



Australian Government

**Australian Communications
and Media Authority**

Australia's regulator for broadcasting, the internet, radiocommunications and telecommunications

www.acma.gov.au

Restricted Access Systems Declaration

An ACMA consultation paper relating to the establishment of restricted access arrangements for regulating access to MA15+ and R18+ content with an Australian connection which is accessed via convergent devices.

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SUBMISSIONS TO ACMA

ACMA invites submissions from industry and the public on matters set out in this consultation paper to assist it in finalising the proposed Restricted Access Systems Declaration.

The closing date for comment is 5.00 pm on Friday 16 November 2007

Submissions received after this date may not be considered in finalising the declaration.

ACMA is required to have the restricted access systems declaration in force at all times after the commencement of Schedule 7 of the *Broadcasting Services Act 1992* which is 20 January 2008.

ACMA encourages people to make submissions electronically by email to:

NewContentRegulation@acma.gov.au

Written submissions can be addressed to:

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Publication of submissions

In general, ACMA publishes all submissions it receives.

ACMA prefers to receive submissions which are not claimed to be confidential. However, ACMA accepts that a submitter may sometimes wish to provide information in confidence. In these circumstances, submitters are asked to identify the material over which confidentiality is claimed and provide a written explanation for confidentiality claims.

ACMA will consider each claim for confidentiality on a case by case basis. If ACMA accepts a confidentiality claim, it will not publish the confidential information unless required to do so by law.

When can ACMA be required by law to release information?

Any submissions provided to ACMA may be released under the *Freedom of Information Act 1982*. ACMA may also be required to release submissions for other reasons including for the purpose of parliamentary processes or where otherwise required by law (for example a court subpoena). While ACMA seeks to consult and where required by law, will consult with submitters of confidential information, before that information is provided to another body or agency, ACMA cannot guarantee that confidential information will not be released through these or other legal means.

BACKGROUND

New content regulatory framework

The *Communications Legislation Amendment (Content Services) Act 2007* (the Content Services Act) was made on 20 July 2007 and inserts a new Schedule 7 into the *Broadcasting Services Act 1992* (the BSA).

Schedule 7 to the BSA amalgamates the regulation of all content services delivered via carriage services and extends the regulatory framework established under Schedule 5 to a broad range of content services delivered on convergent devices. The Content Services Act also repeals parts of Schedule 5 of the BSA as it applies to content services and obligations on internet content hosts.

Schedule 7 to the BSA is due to commence on 20 January 2008.

The main elements of the new content regulatory framework in Schedule 7 to the BSA are:

- Extension of obligations to live streamed content and categorising content services as: hosting services, live content services, links services and commercial content services;
- a prohibition on X18+ and RC content (all classification categories as defined by the *Guidelines for the Classification of Films and Computer Games 2005*);
- a prohibition on R18+ content, unless it is subject to appropriate access restrictions;
- a new prohibition on MA15+ content, unless it is subject to appropriate access restrictions;
- ‘take down’ or ‘access removal’ notices to remove access to content that is the subject of a complaint; and
- a co-regulatory approach that provides for the development of industry codes to address issues including the classification of content, procedures for handling complaints about content and increasing awareness of potential safety issues associated with the use of content services.

Under Schedule 7 to the BSA, ACMA has the power to investigate complaints about potentially prohibited content on a wide range of content services, including the internet and mobile phones, monitor compliance with industry codes and undertake necessary enforcement action.

Current regulatory environment

Access to internet content is regulated by the *Restricted Access Systems Declaration 1999 (No.1)* under clause 4(1) of Schedule 5 to the BSA. The Declaration requires that internet content that is classified or likely to be classified by the Classification Board, as RC or X18+ is prohibited content for all purposes. Schedule 5 to the BSA provides for a ‘restricted access’ regime for stored internet content hosted in Australia which is classified, or would likely be classified by the Classification Board as R18+.

If such content is not subject to a restricted access system, it will be prohibited content or potential prohibited content under Schedule 5

The framework under Schedule 5 is supported by a co-regulatory arrangement with Internet Industry Codes of Practice which apply to internet service providers and internet content hosts to address issues including access to content, the assessment of content, and procedures for handling complaints about content, and increasing awareness of potential safety issues associated with the use of content services.

Mobile phone content supplied by premium rate SMS and MMS or on a mobile portal is regulated under the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)* (the Determination) under subsection 99(1) of the *Telecommunications Act 1997*. The Determination requires that a content service provider or mobile carriage service provider must not supply content classified as MA15+ or R18+ by way of a premium SMS or MMS service otherwise than on a number with the prefix 195 or 196. A mobile carriage service provider must not supply MA15+ or R18+ content to a customer unless the customer has requested access and has been verified as at least 18 years old.

Impact on current regulatory environment

Clause 14 of Schedule 7 to the BSA requires the Australian Communications and Media Authority to make a 'restricted access systems declaration' (RAS Declaration). When read in conjunction with Schedule 7 to the BSA, the RAS Declaration will regulate access to MA15+ content (in limited circumstances specified in subclauses 20(1)(c) and (d) of Schedule 7) and R18+ content, including internet content, live content services, and mobile premium content, where the service providing the content has an Australia connection.

Content that is classified as, or likely to be classified as, MA15+ by the Classification Board will need to be subject to a restricted access system where the conditions in subclauses 20(1)(c) and (d) of Schedule 7 to the BSA are satisfied. For convenience, MA15+ content which must be subject to a restricted access system under Schedule 7 to the BSA is referred to in this discussion paper as 'covered MA15+ content'.

The purpose of the restricted access arrangements introduced by Schedule 7 and the RAS Declaration is to ensure that:

- access is limited to persons 15 years and over, in the case of covered MA15+ content;
- access is limited to persons 18 years and over in the case of R18+ content; and
- the methods used for limiting this access meet a minimum standard.

Schedule 7 to the BSA and the new RAS Declaration, will replace both the existing restricted access arrangements for internet content in place under Schedule 5 and the existing arrangements for mobile premium services content in place under the Determination. The RAS Declaration will also be supported by new Industry Codes of Practice and ACMA must ensure that a RAS Declaration is in force at all times after the commencement of Schedule 7.

DISCUSSION

Objectives for a restricted access system

Clause 14 of Schedule 7 requires ACMA to declare by legislative instrument that a specified access control system is a restricted access system. In making this instrument, ACMA must have regard to the following matters specified in subclause 14(4) of Schedule 7 to the BSA:

- (a) the objective of protecting children from exposure to content that is unsuitable for children; and
- (b) the objective of protecting children who have not reached 15 years from exposure to content that is unsuitable for children who have not reached 15 years; and
- (c) such other matters (if any) as the ACMA considers relevant.

Invitation to comment

In preparing the draft RAS Declaration, ACMA has had regard to the matters listed above in subclauses 14(4)(a) and 14(4)(b) of Schedule 7 to the BSA. In relation to objective 14(4)(c) ACMA has sought to take into consideration the needs of industry by allowing some flexibility in meeting its obligations to operate a restricted access system. This approach is in keeping with the regulatory policy specified by Parliament in section 4 of the BSA which requires ACMA to regulate designated content/hosting services in a manner that enables *public interest considerations* to be addressed in a way that does not impose *undue financial and administrative burdens on industry* and will readily accommodate technological change¹.

Comment is invited on whether there are any other relevant matters that ACMA should have regard to in developing the restricted access systems declaration.

ACMA requests that submitters provide reasons to support any views expressed.

Parties with obligations under the restricted access systems declaration

There are four main categories of content service which are subject to regulation under Schedule 7. These are a hosting service, live content service, a links service and a commercial content service. Providers of these services are 'designated content/hosting service providers' (see clause 2 of Schedule 7).

Under Schedule 7, a designated content/hosting service provider will be required to put in place or implement a restricted access system if they wish to provide their customers with access to R18+ and/or covered MA15+ content and if the service has **an Australian connection**.

¹ Section 4(3AA) of the BSA will be inserted into the BSA upon commencement of Part 1 of Schedule 1 to the *Communications Legislation Amendment (Content Services) Act 2007*.

Definitions under Schedule 7 to the BSA for each of the services are listed below.

Hosting service:

For the purposes of this Schedule if:

- (a) a person (the first person) hosts stored content; and
- (b) the hosted content does not consist of:
 - (i) voicemail messages; or
 - (ii) video mail messages; or
 - (iii) email messages; or
 - (iv) SMS messages; or
 - (v) MMS messages; or
 - (vi) messages specified in the regulations; and
- (c) the first person or another person provides a content service that:
 - (i) provides the hosted content; and
 - (ii) is provided to the public (whether on payment of a fee or otherwise);

the hosting of the stored content by the first person is taken to be the provision by the first person of **a hosting service to the public** (clause 4 of Schedule 7).

Live content service: means a content service that:

- (a) provides live content (not stored content); and
- (b) is provided to the public (whether on payment of a fee or otherwise).
(clause 2 of Schedule 7).

Links service: means a content service that:

- (a) provides one or more links to content; and
- (b) is provided to the public (whether on payment of a fee or otherwise).
(clause 2 of Schedule 7).

Commercial content service: means a content service that:

- (a) is operated for profit or as a part of a profit making enterprise; and
- (b) is provided to the public but only on payment of a fee (whether periodical or otherwise) (clause 2 of Schedule 7).

Australian connection

Clause 3 of Schedule 7 to the BSA provides the following definition of an Australian connection in relation to a content service and a hosting service.

Content service

(1) For the purposes of this Schedule, a content service has an Australian connection if, and only if;

- (a) any of the content provided by the content service is hosted in Australia; or
- (b) in the case of a live content service – the live content service is provided from Australia.

Hosting service

(2) For the purposes of this Schedule, a hosting service has an Australian connection if, and only if, any of the content hosted by the hosting service is hosted in Australia.

Content of the RAS Declaration

Under subclause 20(1) of Schedule 7 to the BSA, content (other than an eligible electronic publication) is **prohibited content** if:

- (a) the content has been classified RC or X18+ by the Classification Board; or
- (b) both;
 - (i) the content has been classified R18+ by the Classification Board; and
 - (ii) access to the content is not subject to a **restricted access system**; or
- (c) all of the following conditions are satisfied:
 - (i) the content has been classified MA15+ by the Classification Board;
 - (ii) access to the content is not subject to a **restricted access system**;
 - (iii) the content does not consist of text and/or one or more still visual images;
 - (iv) access to the content is provided by means of a content service (other than a news service or a current affairs service) that is operated for profit as part of a profit making enterprise;
 - (v) the content service is provided on payment of a fee (whether periodic or otherwise);
 - (vi) the content service is not an ancillary subscription television content service; or
- (d) All of the following conditions are satisfied:
 - (i) the content has been classified MA15+ by the Classification Board;
 - (ii) access to the content is not subject to a **restricted access system**;
 - (iii) access to the content is provided by a **mobile premium service**.

Under subclause 20 (2) of Schedule 7 content that consists of an eligible electronic publication is **prohibited content** if the content has been classified refused classification (RC), category 2 restricted or category 1 restricted by the Classification Board.

Clause 21(1) of Schedule 7 describes when content is considered to be potential prohibited content:

(1) For the purposes of this Schedule, content is **potential prohibited content** if:

- (a) the content has not been classified by the Classification Board; and
- (b) if the content were to be classified by the Classification Board, there is a substantial likelihood that the content would be prohibited content.

Subclause 21(2) of Schedule 7 describes when content is not considered to be **potential prohibited content**:

(2) Content is not potential prohibited content if:

- (a) the content consists of an eligible electronic publication; and
- (b) the content has not been classified by the Classification Board; and
- (c) if the content were to be classified by the Classification Board, there is no substantial likelihood that the content would be classified RC or category 2 restricted.

A **mobile premium service** is defined as a commercial service under clause 2 of Schedule 7 where:

- (a) a charge for the supply of the commercial content service is expected to be included in a bill sent by or on behalf of a mobile carriage service provider to the relevant customer; or
- (b) a charge for the supply of the commercial content service is payable:
 - (i) in advance; or
 - (ii) in any other manner;

by the relevant customer to a mobile carriage service provider or a person acting on behalf of a mobile carriage service provider.

An **eligible electronic publication** is defined in clause 11 of Schedule 7 as:

- (a) content that consists of:
 - (i) an electronic edition of a book, magazine or newspaper; or
 - (ii) an audio recording of the text, or abridged text, of a book, magazine or newspaper; and
- (b) a print edition of the book, magazine or newspaper is or was available to the public (whether by way of purchase or otherwise) in Australia;
- (c) the content is **an eligible electronic publication**; and
- (d) the print edition of the book, magazine or newspaper is the corresponding print publication in relation to the eligible electronic publication.

The ABA Declaration prescribed two types of access control systems which had to be adopted by all hosting service providers providing access to R18+ content via the internet. This approach is tailored specifically for the internet where access to content provided by a hosting service provider requires verification of the customer's identity, on each occasion a person wishes to access age restricted content.

The *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)* provides a different approach which accommodates the mobile platform technology and uses the existing relationship between the mobile carriage service provider and their customers to assist in determining a, 'one-off' age verification for ongoing entitlement to access to content.

The new RAS Declaration has been tailored to accommodate these differing approaches to regulate internet, live services and mobile carriage services operating on converging platforms with a diverse range of industry participants.

The RAS Declaration sets out obligations for processing applications for access to age restricted content, verifying an applicant's age and providing a means of preventing others from accessing content. These processes are supported by industry compliance plans and record keeping requirements. Taken together, it is intended that the RAS Declaration will achieve the *public interest consideration* of protecting children from access to inappropriate content while not *imposing undue financial and administrative burdens on industry* and readily accommodating technological change, in line with the regulatory policy set out in section 4 of the BSA. The latter is partially accomplished by allowing industry participants to implement a restricted access system that is both robust and compatible with their business models.

There are four essential elements which when taken together constitute an acceptable restricted access system. The restricted access system must:

- (1) restrict access to age restricted content;
- (2) provide access only to approved applicants;
- (3) implement an age verification plan; and
- (4) keep records of the age verification for each applicant.

The following paragraphs elaborate on each of the four key elements to a compliant restricted access system with each element forming a paragraph heading for convenience.

Restricting access to age restricted content

The restricted access system must not allow access to covered MA15+ content and/or R18+ content unless the person has been provided with an access control system. This element of the restricted access system is necessary to allow persons with access to age restricted content to be able to secure their access to the content from other people, especially children. Under clause 2 of Schedule 7 to the BSA an 'access control system' is a system under which the person seeking access to content has been issued with a Personal Identification Number (PIN) or a password or some other

means by which a person who has sought access can be identified but which provides a means of limiting access by other persons to the content.

Invitation to comment

The draft RAS Declaration permits industry to adopt existing PIN, password and other technologies to allow an approved applicant to secure their access to age restricted content from unauthorised persons.

Comment is invited on the effectiveness of this approach and what other robust methods of securing an approved applicant's access to age restricted content could be specified.

ACMA requests that submitters provide detailed examples of alternatives.

Options for access to MA15+ or R18+ content

The RAS Declaration permits a designated content/hosting service provider to provide access to covered MA15+ content to persons who can verify their age as at least 15 years and/or access to R18+ content to persons who can verify their age as at least 18 years. This option will allow providers who are able to verify that an applicant's age is 15, 16 or 17 years of age to provide access to MA15+ content to those applicants.

Provision has also been made for access to covered MA15+ content and/or R18+ content only to be granted by providers to persons who can verify their age as at least 18 years. This option recognises that some providers may be unable to verify the age of an applicant who is under 18 years. Under this option a person who is 15, 16 or 17 years of age would be denied access to covered MA15+ content.

Invitation to comment

The draft RAS Declaration has made provision for covered MA15+ content to be made available to persons:

- (i) 15, 16 or 17 years of age where their age can be verified; or
- (ii) 18 years or older where their age can be verified.

Comment is invited on the inclusion of both options.

ACMA requests that submitters provide reasons to support any views expressed.

Provide access only to approved applicants

Access to age restricted content is on an 'opt-in' basis rather than access being automatically provided to any customer who can have their age verified, regardless of whether they wish to have access to age restricted content or not. Consequently, access to such content must not be provided unless an applicant has specifically requested access. The designated content/hosting service provider must not provide access to age restricted content unless a request is received (whether orally, electronically or in hard copy) that the applicant be given access.

Evidence must be provided to a designated content/hosting service provider to enable it to verify that an applicant:

- is at least 15 years for access to MA15+ content,
- is at least 18 years for access to R18+ content; or
- is at least 18 years for access to both MA15+ content and R18+ content.

The restricted access system to be put in place by a designated content/hosting service provider must include an age verification plan which will include both a risk analysis and age verification measures. The risk analysis must identify and assess the risk that evidence provided to verify the applicant's age could be held or used by either;

- a person other than the person it purports to identify; or
- a person younger than the age of the person identified in the evidence.

The risk analysis must also provide a method for taking into account the kind of evidence of age provided by the applicant and the manner in which the evidence of the applicant's age is received by the restricted access system.

Age verification measures must include rules or procedures that will be applied by the restricted access system to each application for access to age restricted content that address the risks identified by the risk analysis. Further discussion of age verification measures is included on page 14.

Where the applicant is unable to provide sufficient evidence to verify their age, the designated content/hosting service provider must not provide access to the requested content.

Invitation to comment

Comment is invited on the approach to provision of access to MA15+ content and R18+ content that relies on:

- **an ‘opt in’ requirement – i. e a person wishing to have access to this content must apply for such access;**
- **a requirement that the applicant provides evidence of his or her age;**
- **a requirement that the applicant’s age is verified, using the evidence of age in accordance with rules or procedures that reflect an analysis of risk associated with the use of that evidence; and**
- **a requirement that access to this content is not permitted if the age of the applicant cannot be verified as 15 years and over or 18 years and over as appropriate.**

ACMA requests that submitters provide reasons to support any views expressed.

Implementation of age verification plans

The draft RAS Declaration requires that a designated content/hosting service provider must have an age verification plan in place as an essential element of its restricted access system. The age verification plan is comprised of a risk analysis which is discussed on page 13, age verification measures and quality assurance measures.

An age verification plan will ensure that a designated content/hosting service provider adopts rules or procedures for verifying the age of persons seeking access to MA15+ or R18+ content that reflects a proper assessment of the risk associated with different kinds of evidence of age provided by an applicant and the manner in which the evidence is received. An age verification plan must contain documentation of both a risk analysis, and the measures devised to address the identified risk. Consequently, an age verification plan should demonstrate how the designated content/hosting service provider has gone from identifying the nature of the problem through to the implementation of a solution.

The quality assurance measures contained in an age verification plan must include procedures to:

- be followed by employees and agents of the designated content/hosting service provider to implement the age verification measures;
- assess the effectiveness of employees and agents in implementing the age verification measures;
- remove an applicant’s access to MA15+ or R18+ content in the event that access has been provided in contravention of the requirements of the RAS Declaration; and
- periodically review the design of the measures and procedures in order to identify faults and to allow them to be rectified.

Invitation to comment

Comment is invited on the likely impact on providers of hosting services, live content services, links services and commercial content services of implementing age verification plans.

ACMA requests that submitters provide reasons to support any views expressed.

Keeping records of the age verification for each applicant

The draft RAS Declaration requires that the designated content/hosting service provider keep adequate records to demonstrate that it had received an application for access to age restricted content and how it was able to verify that the applicant was at least 15 years (for MA15+ content) or at least 18 years (for MA15+ and or R18+ content). Such records will need to be retained in accordance with the National Privacy Principles under the *Privacy Act 1988* and be retained for a period of 2 years, after which time the records are to be destroyed.

ACMA has made provision for it to request access to the age verification records of the designated content/hosting service providers and to test the compliance of a restricted access system if it receives a complaint.

Invitation to comment

Comment is invited on the impact on industry of maintaining records relating to an application for access to age restricted content.

ACMA requests that submitters provide reasons to support any views expressed.

Comment is also invited on the likely effectiveness of the restricted access system approach in the draft RAS Declaration incorporating:

- (1) restriction of access to age restricted content;**
- (2) provision of access only to approved applicants;**
- (3) implementation of an age verification plan; and**
- (4) keeping records of the age verification for each applicant.**

ACMA requests that submitters provide reasons to support any views expressed.

Financial impact of the restricted access system on industry

The regulatory policy specified by Parliament in section 4 of the *Broadcasting Services Act 1992* requires ACMA to regulate designated content/hosting services in a manner that enables *public interest considerations* to be addressed in a way that does not impose *undue financial and administrative burdens on industry* and will readily accommodate technological change.

Internet content hosts, mobile carriage service providers and mobile content service providers are currently subject to either the *Restricted Access Systems Declaration 1999* or the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)* respectively in providing applicants with access to age restricted content. Under Schedule 7 to the BSA the new RAS Declaration will require that hosting services, live content services, links services, and commercial content services with a connection to Australia each have a restricted access system in place if they are to provide access to covered MA15+ content and R18+ content. The relevant restricted access system must meet the requirements specified in the RAS Declaration to be made by ACMA.

Invitation to comment

To assist ACMA in the preparation of a regulatory impact statement, it would be appreciated if providers of a hosting service, live service, links service and a commercial content service in Australia could provide ACMA with information on the impact, including the financial impact of complying with the proposed RAS Declaration.

ACMA requests that submitters provide reasons to support any views expressed.