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Google welcomes the opportunity to comment on ACMA's Draft Restricted Access Systems Declaration 2007 as attached to the ACMA Consultation Paper released 26 October 2007 (**RAS Declaration**).

### **Introduction**

Google thanks ACMA again for extending the time for lodgment of this submission and appreciates the opportunity to provide detailed comments upon the draft RAS Declaration prior to its finalization.

The structure of this submission is as follows:

- an Executive Summary of Google's recommendations;
- an outline of Google's structure and services;
- some suggestions for improvements of the RAS Declaration.

Google notes that ACMA will make the declaration to facilitate implementation of Schedule 7 – Content Services of the *Broadcasting Services Act 1992 (BSA)* and in particular clause 14 – *restricted access system* of Schedule 7. Google has fundamental concerns with the drafting of key provisions of Schedule 7 which ACMA will be required to administer. However, Google's comments in this submission are limited to the manner of exercise of discretions by ACMA in respect of the RAS Declaration.

Although Google does not believe that Schedule 7 currently applies to Google's services, Google is making this submission as it wishes to ensure that the regulation is workable for the industry generally and continues to encourage content product innovation and usage, and also to ensure that Google would be able to ensure appropriate compliance with content regulation in Australia to the extent that any of its services become subject to these regulations.



### **Executive Summary – Google comments on draft RAS Declaration**

- The principal feature for users of YouTube and similar user generated video content (“UGC”) services provided as ‘on-sites’ (that is, enabling content to be uploaded by users without human intervention or intermediation by the content host) is spontaneity of sharing of video content, enabled by immediate global availability of content when uploaded by a user. Globally available UGC services create particular challenges for service providers seeking to address user concerns as and when they arise, and for policy-makers concerned to ensure that national expectations as to acceptable and unacceptable content are properly addressed.
- Schedule 7 of the BAS has no, or only limited application to Google’s current services, including YouTube for a number of reasons (including because YouTube does not currently host content in Australia). However Google’s desire to promote international best practice in regulation, Google’s innovation as a service provider and Google’s concerns as to uncertainties in scope of operation of both Schedule 7 and the draft RAS Declaration, lead Google to suggest a number of amendments to the draft RAS Declaration for ACMA’s consideration.
- ACMA’s discretions include an ability to differentiate between different types of content or hosting services in declaring a RAS. In exercising these discretions, Google submits that ACMA should give due consideration to the different financial and administrative burden imposed by implementation of access control systems upon providers of ‘free’ Internet services from providers of ‘for payment’ Internet and mobile services.
- Google supports the Internet Industry of Australia’s (IIA) proposal that a restricted access system in relation to particular MA15+ content that is the subject of a take-down notice (that is, in a type B remedial situation, such as under clause 47(7)) might be required to have the following characteristics:
  1. an access seeker is required to make a declaration prior to access to ‘covered MA15+ content’ (under clause 20(1)(c) and 20(1)(d) of Schedule 7) that the content access seeker is 15 years or over;
  2. the site provides a warning notice before ‘covered MA15+ content’ is first made available that this content is only suitable for persons 15 years or over;
  3. the site provides a link to an approved internet content filter (e.g. a IIA Family Friendly filter which may include a PAFO approved filter) whereby persons seeking access to the relevant content will be provided with a means of limiting access by other persons to the content;
  4. the access provider has conducted an internal risk assessment as to the likelihood of access by children under the age of 15 to their content (guidelines for which assessment may be set out in relevant industry



codes of practice as registered by the ACMA); and

5. the access provider has in place measures to takedown covered MA15+ content where the ACMA believes that the preceding four measures have not been adequately implemented and no remediation has occurred within a reasonable time following notification by the ACMA to the designated content/hosting service provider.

- Google submits that the above requirements should be stated so as to facilitate use of a password or other unique identifier (such as a cookie) that has been issued to a person, so that this person can subsequently access content within that classification category by entry of that password or by the provider's system recognizing that unique identifier.
- Google believes that in order to be effective for all types of covered content, the requirements for an access control system in relation to R18+ content should take account of the extent of control of a content provider over the content available through the service and the character of the content service.

- Google submits that where a content service:

principally makes available content that is contributed by persons other than the content host or (if a different person to the content host) the provider of the content service, and

the content service does not predominantly consist of content that is prohibited content or potentially prohibited content,

then a restricted access system in relation to particular R18+ content that is the subject of a take-down notice should be required to have the same characteristics as specified above in relation to MA15+ content.

- In relation to any other content service that makes available R18+ content, Google suggests that a restricted access system in relation to particular R18+ content that is the subject of a take-down notice might be required to comply with requirements broadly equivalent to the 1999 Declaration, namely requirements that:
  1. a suitable form of personally identifying information (e.g. driver's licence or credit card) is provided by an access seeker before an access key is issued;
  2. a risk analysis that has been conducted by the access provider determines that the forms of personally identifying information that are accepted by the access provider are reasonably likely to be valid and to have been provided by the person identified in the information provided;
  3. the access control system is capable of verifying or validating the information so provided.
- Google considers that the above proposal would be more workable than the scheme currently proposed in the draft Declaration, and balances the need to protect children from unsuitable content on the internet with ensuring that this



protection does not create undue financial, technical and administrative burdens on industry. Further, the above proposal would not jeopardize the user experience that has seen consumers so readily embrace user generated content sites for uploading and accessing benign content, while ensuring that any higher level content is flagged when identified as such and appropriately access controlled.

- Google makes a number of other, more detailed, suggestions for improvements of the draft RAS Declaration, in sections 6, 7 and 8 of this submission.

## Detailed comments

### 1. Google Services

Google Australia Pty Limited provides marketing and technical support and representation in Australia for Google corporations providing the Google family of services globally. These service provider entities relevantly include Google Inc and Google Ireland Limited. We will use Google in this submission to refer to Google Inc and its subsidiaries, including Google Australia Pty Limited.

Google as an internet service provider initially became familiar to most to Internet users as the provider of the Google search engine and subsequently as the provider of email, instant messaging and specialist search and information services, including Google News, Google Finance and Google Maps.

Most recently Google (by acquisition of YouTube) became the provider of the well-known YouTube service. YouTube is a platform for people to watch and share original videos through a Web experience. By registering, users are able to upload and share videos, save favorites, create playlists and comment on videos, all for free. YouTube is a user generated content service that is made available as an 'on-site' – that is, following registration as a user, a user is able to upload content directly to the site without intervention or intermediation in relation to that content by Google YouTube staff. Any person may view content on the YouTube site without prior registration or payment of any charge.

YouTube is currently made available in Australia and many other countries from servers in the United States of America. Google does not currently host YouTube content in Australia.

YouTube presents content in tailored form for users from different countries. For example, the Google service provider entities currently provide YouTube service from sites including [www.youtube.com](http://www.youtube.com), <http://au.youtube.com>, and <http://nz.youtube.com>, all serving content from USA based servers. These localized sites are a 'sub domain' of the YouTube.com site. The different YouTube sites use a common graphical user interface but have customised elements and rank and present content according to demand patterns at individual sites. Accordingly, although content available for viewing in most countries comes from a common pool and is presented through a broadly common graphical user interface, content displayed as



most popular content on [www.youtube.com.au](http://www.youtube.com.au) will differ from content displayed as most popular content on [www.youtube.co.nz](http://www.youtube.co.nz).

The principal feature for users of YouTube and similar user generated content (UGC) services is spontaneity of sharing of video content, enabled by immediate global availability of content when uploaded by a user. This feature was well demonstrated by the Boxing Day Tsunami disaster in Indonesia, where YouTube became the initial source of video reportage on the disaster and stimulated an early international relief effort. YouTube has also enabled empowered near real time election coverage of elections and other events of public interest by uploading of content by a broad range of users and commentators in many countries around the globe. The wealth in volume and range of content uploaded to Google each day from around the globe is such that it is simply administratively and financially impossible for Google to pre-vet or otherwise intermediate the vast quantity of content as it is uploaded.

YouTube has built a community that is highly motivated to watch and share videos. Maintaining the safety and integrity of the YouTube community is essential to YouTube's attractiveness as a reliable and safe place to view user generated content. YouTube Community Guidelines are published - see for example [www.au.youtube.com/community\\_guidelines](http://www.au.youtube.com/community_guidelines).

The YouTube service is operated on a global basis and handles inappropriate content on a global basis and applying global community standards. It is not administratively practicable for YouTube to pre-vet user-generated content, or (following complaint and review) to rate user-generated content in accordance with diverse and inconsistent national classification standards. However, while content is hosted on servers located in the USA, Google recognizes that YouTube content will be available to be viewed by a diverse global audience with different expectations and tolerances as to particular forms of content. Google recognizes its responsibilities as a good corporate citizen and that YouTube's success is dependent upon maintaining YouTube as a trusted consumer brand that is accessible and broadly acceptable to persons of different ages, nationalities, cultural, social and national sensibilities and sensitivities and concerns. YouTube must accordingly be responsive to user concerns and assiduous in addressing areas of universal concern such as protection of children from harm and exposure to inappropriate content.

YouTube actively protects the safety and integrity of the YouTube community in the following ways:

- policies
- enforcement
- product features
- education and innovation.

Content when evaluated is considered against a number of criteria. Generally prohibited content includes the following material:

- sexually explicit or pornographic material
- instructional (or capable of imitation) bomb making and drug abuse



- graphic content intended to shock or disgust
- violence which is graphic, gratuitous or humiliating
- hate speech
- stalking or harassment
- posting of other's personally identifying information.

Some prohibitions that are specific to children are:

- any content deemed to be exploitive of a child
- content endangering the safety or privacy of a child
- drug use of any kind, dangerous use of fire or explosives by a minor
- videos of interest to child predators
- inappropriate provocative behavior by children
- fights involving minors or taking place at a school or playground
- predatory behavior, including the aggregation or posting of content containing children for the purpose of obtaining or eliciting sexual gratification

In addition to take-down of prohibited content or, where appropriate, classification of content as "restricted", YouTube implements a number of abuse prevention and safety incident reporting measures. These include:

- digital hashing detects duplicate file uploads and globally blocks rejected content
- policy violators received 'strikes', repeat violators are automatically terminated and their email address is permanently banned
- child safety, exploitation and harassment policy offences result in immediate termination and banning
- policy violations involving children are reported to a designated YouTube team member who is able to further investigate the user and content involved
- child pornography incidents are escalated and reported to law enforcement authorities
- YouTube works with appropriate authorities in relation to threats, support for possibly suicidal users, victims of crime and others that are identified as in need of assistance.

The focus of the draft RAS Declaration is of course implementation of restrictions as to age restricted content. YouTube regulates age restricted content in the following ways.

A user may at any time 'flag' content for review by YouTube. Google promptly considers, and where appropriate responds, to 'flagged' content that the user considers to be prohibited, or inappropriate for unrestricted viewing. Currently, YouTube staff consider the 'flagging' and promptly review the 'flagged' content to determine



whether this content violates the Community Guidelines. Content which YouTube determines violates the Community Guidelines will be taken down. YouTube staff may also give a warning notification to the uploading user or terminate the uploading user's YouTube account.

Content which is acceptable within the Community Guidelines, but which upon review by YouTube is considered inappropriate for viewing by younger viewers, is placed behind a restricted access system. This restricted access system requires a YouTube user wishing to access relevant content to be a registered user. To register a prospective user must enter their email address and declare their age and be allocated a user name and password. Only after the password has been issued and entered by the user is access granted to the restricted content. Users are cautioned to maintain the confidentiality of their passwords so as to ensure that only a user to whom a password has been granted obtains access to relevant content.

In summary:

- content which following review is marked "restricted" can only be viewed by users who have completed a registration process requiring them to declare their age as 18 and over
- viewers must be logged in to view "restricted" content
- an interstitial warning screen is displayed before "restricted" content is displayed. Users must click to confirm that they wish to view "restricted" content before being able to view that content
- "restricted" videos do not appear in video browse pages (e.g., 'Videos being watched right now on the home page) or 'featured videos' on the YouTube site
- only content that is not prohibited by other content policies can be classified as "restricted".

Google's interest in the draft RAS Declaration is not limited to the YouTube service, to the extent that it may one day be captured by the requirements in Schedule 7. Google, along with other players in the internet industry in Australia and internationally, is well known as a product and service innovator. Google will launch other products and services that may include content which potentially falls within the definition of "content service(s)" potentially regulated by the RAS Declaration (when made). Some services may make available provider originated content, some will make available user generated content, and some will be a combination of the two. Google intends to develop and implement its services in a manner which properly manages the risk that children may be exposed to inappropriate content. Google does not consider that national regulation is generally necessary to cause providers to properly manage the risk that children may be exposed to inappropriate content. However, to the extent that Australia and other countries consider it necessary or desirable to supplement self-regulation by service providers, Google seeks to facilitate the development and implementation of national regulatory regimes that protect children from harm and exposure to inappropriate content while facilitating development and the implementation of technological solutions to these important



issues. Google's recommendations as to improvements to the RAS Declaration are made in this context.

## **2. Application of Schedule 7 to Google's current services**

The provisions of Schedule 7 of the BSA on their face have limited application to Google's current services, including YouTube, for a number of reasons:

- YouTube does not host content in Australia. Accordingly, YouTube is not a content service with a relevant Australian connection pursuant to clause 3 of Schedule 7.
- Google YouTube implements a policy of responding promptly to complaints concerning sexually explicit content such as would be classified RC, X18+ or R18+ under current Australian Classification Board guidelines. This policy includes takedown of unacceptable content.
- YouTube is available for free – in terms of Schedule 7, “other than on payment of a fee (whether periodical or otherwise)”. Accordingly content that has been or would be classified MA15+ by the Classification Board is not prohibited content in terms of paragraph 20(1)(c) of Schedule 7 (by virtue of operation of paragraph 20(1)(c)(v)). That noted, Google YouTube implements restricted access in relation to content that has been identified as inappropriate for viewing by children.
- Many current Google services are not “content services” relevantly regulated by Schedule 7 as the services are respectively “exempt Internet directory services”, “exempt Internet search engine services”, or email or instant messaging services within the exemptions from the definition of “content service” in paragraph 2 of Schedule 7.
- Other Google services are “news services” or “current affairs services” or consist of text or still visual images (as well as being provided other than on payment of a fee) and accordingly do not satisfy the conditions (pursuant to clause 20 of Schedule 7) for MA15+ content being prohibited content.

Although Schedule 7 therefore has limited relevance to Google's current services, Google's innovation as a service provider, its desire to promote international best practice in regulation, and Google's concerns as to uncertainties in scope of operation of both Schedule 7 and the draft RAS Declaration, lead Google to suggest a number of amendments to the draft RAS Declaration.

## **3. Regulatory Policy under the BSA and ACMA's Regulatory Discretions**

ACMA is required to make a RAS Declaration in order to specify the attributes of an access-control system. The broad characteristics of an access-control system are that the system must satisfy one of the following (pursuant to clause 2 of Schedule 7):

- persons seeking access to the relevant content have been issued with a personal identification number that provides a means of limiting access by other persons to the content; or
- persons seeking access to the relevant content have been provided with some other means of limiting access by other persons to the content.



ACMA relevantly has a number of discretions:

- to determine what means of limiting access is appropriate for a particular category of content. PIN based access keys are an example of a possible access control system. A password or cookie-based system, with or without deployment of a filter, would also be a means of limiting access that could satisfy the definition of 'restricted access system' in Schedule 7;
- to determine and state (whether at the level of principle or with specificity) the steps that are to be taken by a provider before an access seeker is granted access rights in relation to a particular category of content;
- to differentiate in relation to each of the above between R18+ content and MA15+ content (as an discretion expressly conferred on ACMA by clause 14(2) of Schedule 7);
- to differentiate in respect of sub-categories of content that otherwise is within a particular classification category (pursuant to ACMA's general discretions under clause 14).

ACMA's discretions therefore include an ability to differentiate between different types of content or hosting services. For example, a restricted-access system in relation to a mobile premium service may be different to an access-control system in relation to an Internet content service.

ACMA may also differentiate between different forms of Internet content services and designated content/hosting services in the course of fulfilling its obligation to have regard to the child protection objectives as stated in clause 14(4) of Schedule 7 while also giving effect to the regulatory policy as now stated in Section 4(3AA) of the BSA. The regulatory policy is to ensure that designated content/hosting services are regulated in a manner that:

- enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on the providers of those services; and*
- will readily accommodate technological change; and*
- encourages:*
  - the development of communications technologies and their applications; and*
  - the provision of services made practicable by those technologies to the Australian community."*

Consistent with this regulatory policy due consideration should to be given to three key attributes of Internet services.

First, many Internet services (such as YouTube) are made available on a global basis and by global providers. A key feature of their appeal is near instantaneous global access to globally available content.

Second, many Internet services (including YouTube) consist of large volumes of content placed on the site by individual users, rather than the service provider (many



millions of individual videos are viewed every day). This makes it practically impossible to pre-vet each piece of content prior to its upload on the site.

Second, most Internet services are provided other than on payment of a fee by the access seeker and accordingly do not require establishment of a billing relationship with a customer or associated customer service functions or capability. Any access-control system or other administrative requirement that is imposed upon Internet service providers is likely to constitute a new financial and administrative burden that will impact in a significant way in a manner that would not constitute such a burden for mobile service providers or commercial Internet service providers.

Mobile service providers currently carry a current regulatory burden of complying with 'know your customer' requirements that were imposed in respect of both prepaid and postpaid services principally for national security reasons. Providers of 'for payment' Internet services already have in place credit card verification procedures (that also involve identity assurance as part of the verification) and customer support capabilities to support their billing processes. In other words, billing of customers for provision of internet services (whether one-off or subscription) necessarily involves development of processes, systems and customer support capabilities that are simply not necessary for provision of 'free' Internet services. The financial and administrative burdens imposed by implementation of the currently proposed RAS will therefore be entirely different for providers of 'free' Internet services from providers of mobile service providers and operators of 'for payment' Internet services.

In summary, there are a number of two main scenarios where a RAS may need to operate:

- commercial services (services provided to the public either on payment by the access seeker of a subscription or for particular content), where the CSP has a more direct financial relationship with a customer (i.e., through one-off payment or subscription).
- non-commercial (as defined in Schedule 7) services, where the CSP does not collect financial or other details about customers (and therefore any requirement to collect such information is a new operational burden on the provider).

Many of the elements of the proposed RAS (such as the requirement to seek documentary evidence of age and to implement a capability for subsequent verification) may be broadly consistent with existing practices and processes for commercial services (such as age restricted mobile content services where a customer's age details are verified at the time of subscription to the mobile service or the individual content service).

In contrast, in the case of non-commercial internet sites (such as user generated content sites), it is not necessary for a user to subscribe to the site to view content. Rather, it is only generally necessary for users to subscribe or to create a user account if they wish to post content to the site. In this circumstance, there may not be any actual relationship or technical ability between the CSP and the user to enable pre-assessment of a customer's age prior to that customer's entry to the site. Instead, alternative means are used to control access. For example, YouTube's existing practices are based on technical processes to assess a user's age at the time that a user



seeks access to a particular piece of content that has been 'flagged' as potentially inappropriate for minors.

ACMA's consultation paper rightly suggests that one goal of the proposed RAS is to take into account the needs of industry by allowing some flexibility in meeting its obligations to operate a restricted access system. Google submits that the Declaration must be flexible enough to recognise the different technical and practical requirements for websites with large amounts of user-generated content. Google does not believe that the RAS proposed in the draft Declaration is technically or practically appropriate (or potentially even possible) for these types of sites.

Google suggests that there are two broad approaches to amending the Declaration which may better achieve ACMA's goal in conjunction with recognising the technological realities of user generated content sites:

- amending the Declaration to set high level goals or objectives for the RAS, rather than specify the component parts of a RAS to the level of detail currently contained in the Declaration; and/or
- amending the Declaration to distinguish between content services with a direct commercial/subscription type relationship with users, and non-commercial internet user generated content sites.

We set out below Google's suggested alternative to meeting the objectives of Schedule 7.

#### **4. Access Control Systems for MA15+ Content, R18+ Content and User Generated Content Services Generally**

Google submits that the specified attributes for a RAS in the current draft RAS Declaration are largely unworkable in their current form for non-commercial internet content services (that is, internet content services that are not provided to the public either on payment by the access seeker of a subscription or for particular content).

In particular, it is unclear how it would be technically or administratively possible for a non-commercial website containing user generated content to comply with the proposed regime for restricting access to R18+ content.

The draft declaration currently imposes the same level of regulation for a RAS to assess eligibility to view/access MA15+ content as for R18+. Google submits that requiring the same standards of authentication for M15+ and R18+ content may be inappropriate for two main reasons:

- Practical difficulties - Google notes that, to the best of its knowledge, there is no universal standard of identification across Australia for 15, 16 and 17 year olds (i.e. the category of users who may legally view MA15+ content but not content that has been classified R18+).
- Equivalence in treatment for content delivered across various media platforms – Google notes that the implementation of the current proposed RAS for MA15+ would introduce more stringent access requirements for 15,16 and 17 year olds accessing content via the internet than are currently applicable to the same content delivered via free to air television or at a cinema.



Google submits that for these reasons, ACMA may wish to consider implementing a different RAS requirement for MA15+ content, such as a self-declaration requirement supported by age (i.e. date of birth) information. Google also notes that these practical challenges may be resolved by the Declaration adopting high level objectives and principles of what a RAS must achieve, which would enable industry to implement effective technological solutions to achieve these solutions that would adapt to the technical capabilities and requirements of individual content services.

Google appreciates that ACMA has been endeavouring to address similar concerns as identified by industry. Google has endeavoured to develop a practical alternative approach. Google notes that the Internet Industry Association (IIA) has suggested an alternative approach to achieve the Government's policy objectives of protecting children from exposure to unsuitable content while not imposing unnecessary financial and administrative burdens upon the providers of internet content services. The core elements of this approach are that a restricted access system in relation to particular MA15+ content that is the subject of a take-down notice (that is, in a type B remedial situation, such as under clause 47(7)) would be required to have the following characteristics:

1. an access seeker is required to make a declaration prior to access to 'covered MA15+ content' (under clause 20(1)(c) and 20(1)(d) of Schedule 7) that the content access seeker is 15 years or over;
2. the site provides a warning notice before 'covered MA15+ content' is first made available that content is suitable for persons 15 years or over;
3. the site provides a link to an approved internet content filter (e.g. a IIA Family Friendly filter which may include a PAFO approved filter) whereby persons seeking access to the relevant content will be provided with a means of limiting access by other persons to the content;
4. the access provider has conducted an internal risk assessment as to the likelihood of access by children under the age of 15 to their content (guidelines for which assessment may be set out in relevant industry codes of practice as registered by the ACMA); and
5. the access provider has in place measures to takedown covered MA15+ content where the ACMA believes that the preceding four measures have not been adequately implemented and no remediation has occurred within a reasonable time following notification by the ACMA to the designated content/hosting service provider.

The above requirements should also be stated so as to facilitate use of a password or other unique identifier (such as a cookie) that has been issued to a person so that this person can subsequently access content within that classification category by entry of that password or by the provider's system recognizing that unique identifier.

Google considers that the requirements for an access control system in relation to R18+ content should take account of the extent of control of a content provider over the content available through the service and the character of the content service.



Google submits that where a content service:

- principally makes available content that is contributed by persons other than the content host or (if a different person to the content host) the provider of the content service, and
- the content service does not predominantly consist of content that is prohibited content or potentially prohibited content,

then a restricted access system in relation to particular R18+ content that is the subject of a take-down notice (that is, in a type B remedial situation, such as under clause 47(7)) would be required to have the same characteristics as specified above in relation to MA15+ content.

In relation to any other content service that makes available R18+ content, a restricted access system in relation to particular R18+ content that is the subject of a take-down notice would be required to comply with requirements broadly equivalent to the 1999 Declaration, namely requirements that:

1. a suitable form of personally identifying information (e.g. driver's licence or credit card) is provided by an access seeker before an access key is issued;
2. a risk analysis has been conducted by the access provider that determines that the forms of personally identifying information that are accepted by the access provider are reasonably likely to be valid and to have been provided by the person identified in the information provided;
3. the access control system is capable of verifying or validating the information so provided.

Google considers that the above proposal would be more workable than the scheme currently proposed in the draft Declaration, and balances the need to protect children from unsuitable content on the internet with ensuring that this protection does not create undue financial, technical and administrative burdens on industry. Further, the above proposal would not jeopardize the user experience that has seen consumers so readily embrace user generated content sites for uploading and accessing benign content, while ensuring that any higher level content is flagged when identified as such and appropriately access controlled.

## **5. Alignment between the draft RAS Declaration and Schedule 7**

Google submits that the drafting of draft RAS Declaration is inconsistent with the legislative framework established by the Schedule 7 as it has the effect of regulating *content* which is not regulated by Schedule 7.

As noted in ACMA's consultation paper, MA15+ content (whether classified or potentially classifiable as MA15+) is only required to be subject to a restricted access system in the circumstances set out in clauses 20(1)(c) and (d) of Schedule 7 (and where a complaint has been made in relation to that content pursuant to Part 3 of Schedule 7). In the consultation paper this is referred to as 'covered MA15+ content'.

In the case of content services delivered over the internet, this definition generally refers to an audio-visual content service (other than a news or current affairs service) which is provided on a payment of a fee (i.e. commercial audio-visual content).



In contrast, clause 6 of the Declaration states:

“A restricted access system must not provide access to **MA 15+ content** to a person ...” (emphasis added).

‘MA15+ content’ is defined in the Declaration to have the same meaning as in Schedule 7 (clause 3(2)). Clause 15(2) of Schedule 7 defines ‘MA15+ content’ generically by reference to its classification status (or likely classification status), rather than by reference to the exclusions for non-commercial and non-mobile MA15+ content contained in clause 20 of Schedule 7.

Google submits that the current drafting of clause 6 may (inadvertently) have the effect of expanding the operation of the content services regime to *all* MA15+ content, even content not specifically captured by Schedule 7. Google submits that the Declaration should not operate to impose additional obligations not contained in Schedule 7, and clause 6 should be amended to reflect the legislative scheme (i.e. to only refer to ‘covered MA15+ content’ as defined in the consultation paper).

In addition, Google is concerned that an unintended consequence of the drafting may be to create confusion as to whether the Declaration purports to extend the regulation to *conduct* which is not regulated by Schedule 7.

As ACMA would be aware, Schedule 7 does not create a *per se* offence of provision of prohibited content, or potentially prohibited content, where access to the content is not subject to a restricted access system. Rather, Schedule 7 imposes a requirement (with related offences for breach) to respond to notices issued by ACMA in relation to a particular piece of prohibited/potentially prohibited content by either taking down the relevant content or ensuring that it is placed behind a designated access control system.

In contrast, clause 6 of the Declaration may be read ‘on its face’ to prohibit *per se* the provision of R18+ and MA15+ content without that content being subject to an access control system, thereby creating obligations above those contained in Schedule 7. Google submits that ACMA may wish to consider amending the Declaration to avoid any potential confusion, either by re-drafting clause 6 to more closely reflect the legislative provisions, or to insert a note after clause 6 to clarify that the Declaration does not itself impose requirements in relation to RAS that go beyond the requirements of Schedule 7.

## **6. Clause 6 – access key requirements**

Clause 6 of the Declaration provides that a person must not provide access to R18+ and M15+ content unless the person has entered an appropriate access key.

Google has four main concerns with the current drafting of clause 6:

- This requirement does not reflect how user generated content websites typically work today. Typically, if a person wishes to access a piece of content that has been ‘flagged’ as inappropriate for minors, the user is initially required to identify that she or he is old enough to access that content. After the person has been verified as 18 or older, subsequent pieces of age-limited content may generally be accessed without further verification of that user. In other words, once the requirements as to age verification (whether by declaration or otherwise) are



completed, the access seeker can subsequently access content within that classification category by entry of that password or other unique identifier.

- Schedule 7 (and, to Google's knowledge, existing internet and mobile content regulation in Australia) does not require age verification to occur each time a user wishes to access a piece of age-limited content. Rather, CSPs have been permitted to implement a 'one off' verification process. Google submits that the status quo is appropriate to meet the Government's policy objective of protecting children from exposure to content that is unsuitable for children, in a manner that poses the greatest flexibility and least administrative burden on industry. Google submits that the Declaration should be drafted in a manner that enables a CSP to verify age in a manner that is appropriate in the context of the technological realities of that content service.
- Clause 6 states that a RAS must not provide access to relevant content unless the person has entered "*his or her* access key". As the clause is currently drafted, a CSP would be in breach of clause 6 immediately a person enters an access key which he or she (that is, the person who entered the key, and whether or not the key had been validly issued) was not entitled to use. Google submits that if ACMA chooses to retain a clause similar to the current clause 6, this drafting should be amended to permit the provision of relevant content in response to the entry of an appropriately allocated key, unless the CSP is *actually aware* that the person entering the key is not the person to whom the access key had been allocated.
- The drafting is specific to the use of access keys, rather than accommodating the use of alternative access limitation systems. Of course, the drafting would need to be amended in this regard if ACMA adopts Google's suggestion of a declaration based access control system for certain types of services and content.

## 7. Detailed implementation requirements

Google notes that the current detailed requirements of the RAS may cause unintended consequences for industry. Consider the following scenario:

A hosting service provider CSP receives a take down notice from ACMA in relation to a piece of content. The CSP implements a RAS which is broadly consistent with the requirements in the Declaration. The RAS successfully operates to prevent a child of 15 from accessing the content in question. However ACMA later determines that the CSP's quality assurance plan has not, in ACMA's opinion, adequately dealt with the proposed audit provisions (see clause 12 (d)–(f)).

In this scenario, the detailed and prescriptive nature of the Declaration may have the unintended consequence for the CSP that despite responding to the take down notice in the time required by Schedule 7, and despite ensuring that the offending content has been made subject to an access control system that is effective in ensuring that persons younger than 18 cannot access the content, the CSP may be in breach of Schedule 7 as the access control system may not properly be considered to be a "Restricted Access System" for the purposes of clause 14 of Schedule 7.



Google submits that the Declaration should not be so prescriptive that an unintended breach of a 'procedural' requirement of the Declaration would result in a CSP breaching a designated content/hosting service provider rule even in circumstances where the CSP's access control system had effectively prevented children from accessing offending material.

Google is appreciative of the opportunity to submit these detailed comments to ACMA's draft RAS Declaration. Google's conclusions are summarized in the Executive Summary earlier in this submission.

Google would be pleased to discuss any aspect of this submission with ACMA or to provide any further information that may assist ACMA in its deliberations. If I can assist you in any way, please contact me on [carolyndalton@google.com](mailto:carolyndalton@google.com) or telephones (02) 9374 4482 or 0402 791 031.

Yours sincerely

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Google