



**Optus Submission to
Australian Communications and Media Authority
on
Draft Restricted Access System Declaration**

16 November 2007

1. Executive Summary

- 1.1 Optus strongly supports the policy objectives of protecting children (and others) from exposure to content that is unsuitable for them while respecting the right of adults to read, hear and see any material that is legal.
- 1.2 We continue to engage closely with government and industry stakeholders, including ACMA, to work towards an effective and commercially workable regulatory framework which supports these policy objectives.
- 1.3 With respect to ACMA's draft Restricted Access System (RAS) Declaration, Optus is highly concerned that it does not reflect the substance of the numerous previous discussions between ACMA and Optus (and between ACMA and other industry stakeholders) and statements made by ACMA, including in its consultation paper to its draft RAS Declaration.
- 1.4 That is, the draft RAS Declaration is highly prescriptive and process-orientated, unlike the precedent set by the Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1) (MPSD) under which Optus and other mobile carriers have been operating. We do not believe that the draft RAS Declaration in its current form can achieve its intended policy outcomes.
- 1.5 In this context, Optus' submission focuses on four specific issues:
 - (a) Access key;
 - (b) Age-verification evidence;
 - (c) Risk analysis; and
 - (d) Measures.
- 1.6 Optus has outlined in detail below our concerns about the draft RAS Declaration and our proposals for how we believe it should be revised to enable it to meet its policy objectives in an effective and workable manner.
- 1.7 Recognising the accessible approach ACMA has adopted with Optus and other industry stakeholders since the making of the Communications Legislation Amendment (Content Services) Act 2007 (Content Services Act), we look forward to continuing to work with ACMA in the near future in this spirit.
- 1.8 Optus also supports the submissions made by the Australian Mobile Telecommunications Association (AMTA) and the Internet Industry Association (IIA) in response to ACMA's draft RAS Declaration. We especially highlight and endorse the proposal regarding access to MA15+ content contained in the IIA submission and related comments in the AMTA submission.
- 1.9 ACMA's **access key** concept:
 - (a) goes beyond the definition of an "access control system" contained in the Content Services Act;
 - (b) imposes a prescriptive and process-orientated obligation on industry;

- (c) goes beyond the existing obligations contained in the MPSD; and
 - (d) appears to ignore RAS investments already made.
- 1.10 Optus believes that ACMA should adopt a broad interpretation of the definition of “access control system” contained in the Content Services Act; and in place of its access key concept should draw upon clauses 3.4(1)(2)(3) and (4) of the MPSD, which articulate outcomes-orientated requirements on industry.
- 1.11 It appears that sections 7 and 8 of ACMA’s draft RAS Declaration may require that an applicant for age-restricted content would need to provide **age-verification evidence** at the same time as making an application, regardless of whether the same evidence had already been provided by the applicant and verified by the provider.
- 1.12 Optus proposes that ACMA remove sections 7 and 8 of its draft RAS Declaration and, as above, draw upon clauses 3.4(1)(2)(3) and (4) of the MPSD.
- 1.13 Optus believes that ACMA’s proposed **risk analysis** requirements impose a more onerous obligation on industry than currently exists under the MPSD and that, in practice, would prove to be an ineffective and burdensome requirement.
- 1.14 Optus proposes that ACMA remove the risk analysis requirements from the draft RAS Declaration and draw upon clause 3.4(1) of the MPSD. This clause clearly articulates the high level principles that must be achieved by industry – which could then be supported by more detail in the Content Services Code.
- 1.15 Consistent with our comments above, Optus believes that the age verification and quality assurance **measures** as described in the draft RAS Declaration are prescriptive and process-orientated.
- 1.16 Our view is that the content of an age verification compliance plan should be focused on the outcomes required of industry such that providers have flexibility to determine for themselves how to ensure the protection of children from inappropriate content. Optus has outlined in our submission those matters which we consider could reasonably be addressed in such a plan.

2. Introduction

- 2.1 Optus is a strong supporter of the policy objectives of protecting children from exposure to content that is unsuitable for them; as well as the view that adults should not be subjected to inappropriate or illegal content while having the right to read, hear and see any material that is legal.
- 2.2 We have engaged closely with government and industry stakeholders, including ACMA, and allocated significant resources over a sustained period to work towards an effective and commercially workable regulatory framework to facilitate fulfilment of these policy objectives.
- 2.3 Since the making of the Communications Legislation Amendment (Content Services) Act (Content Services Act) on 20 July this year, Optus has been a key participant along with other industry stakeholders in developing both a new Content Services Code to cover those requirements contained in the new

Schedule 7 to the Broadcasting Services Act (BSA); and in reviewing the Mobile Premium Services Industry Scheme (MPSIS) and the Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1) (MPSD).

- 2.4 As ACMA would be aware, throughout the above processes Optus and other industry stakeholders have liaised regularly and openly with ACMA to ensure as far as possible an efficient and effective process which does not contain unnecessary ‘surprises’ for any party. For our part, Optus has appreciated the accessible and transparent approach adopted by ACMA during this period.
- 2.5 During our discussions with ACMA to date, Optus has been reassured by ACMA’s consistent messages that, with regard to its Restricted Access System (RAS) Declaration, ACMA would develop a Declaration that focused on high-level required outcomes in a manner not dissimilar to the MPSD and would look to industry to articulate in its Content Services Code the processes that would be required to fulfil those required outcomes.
- 2.6 We have also been reassured by ACMA’s statements that it recognised the investments already made by mobile carriers such as Optus in developing RASs. Indeed, ACMA’s consultation paper on its draft RAS Declaration states that it has been tailored to accommodate the MPSD and notes that the MPSD “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” and that the draft RAS Declaration would allow “industry participants to implement a restricted access system that is both robust and compatible with their business models.”¹
- 2.7 However, Optus is concerned that the content of ACMA’s draft RAS Declaration does not reflect the substance of our previous discussions with ACMA nor the statements cited above in ACMA’s consultation paper. Nor does it recognise the impacts of imposing restricted access to MA15+ content available on the internet, where this same content is available offline without the same restrictions. That is, as currently drafted the Declaration is both highly prescriptive and process-orientated, unlike the precedent set by the MPSD under which Optus and other mobile carriers have been operating, while also imposing much more onerous planning and reporting obligations on industry than those imposed by the MPSD. We do not believe that it can achieve its intended policy outcomes.
- 2.8 Optus’ submission focuses on the following specific issues:
 - (a) access key;
 - (b) age-verification evidence;
 - (c) risk analysis; and
 - (d) measures.

¹ ACMA consultation paper to its draft RAS Declaration (released 26 October 2007), p11

3. Access Key

- 3.1 Optus is concerned by and opposed to the access key concept contained in the draft RAS Declaration for the following four reasons:
- (a) It goes beyond the scope of the Content Services Act and appears to impose an unworkably narrow interpretation of the Act on industry;
 - (b) It imposes a prescriptive and process-orientated obligation on industry (contrary to all indications from ACMA preceding the draft RAS Declaration's release);
 - (c) It goes beyond the existing obligations contained in the MPSD and, consequently, appears to ignore the RAS investments already made and procedures already developed by mobile carriers; and
 - (d) It would not guarantee that the policy objective of protecting children would be met any more effectively than is already being achieved under existing arrangements.
- 3.2 Based on ACMA's description of an "access control system" in the consultation paper to its draft RAS Declaration and its definition of an "access key" in the draft Declaration, it appears to Optus that ACMA has either misread the definition of "access control system" in clause 2 of the new Schedule 7 to the BSA contained in the Content Services Act or interpreted it in a potentially unworkably narrow manner.
- 3.3 The definition of "access control system" in clause 2 of Schedule 7 to the BSA in the Content Services Act states that it is "a system under which:
- *(a) persons seeking access to the content have been issued with a Personal Identification Number that provides a means of limiting access by other persons to the content; or*
 - *(b) persons seeking access to the content have been **provided with some other means of limiting access** by other persons to the content.*²
- 3.4 However, in its consultation paper to the draft RAS Declaration, ACMA states that "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 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."³ Furthermore, clause 3 of the draft RAS Declaration states that an "access key means:
- *(a) a password; or*
 - *(b) a Personal Identification Number; or*

² Schedule 7 – Content Services, Part 1 – Introduction, 2 Definitions, *Communications Legislation Amendment (Content Services) Act 2007*, p16

³ ACMA consultation paper to its draft RAS Declaration (released 26 October 2007), pp11-12

- (c) *any other means by which a person who has been granted access by the restricted access system can be identified.*⁴

3.5 As is demonstrated by the direct quotes above, there appears to be a fundamental difference between the definition of an access control system in the Content Services Act and how it is described by ACMA in its consultation paper and how an access key is defined in its draft RAS Declaration:

- (a) Clause 2(b) of Schedule 7 to the BSA contains a broad statement that persons need to “have been provided with some other means of limiting access” as an alternative to being “issued with” a PIN. In creating its access key concept as defined, ACMA appears to have removed the ability for industry to develop its own processes and safeguards to limit access to age-restricted content as envisaged by clause 2(b).
- (b) Moreover, ACMA’s definition of an access key in 3(a) and 3(b) of its draft RAS Declaration goes to ‘access’ (that is, the issuing of a password or PIN), whereas its requirement in 3(c) goes to ‘identity’. There is nothing in the definition of an access control system in the Content Services Act that requires such a system to ‘identify’ a person. The requirement in the Content Services Act is quite explicitly on “limiting access”. If interpreted narrowly, ACMA’s requirement would be unworkable in practice.
- (c) Furthermore, while clause 2(a) of Schedule 7 to the BSA uses the expression “issued with” with respect to a PIN, in 2(b) it explicitly uses the broader “provided with” expression with respect to “some other means of limiting access”. However, the entire construction of ACMA’s access key concept in its draft RAS Declaration appears to exclude the Content Services Act’s broader application, for example using the narrow terms “allocate” (in clause 5(2)(b), 7(1) and 8(1)) and “entered” (in clause 6(1) and 6(2)).

3.6 The MPSD articulates the outcomes required of industry while providing industry with the flexibility to determine the most efficient and effective ways of doing so. For example, sections 3.4(1) and 3.4(2) of the MPSD state the specific conditions that must be met before age-restricted content can be provided to a customer. This stands in stark contrast to the prescriptive and process-focused access key concept in ACMA’s draft RAS Declaration.

3.7 ACMA’s access key concept also appears to ignore the RAS investments already made and procedures already developed. Moreover, the concept does not necessarily provide any greater support to the policy objective of protecting children than is provided under current arrangements.

Optus’ recommendation

3.8 A reasonable and workable approach by ACMA to defining an access control system would be to:

⁴ Draft RAS Declaration (released 26 October 2007), pp1-2

- (a) adopt a broad interpretation of the definition in clause 2 of Schedule 7 to the BSA in the Content Services Act; and
- (b) in place of its access key concept, draw upon clauses 3.4(1)(2)(3) and (4) of the MPSD which, while wordy, clearly articulate outcomes-orientated requirements that industry must meet.

4. Age verification evidence

- 4.1 Optus is concerned that, when sections 7(1)(b), 7(2)(a) and 7(3) and/or sections 8(1)(b), 8(2)(a) and 8(3) of the draft RAS Declaration are read together, it appears that an applicant for age-restricted content may need to provide evidence of his/her age at the same time as making the application – regardless of whether the provider already has this evidence.
- 4.2 Were such a prescriptive and process-orientated requirement to be imposed, it would go considerably further than the obligations in place under the MPSD and currently complied with by mobile carriers, let alone ISPs and internet content hosts, which are currently not required to restrict access to MA15+ content. Given previous assurances by ACMA to Optus and ACMA’s statement in its consultation paper that the “new RAS Declaration has been tailored to accommodate...differing approaches [such as mobile carriers’] ‘one-off’ age verification for ongoing entitlement to access to content”⁵, Optus considers that ACMA is unlikely to have intended that there be a timing linkage between an application for age-restricted content and presentation/collection of evidence of an applicant’s age and identity.
- 4.3 For example, if Optus can determine that a particular customer is aged 15-17 or 18+ by virtue of evidence previously provided by that customer and held by Optus, there is some ambiguity as to whether Optus would be compliant with sections 7 and/or 8 of ACMA’s draft RAS Declaration if we did not require the customer to provide evidence a second time (and for Optus to verify it a second time) at the point at which the customer applied for access to age-restricted content.
- 4.4 Further, sections 7 and 8 of the draft RAS Declaration make statements that “the restricted access system receives a request...”, that “the restricted access system has verified...” and “the restricted access system is taken to have verified...”. Optus is concerned that this language may impose an unworkably arbitrary distinction between a provider of age-restricted content and the RAS used by that provider.

Optus’ recommendation

- 4.5 Given the above concerns, Optus would propose that ACMA remove sections 7 and 8 of its draft RAS Declaration and, as above, draw upon clauses 3.4(1)(2)(3) and (4) of the MPSD which, while wordy, clearly articulate outcomes-orientated requirements that industry must meet.

⁵ ACMA consultation paper to its draft RAS Declaration (released 26 October 2007), p11

5. Risk analysis

- 5.1 Optus believes that ACMA's proposed risk analysis requirements impose a more onerous burden on industry than exists currently under the MPSD. This is because an analysis appears to be required for every type of evidence (such as passport, birth certificate, credit card and student card etc) and for every manner in which evidence is received (such as electronically, in person and over the phone etc) as to whether that evidence could be used by a person other than the person it purports to identify or a person younger than the age the evidence attributes.
- 5.2 It appears that these requirements draw upon the risk analysis requirements in the MPSD in relation to chat safety measures. However, the interactive nature of chat services make them materially different to other forms of age-restricted content located behind a RAS. That is, a risk analysis in relation to each chat service (or type of chat service) allows the differences between them to be taken into account with respect to the risk of illegal contact between adults and children.
- 5.3 However, with respect to a RAS the range of evidence types and the methods of receipt are essentially static categories. Given that the kinds of evidence and the manner in which they may be received would be relevant to every provider of a RAS, it would be a burdensome and ineffective obligation that every provider be required to conduct their own risk analysis on the same types of evidence and the same methods of receiving evidence.
- 5.4 In contrast, the MPSD essentially requires that the nature of the evidence and the way in which it is given is such that it would be improbable or difficult for it to be held by a person other than the customer, and where age is not known at the time of the request, it verifies that the customer is at least 18 years old.
- 5.5 As is the case with the access key concept, the risk analysis requirements would require a complete review of Optus' current procedures.
- 5.6 The MPSD also contains provisions relating to the circumstances in which a provider would be taken not to have contravened the age verification requirements. These have not been adopted in the draft RAS Declaration and therefore it appears that protections which previously existed have been removed.

Optus' recommendation

- 5.7 A reasonable and workable approach by ACMA would be to remove the risk analysis requirements in the draft RAS Declaration and draw upon clause 3.4(1) of the MPSD. This clause clearly articulates the high level principles that must be achieved. As previously discussed with ACMA, these high level principles could then be supported by more detail in the Content Services Code.

6. Measures

- 6.1 Consistent with our comments above, Optus believes that the age verification and quality assurance measures as described in the draft RAS Declaration are

prescriptive and process-orientated. Our view is that the content of an age verification compliance plan should be focused on the outcomes required of industry such that providers have flexibility to determine for themselves how to ensure the protection of children from inappropriate content.

Optus' recommendation

6.2 We believe that it would be reasonable for the following matters to be addressed:

- (a) Measures to be adopted to ensure that an application for age-restricted content has been received;
- (b) Procedures to be followed to verify an applicant's age;
- (c) Procedures for an applicant's access to age-restricted content to be removed where access has been given in contravention of the requirements for access; and
- (d) Periodic internal reviews of these measures and procedures.

7. Conclusion

7.1 Optus strongly supports the policy objectives of:

- (a) protecting children from material likely to harm or disturb them;
- (b) protecting everyone from exposure to unsolicited material that they find offensive; and
- (c) respecting the right of adults to read, hear and see any material which is legal.

7.2 We have serious concerns regarding ACMA's draft RAS Declaration because we believe that in its current form it will not achieve its intended policy outcomes but will significantly undermine legitimate industry endeavours and investments to date and going forward.

7.3 However, recognising the accessible approach ACMA has adopted with Optus and other industry stakeholders since the making of the Content Services Act, we look forward to working with ACMA in the near future to revise the draft RAS Declaration such that it can meet its intended policy outcomes in an effective and workable manner.