or potential prohibited content, they may make a complaint to the ACMA. Complaints may also be made about links to prohibited or potential prohibited material (**subclause 37(3)**).

The complaint must:

- identify the content
- if the content is stored – set out how to access the content (for example, a URL, password, or the name of the newsgroup), and the name of the host country if known. However, a complainant is not required to give this information if to do so would cause them to contravene a Commonwealth or State/Territory law (**subclause 37(5)**)
- if the content is live content – set out details of how the content was accessed, the date and time it was accessed, and the reasons why the complainant believes it was prohibited or potential prohibited content. Complaints regarding live content must be made within 60 days of the occurrence of the incident
- be in writing, or in a ‘specified kind of electronic transmission’ (i.e. email) (**clause 39**), and
- be made by an Australian resident, a body corporate with activities in Australia, or by the Commonwealth or a State or Territory (**clause 41**).

**Subclause 40(1)** provides that if a complaint regarding live content is accompanied by a recording of the live content, or part thereof, the making of the recording and the giving of it to ACMA does not infringe copyright. However, under **subclause 40(2)**, ACMA may override this provision if it is satisfied that the complaint is frivolous, vexatious, or not made in good faith; or if the complaint was made for the purpose of undermining or frustrating the operation of the content regulation scheme; or if the making of the recording would contravene a Commonwealth, State or Territory law (other than the *Copyright Act 1968*).

**Clause 42** provides for the escalation of complaints made under an industry code, so long as the complaint meets the requirements of subclauses 37 (1), (2) or (3) or 38 (1) or (2);

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and the complaint is referred to ACMA under the industry code; meaning that the consumer does not need to go through the process of making the complaint again.

#### Division 2: Investigations by the ACMA

Under **clause 43**, ACMA must investigate a complaint made under Division 1 (outlined above), and notify the complainant of the result. However, ACMA may choose not to investigate a complaint if it is satisfied that:

- it is frivolous, vexatious or not made in good faith
- it was made for the purpose of frustrating or undermining the content regulation scheme, or
- a complaint has been, or could have been, made under an industry code or standard as outlined in Part 4 of the Bill.

ACMA may also launch its own investigations, with **clause 44** setting out the matters which it may investigate.

**Clause 45** gives ACMA wide ranging power to conduct investigations ‘as the ACMA thinks fit’, including the power to obtain information from such persons, and make such inquiries, as it thinks fit. These powers are in addition to those provided to ACMA under Part 13 of the BSA, which include the power to call for submissions, call for persons to attend a hearing or provide documents, conduct hearings in private, and make reports.

**Clause 46** provides protection against civil proceedings for any person because they make a complaint under Division 1, or a statement to ACMA, or providing a document to ACMA, for the purposes of an investigation.

#### Division 3: Action in relation to hosting services

This part of the Bill gives ACMA the power to issue hosting services with a ‘**take-down notice**’, directing them to remove material that has been judged to be prohibited content (**subclause 47(1)**). The provisions throughout the Bill only relate to hosting services with an ‘Australian connection’. **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.

In relation to potential prohibited content, ACMA is given authority to make a judgement that if the material in question were to be classified by the Classification Board, there is a substantial likelihood that it would be classified as RC or X 18+; or category 2 restricted (clause 47(2)); or R18+ or MA15+ (**subclause 47(3)**) (see explanations above). If ACMA makes such a judgement, it must issue the hosting service with an ‘**interim take-down notice**’, to apply until the Classification Board has given the content a classification.

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If the Classification Board finds that the material does constitute prohibited content, ACMA must then issue the hosting service with a ‘final take-down notice’ (**subclause 47(4)**). This decision may be reviewed by the Administrative Appeals Tribunal (AAT) (see Part 8 of the Bill – Review of Decisions).

For the lower classifications of R18+ or MA15+; host providers may continue to provide the service so long as it is subject to a ‘restricted access system’ which is approved by ACMA (**subclause 47(7)**).

If a hosting service voluntarily ceases to host content that is subject to an interim take-down order, ACMA may accept their undertaking not to host the content, revoke the interim take-down order, and tell the Classification Board that classification of the material is not necessary (**clause 48**).

If, after review, the Classification Board reclassifies content that is subject to a final take-down notice, and thus it ceases to be prohibited content, ACMA must revoke the final take-down notice, and write to the service provider accordingly (**clauses 49-51**).

**Clause 52** provides anti-avoidance measures via the use of ‘**special take-down notices**’. If an interim or final take-down notice is in place for particular content, and ACMA is satisfied that the hosting service is hosting, or intending to host, content that is the same as, or substantially similar to, the prohibited content, then ACMA may issue a special take-down notice directing the service provider to take down the material as in the earlier provisions of the Bill. These special take-down notices apply at any time when an interim or final take-down notice is in force.

Interim take-down notices, final take-down notices, and special take-down notices must all be implemented as soon as practicable, or by 6pm on the next business day after the notice was given to the service provider (**clause 53**).

#### Division 4: Live content services

This section of the Bill outlines procedures for removal of prohibited or potential prohibited content for live content services. The procedures are largely the same as those outlined above for non-live content. For live content, the ACMA notices are termed ‘**final or interim service-cessation notice**’

For potential prohibited content, ACMA must have a recording of the content, or a copy of such a recording, and provide this to the Classification Board for classification (**subclause 56(2) and (3)**).

If, during an investigation in which ACMA is satisfied that live content is prohibited content, or potential prohibited content, the service provider gives ACMA a written undertaking to cease providing the live content, ACMA may accept this and is not

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legislatively required to continue on with an interim or final service-cessation notice (**clause. 57**). Such a provision is not available to the ACMA in cases of non-live content.

The revocation and AAT review procedures for service-cessation notices are essentially the same as for non-live content, as outlined above.

There is no anti-avoidance clause for live services, as there are for non-live and link services (**clauses 52 and 67**).

#### Division 5: Links services

Again, the procedures in this part of the Bill are largely similar to those outlined above. If ACMA believes that end-users in Australia can access prohibited or potential prohibited content using a link provided by a links service with an Australian connection, then it will issue the links service provider with an **interim or final 'link-deletion notice'**.

Links providers may voluntarily delete the link, prior to the issue of a final link-deletion notice, in which case ACMA can advise the Classification Board not to proceed with the classification (**clause 63**). Revocation and AAT review procedures for link-deletion notices are as outlined above.

#### Division 6: Law enforcement agencies

Under Division 6 of new Schedule 7 to the BSA, if during the course of an investigation ACMA is satisfied that content is prohibited or potential prohibited content, and it is of a sufficiently serious nature to warrant referral to a law enforcement agency, then ACMA must notify the content to the Australian Federal Police (AFP), or another person or body if there is an agreement to do so between ACMA and an Australian police force.

**Clauses 70-72** provide for the deferral of action by ACMA in relation to hosting services, live content services and links services, if a member of an Australian police force satisfies ACMA that the taking of action should be deferred for a particular period, in order to avoid prejudicing a criminal investigation. The Explanatory Memorandum points to an example of where this may occur:

In cases of extreme concern, for example paedophiles providing illegal material or exploitation of children through the use of online services, it is possible that a police investigation may be concurrent with a complaint to the ACMA about particular material. The public nature of the ACMA complaints and investigations process proposed in the Bill could prejudice a police investigation in these circumstances.

As a safeguard, therefore, it is proposed to give ACMA discretion to defer action where a member of the Federal, State or Territory police satisfies the ACMA that an investigation should be deferred for a specified period.<sup>48</sup>

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## Part 4: Industry codes and standards

Under this Part:

- Division 1 provides a simplified outline of the Part
- Division 2 provides, for the purposes of the part, interpretation of the terms: industry code, industry standard, content activity, section of the content industry, participant of the content industry and designated body. For the purposes of the Part:
  - Industry code – a code developed under the Part
  - Industry standard – a standard determined under the Part
  - Content activity – an activity that consists of providing a hosting service, live content service or commercial content service that has an Australian connection
  - Section of the content industry – hosting services providers, live content providers, links service providers and commercial content providers with an Australian connection
  - Participant of the content industry – member of a group that constitutes a section of the content industry
  - Designated body – a body declared as such for the purposes of the Part.
- Division 3 states regulatory policy.

Industry codes

**Clause 80** states that sections of the content industry should develop codes to apply to industry participants. ACMA should make reasonable efforts to ensure the codes and standards are registered.

**Clause 81** states the matters that industry codes and standards should deal with, either individually or jointly with regards to providing content. Trained content assessors are to be engaged to ensure that content (both stored and live) that has not been classified by the Classification Board or content that would be likely to be classified by the Classification Board as RC, X18+, R18+ or Ma 15+ is not to be provided by commercial content service providers.

**Clause 82** sets out examples of matters that may be dealt with by industry codes and standards. These relate to a person's right to complain, assistance to be given to assist people to complain person's to complain and procedures to be followed to deal with complaints.

The clause also deals with referral of complaints to ACMA if complainants are dissatisfied with the way with which complaints are handled and procedures that should be initiated if

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prohibited content is delivered to or made available for access by end users of commercial content service providers.

Other matters that may be dealt with under industry codes and standards are: information, advice and procedures to be used in dealing with safety issues in relation to chat services, procedures to inform producers of content about legal responsibilities and record keeping requirements.

Division 4 deals with the registration of industry codes. **Clause 85** applies if a body or association develops a code. The code is to be developed after consultation with the public and the industry and after consideration has been given to the views expressed by these groups. The code is to deal with matters of substantial relevance to the community. ACMA must register the code by including it in the Register of industry codes under Clause 101.

Under **clause 86** ACMA may request a body or association to develop an industry code if it is satisfied that development of the code:

- is necessary to provide appropriate community safeguards
- is necessary to deal with the performance or conduct of participants in a particular section of the industry, or
- if it is unlikely an industry code would be developed within a reasonable period.

If a code is contravened ACMA may direct participants in the industry in writing to comply. This provides an incentive for self-regulation.

#### Industry standards

Under **clauses 91 and 92** ACMA may determine an industry standard by legislative instrument if a request to a body or association for an industry code is not complied with. ACMA must consult with the particular body before determining the standard. ACMA may also determine an industry standard if it is satisfied there is no representative body or association for a section of the industry.

ACMA may determine industry standards if it is satisfied that a registered industry code is wholly or partially deficient and if it has given notice requesting that deficiencies in the code are remedied and if this has not been done within a specified period (**clauses 93 and 94**). In determining the standard ACMA must consult the industry body or association. In the case of a total failure of a code, the existing code ceases to apply when the industry standard comes in to force. In the case of a partial failure of a code the industry code has no effect, only to the extent to which it deals with the deficient matter or matters when the industry standard comes into force.

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ACMA is required under **clause 96** to give formal warning if persons contravene industry standards. It may vary or revoke standards if it is satisfied it is necessary to do so to ensure appropriate community standards and adequate regulation. Before determining or varying a standard ACMA must consult with the public and the designated industry body.

Under **clause 101** ACMA is required to maintain a Register which includes all industry codes and industry standards.

#### Part 5: Designated content/hosting service provider determinations

Part 5 allows ACMA to make rules that apply to designated content/hosting service providers, via legislative instrument. These determinations will only have effect to the extent that they are authorised by the following sections of the Constitution:

- paragraph 51(v), either alone or when read together with paragraph 51(xxxix), or
- section 122 if it would have been authorised by paragraph 51(v) (either alone or when read together with paragraph 51(xxxix)) if section 51 of the Constitution extended to the Territories.

Paragraph 51(v) of the Constitution gives the Parliament the power to make laws in respect to postal, telegraphic, telephonic and other like services. Paragraph 51(xxxix) relates to the Parliament's power to make laws with respect to matters incidental to the execution of any power vested in the Constitution. Section 122 gives the Parliament the power to make laws in relation to the Territories.

The determinations must relate to a matter specified in the BSA Regulations (**subclause 104(4)**). The determinations may empower ACMA to make decisions of an administrative character (**subclause 104(5)**).

The Minister may, via legislative instrument, exempt a specified content/service hosting provider from all determinations, or specified determinations (**subclauses 105(1) and (2)**). The determinations may be conditional or unconditional (**subclause 105(3)**).

#### Part 6: Enforcement

**Part 6 to new Schedule 7 of the BSA** creates offences for contravention of the rules set out throughout Bill.

**Clause 106** provides that a person who is a designated content/hosting service provider whose conduct contravenes a rule set out in new Schedule 7 to the BSA will be liable for a penalty of 100 penalty units. Each day the contravention continues is counted as a separate offence (**subclause 106(2)**).

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Under the *Crimes Act 1914*, a penalty unit currently stands at \$110. Therefore, a service provider will face a fine of \$11,000 per day for contravention of a rule under the Act (for example, failure to remove content subject to a final take-down notice).

**Clause 107** creates a civil liability for contravention of the rules by a designated content/hosting service provider. Under **subclause 107(3)** a separate contravention is taken to have occurred for each day during which the contravention continues.

**Clause 108** allows ACMA, if they are satisfied that a content/hosting service provider has contravened, or is contravening, a rule which applies to them, to issue the content/hosting service provider with written directions to take remedial action towards ensuring that they do not contravene a rule. These may include, for example:

- a direction that the provider must implement effective administration systems for monitoring compliance, or
- a direction that the provider educate their staff regarding the requirements of the Act, in so far as they affect the staff.

If a person contravenes an ACMA remedial direction, they are liable for a penalty of up to 100 penalty units, counted for each day of the contravention. Civil penalties may also apply (**subclauses 108(6-8)**).

ACMA may issue formal warnings to a person if they are satisfied that the person has, or is, contravening the rule that applies to them (**clause 109**).

If, in the event that the above measures fail to prevent a contravention, then ACMA may apply to the Federal Court for an order that the person cease providing the contravening content/hosting service (**clause 110**).

## Part 7: Protection from civil and criminal proceedings

**Clause 111** provides protection from civil proceedings for hosting providers, live service providers or links providers, if they are complying with take-down, service-cessation, or link-deletion notices provided for under the Act.

**Clause 112** provides protection from criminal proceedings for ACMA, its members or associate members, staff and consultants, members of the Classification Board and Classification Review Board and staff/consultants, and officers made available to the Classification Board, in respect of collection, possession, distribution, delivery, or copying of content or material; or the doing of any other thing in relation to content or material in connection with the exercise of their powers and functions under the Act. The Explanatory Memorandum states:

In effect, immunity will be granted with respect to a prosecution that may otherwise arise in relation to...offensive content or material (ie, material that has been classified

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RC or X18+). This amendment is necessary to enable the various regulators to effectively perform their statutory functions under this Schedule.<sup>49</sup>

## Part 8: Review of Decisions

As outlined above, content/hosting service providers may apply to the AAT for review of ACMA decisions in relation to content services, live services, links services, registration of industry codes, directions, determinations and remedial directions.

## Part 9: Miscellaneous

**Clause 114** gives ACMA some additional functions for the purposes of Schedule 7 to the BSA. The general effect of these is to widen ACMA's overview of the content services industry, and provide for education and awareness campaigns for children and parents in relation to content services.

**Clause 118** provides for a review within three years of the commencement of Schedule 7. The review, to be tabled in Parliament, will cover the operation of the new Schedule, and whether it should be amended or repealed.

This would seem a good idea given the rapid pace of technological development in content services, and some of the concerns raised regarding the classification of content.

## Schedule 1, Part 2

This part of the Bill provides general application and transitional provisions.

## Schedule 1, Part 3

This part provides some special transitional provisions:

- **Item 106** provides that the Director of the Classification Board may develop and approve training to be provided for people to become a 'trained content assessor' as required by Clause 18 in Schedule 7 to the BSA, prior to the Schedule coming into operation. The 12 months within which the training must have occurred, may also begin prior to the Schedule coming into operation.
- **Item 107** allows for industry codes, as required under Part 4 of Schedule 7 to the BSA, to be developed before that Schedule has come into operation. ACMA or any other person, body or association may exercise a power conferred by, or do anything under, Division 4 of Part 4 of Schedule 7, as if it had already come into operation.
- However, any codes developed and registered prior to the Schedule's operation will only come into effect when the Schedule comes into operation (**item 107(4)**).

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## Schedule 2

Schedule 2, Parts 1-2 makes minor amendments to the BSA and amendments and transitional provisions to the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

## Schedule 3

Schedule 3 to the Bill amends the definition of 'Australia' within the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. Sections 158P(10) and 158T(7) will be amended to state that 'Australia' includes an external Territory prescribed for the purposes of section 10 of the *Telecommunications Act 1997*. Under this Act, 'Australia' includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands but not any other external Territory that may in the future be prescribed for the purposes of s. 10 of the Telecommunications Act.

This will ensure that the proposed Regional Telecommunications Independent Review Committee must review the adequacy of telecommunications services in the above two remote Territories.

## Concluding comments

In the scheme to be set out in Schedule 7 to the BSA, the government has opted for a co-regulatory approach for content services delivered over convergent devices. The Bill was developed in response to concerns about the dangers posed to children from inappropriate content on mobile phone and other technologies, and the limited opportunities there may be for parents to supervise such access.

Early indications from industry groups are that they are happy with the co-regulatory approach, as has been implemented with the Mobile Premium Services Industry (MPSI) Scheme, approved by ACMA in October 2006. As part of its regulatory role, ACMA gains an 'own-motion' investigative power for a range of matters listed in the Bill. Further indication of industry and other views may be obtained via submissions and evidence to the [Senate Committee](#) inquiry into the Bill (forthcoming).

The 'Big Brother' incident in 2006 was notable in that the content was re-transmitted on a number of different mediums, such as YouTube, MySpace, mobile phones etc. The impact of this Bill on such a phenomenon is yet unclear. However, the original transmitter of the material may be fined. This 'multi-transmission' phenomenon warrants the proposed review, within three years, of the effectiveness of the new regulatory regime for content services on convergent devices, as provided by the Bill.

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## Endnotes

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5. *ibid.*
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10. The Australian Content Standard requires all commercial free-to-air television licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6 am and midnight. In addition there are specific minimum annual sub-quotas for Australian (adult) drama, documentary and children's programs. See:  
<http://www.aba.gov.au/contentreg/codes/television/documents/ACS2004Fulltext.pdf>.  
Children's television standards are at:  
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13. Joint Media Release, *National framework for on-line content regulation*, 15 July 1997.
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  38. Explanatory Memorandum, p. 3.
  39. The definition of 'content' in clause 2 has the effect that content will be subject to regulation under Schedule 7 regardless of its form.
  40. The term used in the Bill is 'restricted access system'. This is further defined in clause 14.
  41. This is further defined in clause 2.
  42. There are four classification categories for publications: Unrestricted, Unrestricted – Mature, Restricted Category 1 Not available to persons under 18 years, Restricted Category 2 Not available to persons under 18 years. Publications which contain elements which exceed the other categories are classified RC. They cannot be legally sold in Australia.
  43. Explanatory Memorandum, p. 53.
  44. *ibid.*, p. 56.
  45. *ibid.*, p. 57.
  46. *ibid.*, p. 58.
  47. *ibid.*, pp. 13 and 18.
  48. *ibid.*, p. 80.
  49. *ibid.*, p. 94.

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