

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.

