

Online Content Regulation – The New Regime

Adrian Lawrence and Ryan Grant outline the new Content Services regime that will apply to internet and mobile content.

On 21 June 2007, the Federal Government passed the *Communications Legislation Amendment (Content Services) Act 2007* (Cth) (**Amending Act**). The Amending Act received royal assent on 20 July 2007, but the majority of the operative parts will only commence on proclamation.

The Amending Act, which amends the *Broadcasting Services Act 1992* (Cth) (**BSA**), involved a complete redraft of the proposed *Communications Legislation Amendment (Content Services) Bill 2006* (Cth) (**2006 Bill**) which related to mobile and live internet content and was released to select industry bodies for consultation late last year. In its released form, the 2006 Bill presented some serious issues for content providers, in particular proposed criminal sanctions for contravention of the regulatory scheme.

Many of the issues of concern to the industry in the 2006 Bill have been addressed in the Amending Act.

Key changes to the BSA

1. A new Schedule 7 has been added to regulate hosts of stored content and providers of live content. Schedule 5 to the BSA, which previously regulated both hosts and Internet Service Providers (**ISPs**) in respect of stored content, now only applies to the activities of ISPs.
2. Under Schedule 7:
 - (a) Hosting service providers may be subject to ACMA take-down notices if they host prohibited (or potentially prohibited) content;

- (b) Live content service providers may be subject to ACMA service-cessation notices if they provide a live content service that contains prohibited (or potentially prohibited) content; and
- (c) Links service providers may be subject to ACMA link-deletion notices if they provide a link that links to prohibited (or potentially prohibited) content.

3. In addition, 'commercial' content service providers (service providers that supply content for a fee and as part of a profit-making enterprise) will be subject to positive obligations to ensure that risky content is assessed before it is made available. These obligations are to be imposed as part of a co-regulatory industry code scheme.

Background to the Amending Act

Big Brother

During July 2006, raw feeds from cameras located on the set used for Channel 10's Big Brother reality television programme were streamed live over the internet. In the early hours of one Saturday morning, an incident of an allegedly sexual nature occurred involving two of the male and one of the female housemates. The incident was streamed live over the internet to a small number of paid subscribers, one of whom made a recording of the foot-

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age, which was then made available on video-sharing sites. In turn, some online news sources linked to the video on the video-sharing sites.

At the time, the specific statutory powers under Schedule 5 of the BSA did not extend to live online content. Although police decided not to prosecute the housemates, and although the online news sources voluntarily removed links to the content, the former Minister for Communications, Information Technology and the Arts issued a media release stating that ACMA:

will be directed to undertake a detailed review of the free to air television code of practice and legislation will be introduced into Parliament to extend content regulation to video streamed on the Internet.

The 2006 Bill

The 2006 Bill proposed the regulation of 'content services', defined as a service that delivers content over a carriage service where a person needs special equipment to receive the service. The proposed definition of content was extremely broad, including text, data, sounds, visual images or any other form or combination of forms. There were, however, a number of

specific exceptions, including broadcasting services, certain news and current affairs services, SMS, MMS, search engines and voice and video calls. Content that was classified X18+ or RC, or content that had a substantial likelihood of being classified as such would have been prohibited. Potential or actual MA15+ or R18+ content would have been required to have an age-based access restriction system.

Under the 2006 Bill, if prohibited or potentially prohibited content was made available or delivered over a carriage service, the content provider was to be directly liable for such provision. This was a significant step away from the previous Schedule 5 regime, which was based on a notice and take-down process. Furthermore, for streamed content, the provisions of the 2006 Bill would have required every 10 minutes block of content to be pre-assessed to determine whether it was 'substantially likely' that the segment contained prohibited content.

A key concern with the 2006 Bill was the onus it placed on content providers to monitor content just in case content contained potential or actual prohibited content, given that once delivered, the content provider would have been liable for a fine of up to \$5,500 per contravention. In this regime only carriage service provid-

ers were given a 'reasonable diligence' defence. Submissions on the 2006 Bill by online publishers pointed out that the regime would have imposed direct pre-classification and censorship obligations on the online delivery of material that had not previously been the subject of any other forms of classification.

Key provisions of the Amending Act

The Amending Act steps back from some of these key areas of concern, retaining, as its primary mode of regulation, a notice and take-down process.

It regulates both stored and live content accessed by means of a carriage service. The Amending Act repeals Schedule 5 of the BSA except to the extent that Schedule 5 regulates internet service providers. It introduces a new Schedule 7 that otherwise sets out the framework for regulation of all forms of online content, including both static and live content.

What is regulated: 'content service'

The core principle of the Amending Act is the regulation of a 'content service'. 'Content' is defined to mean content whether in the form of text, data, speech, music or

other sounds, visual images (animated or otherwise), and content in any other form or in any combination of forms.

A 'content service' is a service that delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of a carriage service or a service that allows end-users to access content using a carriage service.¹ The definition has a number of exceptions, including broadcasting services, datacasting services, internet directories, internet search engines and end-to-end voice calls. In effect, a content service covers most content-related services provided over the internet and over mobile telephones.

It should also be noted that there is a specific carve-out from the scope of the content service providers definition for providers that merely supply a carriage service that enables content to be delivered or accessed, and for persons who merely provide a billing service, or a fee collection service, in relation to a content service.²

Stored and live content

Content may take the form of 'stored content' or 'live content'. Stored content means content kept on 'any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device'. For this purpose, any storage of content on a highly transitory basis as an integral function of the technology used in its transmission is to be disregarded.

Live content is content which is not stored content.³ Accordingly, the legislative intention appears to be that 'live content' only covers content that is provided to the public at the same time that it is created (ie that is not stored in any way other than on the transitory basis referred to above).

Provided to the public

A content service is provided to the public if, and only if, the service is provided to at least one person outside the immediate circle of the person who provides the service.

What content is regulated: 'prohibited content'

Prohibited content

Prohibited content is,⁴ content where the content has in fact been classified by the Classification Board, with the result that:

- the content is RC or X18+;
- the content is R18+ and access to the content is not subject to a restricted access system;
- the content is MA15+, access to the content is not subject to a restricted access system and the content is provided as part of a commercial content service; or
- the content is MA15+, access to the content is not subject to a restricted access system, and access to the content is provided by means of a mobile premium service.

Potential prohibited content

Content is potential prohibited content if the content has not yet been classified and, if the content were to be classified, there is a substantial likelihood that the content would be prohibited content.⁵

Eligible electronic publications

In response to issues raised during the legislative process by publishers, the Amending Act introduces exceptions for material that is freely available in print version to the Australian public, defined as 'eligible electronic publications'. However, there are prohibitions on electronic editions of publications classified as RC or Restricted-Category 1 or 2.

Who is regulated: 'service providers'

The Amending Act places obligations on four major classes of service provider in relation to regulated online content, as follows at the top of page 4:

Note that these classes overlap in some cases. For example, a commercial content service provider of live content is also a live content service provider.

Australian connection

In order for ACMA to have the power to issue a take-down, service-cessation or link-deletion notice regarding a hosting service or a content service, the relevant service must have an Australian connection.¹⁰ A hosting service has an Australian connection if, and only if, any of the content hosted by the hosting service is hosted in Australia.¹¹ An Australian connection with respect to a content service (including a links service) exists when any of the content provided by the content service is hosted in Australia, or in the case

of a live content service, the live content service is provided from Australia.¹²

How are service providers regulated?

Take down notices

In order to remove access to prohibited (or potentially prohibited) content, ACMA is able to issue 'take-down' notices for stored or static content,¹³ 'service-cessation' notices for live content¹⁴ and 'link-deletion' notices for links to content (**Notices**).¹⁵

Depending on the classification or likely classification of the content, ACMA may direct the service provider to take different types of action. Notices instruct the service provider to implement either 'type A remedial situation' or a 'type B remedial situation'. A type A remedial situation is one in which the service provider no longer provides or hosts the content service. A type B remedial situation is one in which the service provider can decide either no longer to provide or host the content service, or to subject the content service to an age-restricted access system.¹⁶ Note that ACMA may, by legislative instrument, declare that a specified access-control system is a restricted access system.¹⁷

Prohibited content

Once ACMA carries out an investigation,¹⁸ a Notice can be issued on the basis that the content hosted, provided or linked to has been classified as prohibited content. In this case, ACMA must issue a *final* take-down, service-cessation or link-deletion notice.¹⁹

If the content is classified MA15+ or R18+, ACMA must, in the Notice, instruct the service provider to implement a type B remedial situation.²⁰ Likewise, if the content is classified RC or X18+, ACMA must instruct the service provider to implement a type A remedial situation.²¹

Potential prohibited content

Similar to the treatment of prohibited content, once ACMA carries out an investigation,²² a Notice can be issued on the basis that the content hosted, provided or linked to is potential prohibited content. In this case, ACMA must issue a *interim* take-down, service-cessation or link-deletion notice.²³

If ACMA is satisfied that there is a substantial likelihood that, if the content were classified, it would be classified MA15+ or

Hosting Service Provider	Is a person who hosts stored content: ⁶ <ul style="list-style-type: none"> not including voicemail messages, video mail messages, email messages, SMS messages, MMS messages or messages specified in the regulations, and where such hosted stored content is provided to the public as a content service.
Live Content Service Provider	Is a person who provides a content service that provides live content to the public. ⁷
Links service provider	Is a person who provides a content service that: <ul style="list-style-type: none"> provides one or more links to content; and is provided to the public (whether on payment of a fee or otherwise).
Commercial Content Service Provider of Live Content	Is a person: ⁸ <ul style="list-style-type: none"> who provides a content service that is operated for profit or part of a profit making enterprise; and is provided to the public but only by way of a payment or a fee; where the content provided is live content.
Commercial Content Service Provider of Stored Content	Is a person: ⁹ <ul style="list-style-type: none"> who provides a content service that is operated for profit or as part of a profit making enterprise and where such content is provided to the public as by way of a payment or a fee; where the content provided is stored content.

R18+, ACMA must, in the Notice, instruct the service provider to implement a type B remedial situation.²⁴ Similarly, if the content is like to be classified RC or X18+, ACMA must instruct the service provider to implement a type A remedial situation.²⁵

ACMA must then apply to the Classification Board to have the content that is the subject of the Notice classified. Once the content is classified, ACMA must issue appropriate Notices as for Prohibited Content.

Note that if ACMA does not have a copy of relevant live content, ACMA cannot issue an interim service-cessation notice for unclassified live content²⁶.

Enforcement

Non-compliance with a Notice by 6pm the day after it is issued constitutes a breach of a 'designated hosting/content service provider rule'.²⁷ Contravention of a designated content/hosting service provider rule can attract a criminal penalty of fines of up to \$11,000.²⁸ A civil penalty for contravention of a designated hosting/content service provider rule also exists.²⁹ Alternatively, ACMA can issue a remedial directions³⁰ or formal warnings³¹ with respect to a breach of a designated hosting/content service provider rule.

If the service provider continues to provide content that is 'substantially similar' to the content that is the subject of the Notice, ACMA can issue a special anti-avoidance notice. Non-compliance with a special anti-avoidance notice by 6pm the day after it is issued also constitutes a breach of a designated hosting/content service provider rule.

Positive obligations and industry codes

The Amending Act also introduces certain compulsory matters to be covered by industry codes, to be developed by bodies or associations that represent the sections of the content industry.³² The industry code can then be registered with ACMA.³³ If a code is not developed or ACMA refuses to register a code, ACMA may develop an industry standard.³⁴

Any industry code or standard must impose obligations on commercial content service providers in respect of the professional assessment of live and stored content to determine if there is a likelihood the content would be prohibited content.³⁵

There are also matters that the industry code may take into account,³⁶ including:

- referral of complaints to ACMA;
- advice about the reasons for content having a particular classification;

- procedures directed toward ensuring that, in the event that a commercial content service provider becomes aware of prohibited content provided by another commercial content service provider, that the other commercial content service provider is told of the content; and
- promotion of awareness of the safety issues associated with commercial content services or live content services.

The Internet Industry Association is developing such an industry code.

Once directed by ACMA to comply with an industry code,³⁷ non-compliance will constitute a breach of a designated content/hosting service provider rule. Non-compliance with an industry standard is also a breach of a designated content/hosting service provider rule.

Conclusion: summary of obligations placed on different service providers

Overall, the introduction of Schedule 7 represents a significant amendment to the landscape of online content regulation in Australia. The table at the top of page 5 is a summary of the above obligations placed on the different classes of service provider identified above:

Service Provider	Obligation
Hosting Service Provider	<ul style="list-style-type: none"> Comply with take-down notices Comply with compulsory industry standards/codes
Commercial Content Service Provider of live content	<ul style="list-style-type: none"> Comply with service-cessation notices Comply with compulsory industry standards/codes – including obligation to have a trained content assessor assess live content where there is a 'reasonable likelihood' that the live content would be classified MA15+ or above
Live Content Service Provider (non-commercial)	<ul style="list-style-type: none"> Comply with service-cessation notices Comply with compulsory industry standards/codes - prohibited content will not include video or audio content classified MA15+
Commercial Content Service Provider of stored content	<ul style="list-style-type: none"> Comply with take-down notices Comply with compulsory industry standards/codes – including obligation to have a trained content assessor assess stored content where it is 'substantially likely' that the stored content would be classified MA15+ or above
Links Service Provider	<ul style="list-style-type: none"> Comply with links-deletion notices Comply with compulsory industry standards/codes

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(Endnotes)

1 *Broadcasting Services Act 1992* (Cth)(BSA), Schedule 7, cl 12.

2 BSA, Schedule 7, cl 5.

3 BSA, Schedule 7, cl 2.

4 BSA, Schedule 7, cl 20.

5 BSA, Schedule 7, cl 21.

6 BSA, Schedule 7, cl 4.

7 BSA, Schedule 7, cl 2.

8 BSA, Schedule 7, cl 2.

9 BSA, Schedule 7, cl 2.

10 BSA, Schedule 7, cl 47 and 56.

11 BSA, Schedule 7, cl 3(2).

12 BSA, Schedule 7, cl 3(1).

13 BSA, Schedule 7, Part 1 Division 3.

14 BSA, Schedule 7, Part 1 Division 5.

15 BSA, Schedule 7, Part 1 Division 4.

16 BSA, Schedule 7, cl 47, 56 and 62.

17 BSA, Schedule 7, cl 14. At time of writing, ACMA was in the process of drafting on the proposed Restricted Access System Declaration: see http://www.acma.gov.au/WEB/STANDARD/pc=PC_310813.

18 An investigation could either follow a complaint under cl 43 or be commenced at ACMA's own initiative under cl 44 of BSA, Schedule 7.

19 BSA, Schedule 7, cl 47(1), 56(1) and 62(1).

20 BSA, Schedule 7, cl 47(1)(d), 56(1)(d) and 62(1)(e).

21 BSA, Schedule 7, cl 47(1)(e), 56(1)(c) and 62(1)(d).

22 An investigation could either follow a complaint under cl 43 or be commenced at ACMA's own initiative under cl 44 of BSA, Schedule 7.

23 BSA, Schedule 7, 47(2) & (3), 56(2) & (3) and 62(2) & (3).

24 BSA, Schedule 7, cl 47(3), 56(3) and 62(3).

25 BSA, Schedule 7, cl 47(2), 56(2) and 62(2).

26 BSA, Schedule 7, cl 56(2)(c) and (3)(c).

27 BSA, Schedule 7, cl 53, 60 and 68.

28 BSA, Schedule 7, cl 106.

29 BSA, Schedule 7, cl 107.

30 BSA, Schedule 7, cl 108.

31 BSA, Schedule 7, cl 109.

32 BSA, Schedule 7, cl 80(1).

33 BSA, Schedule 7, cl 85.

34 BSA, Schedule 7, cl 91.

35 BSA, Schedule 7, cl 81.

36 BSA, Schedule 7, cl 82.

37 BSA, Schedule 7, cl 89.