The purpose of this article is to explain the new regulatory regime (the ‘content services regime’) that applies to the wide range of content delivered via the Internet and mobile devices. The article will first outline the various regimes that regulated content delivered by these technologies prior to the introduction of the content services regime. It will then provide an overview of the new regime, including details of its objectives and of the legal complexities involved in determining its scope. It will then summarise the Australian system for classifying content, and explain how the content services regime adapts and applies the classification system to forms of content delivered via the Internet and mobile devices. After detailing some of the minutiae of the scheme, the article will conclude with comments about the policy choices made in designing the new regime and some observations about the likely effectiveness, and the attendant benefits and costs, of the regime.

INTRODUCTION

Content in Australia is regulated by means of a system of classification that is aimed at providing adults with information about the nature of the content, while protecting children from unsuitable material (ALRC 1991; Mason 1992). The classification model of content regulation has been challenged by new delivery technologies, in particular, Internet streaming and delivery via convergent devices, which include 3G mobile phones and other mobile communications devices 'that can act as multimedia platforms and, in particular, deliver audiovisual content' (DCITA 2006, 1). The Australian response to the challenge of new technologies has been to extend the traditional classification model to apply to content delivered by these new technologies, with appropriate adaptations. Initially, this was done via the introduction of disparate regulatory regimes which applied to content delivered over the Internet and by mobile phones. More recently, a comprehensive new regulatory regime – referred to in this article as the ‘content services regime’ – has been introduced. The content services regime amalgamates the previously disparate regimes, extends content regulation to live Internet services and to services that link to other content and applies uniform standards across these diverse content platforms.

The purpose of this article is to explain the new omnibus regulatory regime that applies to the wide range of content delivered via the Internet and to mobile devices, and to identify aspects of the regime that merit further analysis. In particular, the article will:

- outline the various regimes that regulated content delivered by the new technologies prior to the introduction of the content services regime;
- provide an overview of the new regime, including details of its objectives and of the modifications that have been made to the pre-existing regimes for regulating content as a result of its introduction;
The article concludes with some observations about the likely effectiveness, and the attendant benefits and costs, of the regime. It should be noted that both the original, disparate regimes and the new content regime were introduced and, in respect of the former, modified and/or replaced, in response to a plethora of government and industry reports and reviews, and amidst considerable public discussion and debate. However, these processes are not described in this article. Nor does the article address consumer protection issues that are generated by Internet and mobile phone content, or the problem of inappropriate contact being made with children.

REGULATION OF INTERNET AND CONVERGENT CONTENT BEFORE THE INTRODUCTION OF THE CONTENT SERVICES REGIME

Before the introduction of the content services regime, Internet content and content delivered to telephones were each regulated separately and in a disparate manner. This section will briefly outline the nature of this regulation.

TELEPHONE CONTENT: THE TELEPHONE SEX SERVICES REGIME

Part 9A of the Telecommunications (Consumer Protection and Service Standards) Act 1999 (‘the CPSSA’) was enacted to deal with access by minors to premium voice services, known as ‘telephone sex services’. The legislation defined a ‘telephone sex service’ to mean a commercial service:

- supplied by way of a voice call made using a standard telephone service; and
- having regard to the way in which the service is advertised or promoted, and the content of the service, it would be concluded that a majority of people calling the service are likely to do so ‘with the sole or principal object of deriving sexual gratification from the call’ (CPSSA, s 158J).

In summary, the regime imposed the following requirements on service providers, to restrict access to telephone sex services:

- explain the legal complexities involved in determining the scope of the new regime;
- summarise the Australian system for classifying content, and explain how the content services regime builds upon, and adapts, the existing classification system to apply to new forms of content;
- explain the new system for dealing with complaints about content;
- set out the regulatory procedures for issuing notices for the removal of, or the disabling of access to, content that is deemed to be offensive or unsuitable;
- outline the industry code of practice, which is an important component of the new co-regulatory regime;
- explain the new restricted access regime, which regulates the arrangements for controlling access to content that is not suitable for children;
- set out the flexible, tiered system for enforcing obligations imposed under the regime; and
- make some preliminary observations about the policy choices made in designing the new regime.

REGULATING INTERNET AND CONVERGENT MOBILE CONTENT

DIGITAL RADIO & MOBILE CONTENT
• such services could only be offered by means of numbers with a 1901 prefix;
• access to 1901 numbers was barred, unless the customer elected in writing to access the number range; and
• service providers had to provide customers with a Personal Identification Number (PIN), or some other means of restricting access, to such services (CPSSA, s 158B).

While the legislation did not, in its terms, restrict telephone sex services to minors, it was based on the assumption that the requirements would make it difficult for minors to access these services. In the event that access to telephone sex services was not restricted as prescribed by the regime, a carriage service provider was prohibited from including a charge for the service in bills to customers.

INTERNET CONTENT: THE STORED CONTENT REGIME
The first stage in the regulation of Internet content was the introduction of the Broadcasting Services Amendment (Online Services) Act 1999 (the 'OSA'), which came into effect on 1 January 2000. The OSA inserted Schedule 5 into the Broadcasting Services Act 1992 (the 'BSA'), which established a comprehensive co-regulatory regime that applied to stored Internet content. This 'stored content regime' provided a mechanism for the take-down of 'offensive' content hosted in Australia in response to complaints made to the Australian Communications and Media Authority (ACMA). The regime pragmatically dealt with offensive Internet content hosted outside Australia essentially by obliging Internet Service Providers (ISPs) to comply with an industry code that mandated the provision of 'family-friendly' filtering software to end-users (Lindsay 1999; Penfold 2000). One of the deficiencies of the scheme was that it did not extend to streamed Internet content. This became apparent in 2006, when controversy erupted over offensive content that was streamed live over the Internet by the Big Brother reality program. As the content was neither broadcast nor stored, ACMA found that it was not covered by an existing content regulatory regime (Jaggers, Neilsen and Jolly 2007, 6).

THE MPS DETERMINATION AND MPSI SCHEME
The increased functionality of mobile devices in the years following the introduction of the telephone sex services regime – including their ability to deliver audio-visual content – created gaps in the regulatory regimes. These gaps were dealt with in the short term by means of patchwork interim policy responses. The most significant response was a direction by the then Minister to the former Australian Communications Authority (ACA)\(^1\) to introduce short-term regulatory controls on access to prohibited and age restricted content supplied to premium mobile services (MCITA 2004). These controls would take the form of a service provider determination that would require adult content supplied by premium mobile services to be accessible only by specified number ranges, that would completely prohibit the supply of certain content, and that would impose access restrictions on other content considered suitable only for adults. The ACA independently identified further issues that it considered should be addressed in a service provider determination relating to premium mobile services, including concerns about consumer protection and about ‘chat’ services being used to ‘groom’ children. On 29 June 2005, the ACA made the Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No. 1) (the 'MPS Determination'), pursuant to s 99(1) of the TA.
In relation to content regulation, the MPS Determination established rules that applied to content supplied by premium rate SMS (short message service) and MMS (multimedia message service) services, and to ‘proprietary network services’. SMS services differ from MMS services in that SMS premium services deliver text-only content, such as horoscopes and sporting results, while MMS premium services deliver a combination of audio-visual information and text, including video clips and games (Lee 2006, 100). ‘Proprietary network services’, on the other hand, include ‘walled-garden’ services (or closed network content services), whereby a mobile service operator supplies content to its users at a premium rate that is not generally accessible to persons not connected to that mobile network (MPS Determination, clause 2.1(2), Note, ‘Example of proprietary network services’).

The MPS Determination introduced a co-regulatory regime that was designed to ensure ‘appropriate community safeguards’ for mobile premium services, by making rules:

- to prohibit, and restrict, certain mobile premium services, in line with the principles established under the classification legislation and with community expectations about the accessibility of those services;
- to promote the safety of children in relation to mobile premium services that might facilitate illegal contact between children and adults;
- to ensure that customers of mobile premium services are provided with information to enable them to make informed decisions about the use of the services;
- to ensure that an independent complaints handling mechanism is available to customers of mobile premium services (MPS Determination, cl. 2.2(a)).

In dealing with content regulation, the Determination drew a distinction between ‘prohibited content’ and ‘age-restricted content’. Prohibited content, which service providers were absolutely prohibited from supplying, was defined as material classified as RC or X18+ by the Classification Board, or material that had not been classified, but that would be likely to be classified X 18+ or RC (MPS Determination, cl. 1.3 (definition of ‘prohibited content’)). Age-restricted content, on the other hand, was defined to mean material classified R18+ or MA15+ by the Classification Board, or material that has not been classified, but that would be likely to be classified R18+ or MA15+ (MPS Determination, cl. 1.3 (definition of ‘age-restricted content’)). Service providers were prohibited from supplying age-restricted content unless a customer requested access to the service, and the service provider implemented a mechanism for verifying that the customer was at least 18 years old (MPS Determination, cl. 3.4).

The MPS Determination established a co-regulatory regime, with important elements of the regime left to be addressed by an industry self-regulatory scheme, known as the Mobile Premium Services Industry Scheme (the ‘MPSI Scheme’) (MPS Determination, Part 5). Given the complexity of the regulatory regime, and of industry negotiations, the MPSI Scheme took more than a year to develop, entailing the expenditure of considerable resources by the industry (Australian Mobile Telecommunications Association 2007). The scheme was finally approved by ACMA on 28 September 2006, and came into effect on 29 October 2006 (Communications Alliance 2006). Amongst other matters, the MPSI Scheme provided for a system of assessing premium mobile content by means of a certified assessor and complaints handling rules (MPSI Scheme, cll. 7, 10).
The scheme was supplemented by more detailed practical guidelines, which elaborated on the rules established by the scheme (Communications Alliance 2007).

INTRODUCTION OF THE CONTENT SERVICES REGIME

The content services regime was implemented by the Communications Legislation Amendment (Content Services) Act 2007 (the ‘CSA’), which came into effect on 20 January 2008. The CSA introduced a new Schedule 7 into the BSA. The scheme imposes a comprehensive, uniform regime on services that were previously regulated under the disparate regimes outlined above, and extends content regulation to live streamed Internet content services, to content delivered to convergent devices, and to services that provide links to content.

OVERVIEW OF THE SCHEME

The content services regime consists of the following main elements:

- Schedule 7 of the BSA, which establishes the regulatory framework for the content services regime for content with an Australian connection;
- the Internet Industry Association Content Services Code, which was approved by ACMA on 14 July 2008, and which is an essential component of the co-regulatory regime; and
- the Restricted Access Systems Declaration 2007, which requires content service providers to implement age verification systems for people accessing content classified MA15+ and R18+.

In broad summary, the main rules that apply to content with a relevant Australian connection under Schedule 7 of the BSA are as follows:

- a prohibition on content classified as X18+ and RC (Refused Classification);
- a prohibition on content classified as R18+, unless it is subject to appropriate access restrictions;
- a prohibition on commercial MA15+ content, unless it is subject to appropriate access restrictions;
- in order to provide R18+ and/or commercial MA15+ content by hosting services, live content services, link services or commercial content services, service providers must have appropriate access restrictions in place;
- a complaints procedure that may result in ACMA issuing notices to remove content, or disable access to content, that is the subject of a complaint; and
- the development of industry codes of practice to deal with details relating to the classification of content, complaint handling procedures and increasing public awareness of issues relating to the use of content services.

The details of the rules established under the content services regime are explained below.

OBJECTIVES OF THE CONTENT SERVICES REGIME

The Second Reading Speech to the Bill implementing the content services regime, which was introduced in mid 2007, stated that:
The main focus of the Bill is to extend the general approach adopted by the Government in relation to content regulation to those services where it considers adequate safeguards are not currently in place (Coonan 2007, 43).

This focus was reflected in amendments made by the implementing legislation to the objects and regulatory policy of the BSA. As explained below, the content services regime applies to services known as 'designated content/hosting services'. First, the legislation introduced the following new object to the BSA:

- to ensure designated content/hosting service providers respect community standards in relation to content (BSA, s 3(ha)).

Secondly, the legislation introduced a new statement of regulatory policy, indicating that Parliament intends designated content/hosting services to be 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 application, and the provision of services made practicable by these technologies to the Australian community (BSA, s 4(3AA)).

Despite these general statements, the decision to introduce an omnibus regulatory regime required a series of policy responses to the features of content delivered by new technologies that differed from traditional content. The policy choices involved in establishing the content services regime were enunciated in the Explanatory Memorandum (EM) to the Bill that implemented the regime.

To begin with, the EM identified the main problem arising from the pre-existing platform-specific regulation of content services as the possibility of inconsistent rules applying to diverse content – such as a telephone sex service, a premium mobile service or Internet content – that could be delivered to the one convergent device, such as a 3G mobile phone. The EM proceeded to assess the options for regulating stored content, live content and mobile access to Internet content.

In relation to stored content, the EM concluded that regulation of content based on the extent to which service providers can control content, rather than on the specific communications platform, was likely to be 'more robust and adaptable in the face of new technologies and the development of innovative content services' (EM, cl. 69). Given that mobile service providers are taken to be able to directly or indirectly control stored content (DCITA 2006) – service providers have direct control over branded content on their own portals and contractual control over third party content made available on a revenue share basis (EM, cl 54) – the content services regime effectively applies to all stored content that is not regulated by another regime. In relation to live content, the EM first explained that, while live content supplied over the Internet, such as chat services, is generally not offered commercially, where such services are supplied to mobile devices they are usually offered commercially. Proceeding on the assumption that it is feasible to develop a pre-assessment regime for live commercial content (DCITA 2006), the EM explained
that it had been decided to align the regulation of such services, as much as possible, with the regulation of stored content. Accordingly, it was decided to bring the regulation of telephone sex services within the new general framework for regulating live content. Finally, in relation to mobile access to Internet content, the EM explained that, as filtering products are not yet commercially available, it was decided to give the Minister the power to exempt mobile service providers from regulatory obligations to supply filtering products for Internet access.

**MODIFICATIONS OF EXISTING REGULATORY REGIMES**

The content services regime effectively supersedes the disparate regulatory regimes that had previously applied to telephone sex services under Part 9A of the CPSSA; to stored Internet content under Schedule 5 of the BSA; and to mobile premium services under the MPS Determination.

In particular, and as explained further below, the regulation of all stored Internet content with an Australian connection has been removed from Schedule 5 of the BSA and relocated to Schedule 7 of the BSA. While Schedule 5 continues to regulate access to stored Internet content hosted outside Australia, Schedule 7 deals with all stored content services with an Australian connection, whether accessed by the Internet or by mobile devices.

In relation to mobile premium services, ACMA was required to amend the MPS Determination to remove those aspects of the Determination that applied to content regulation and restricted access arrangements. As a result of the ACMA amendment, the content regulation of mobile premium services, including premium rate SMS and MMS services, is exclusively dealt with under Schedule 7 of the BSA (ACMA 2007a). The amended MPS Determination maintains a residual operation. For example, it continues to impose safety requirements on mobile chat services.

In conjunction with the amendments to the MPS Determination, ACMA was required to take two further important regulatory steps. Under clause 14 of Schedule 7 of the BSA, ACMA was obliged to develop a ‘restricted access systems declaration’, to regulate access to all R18+ and commercial MA15+ content with an Australian connection falling within the scope of Schedule 7. Following public consultation on a draft declaration, ACMA issued the Restricted Access Systems Declaration 2007 (the ‘RAS Declaration’), which is an essential part of the new regime, on 20 December 2007 (ACMA 2007b). The RAS Declaration replaces the Restricted Access Systems Declaration 1999 (No. 1), which had applied to access to stored Internet content under clause 4 of Schedule 5 of the BSA. The Determination is dealt with further below. ACMA was also required to vary the Telecommunications Numbering Plan 1997 to move the imposition of restrictions on mobile premium content to prefixes specified in the MPS Determination so that this is now dealt with under the national numbering plan (ACMA 2007c).

Finally, the regulation of telephone sex services was removed from Part 9A of the CPSSA and transferred to Schedule 7 of the BSA. Part 9A of the CPSSA continues to exist, but it simply requires telephone sex services to be supplied to numbers with a 1901 prefix (CPSSA, ss. 158B, 158H).

**SCOPE OF THE CONTENT SERVICES REGIME**

A great deal of the complexity of the content services regime lies in ascertaining the services that fall within the regime, and in distinguishing between the different categories of services that are...
regulated by the regime. These matters will be summarised and explained in this section of the article.

‘CONTENT SERVICES’
In general terms, the content services regime in Schedule 7 applies to services that fall within the definition of a ‘content service’. A ‘content service’ is first defined broadly, before being limited by means of a long list of exceptions. Applying the broad definition, content services consist of the following two forms of service, regardless of the technology used to deliver the service:

- a service that delivers content to persons having equipment appropriate for receiving the content, where the delivery of the service is by means of a carriage service; or
- a service that allows end-users to access content using a carriage service (BSA, Schedule 7, cl. 2 (definition of ‘content service’, paras (a), (b)).

‘Content’ is defined to mean content whether in the form of text, data, speech, music or other sounds, visual images or any other form or combination of forms (BSA, Schedule 7, cl. 2 (definition of ‘content’). As a ‘carriage service’ is defined broadly by section 7 of the TA to mean ‘a service for carrying communications by means of guided and/or unguided electromagnetic energy’, the broad definition encompasses all services that deliver, or provide access to, content by electronic means. Moreover, as end users that use a link to a content service are taken to have accessed the content service, links also fall within the definition of a content service (BSA, Schedule 7, cl. 8 (d)). This broad definition gives effect to the intention that a uniform regime should apply, in principle, to all electronic content, regardless of the technological platform used to make the content available.

Given the breadth of the services included in the basic definition, the most important part of the definition is the list of exempted services. Before turning to the specific exemptions, however, it is necessary to explain when content will be dealt with under Schedule 5 of the BSA and when it will be dealt with under Schedule 7.

‘AUSTRALIAN CONNECTION’: SCHEDULE 5 OR SCHEDULE 7?
Although it is not an integral part of the definition of a content service, a content service is only regulated by Schedule 7 if it has an ‘Australian connection’. Under clause 3 of Schedule 7, a content service has an Australian connection if:

- any of the content provided by the content service is hosted in Australia; or
- in the case of a live content service, the service is provided from Australia (BSA, Schedule 7, cl. 3(1)).

Content services that do not have an Australian connection are either dealt with under Schedule 5 of the BSA or not regulated at all. Schedule 5 of the BSA, which formerly contained the entire stored content regime, now applies only to ‘Internet content’ that is hosted outside Australia. As was the case under the previous stored content regime, ‘Internet content’ is essentially defined to mean information that:
• is kept on a data storage device; and
• is accessed, or available for access, using an Internet carriage service (BSA, Schedule 5, cl. 3 (definition of 'Internet content')).

This means, for example, that live content that is streamed from outside Australia remains unregulated.

In summary, Schedule 5 of the BSA requires ISPs, including mobile service providers that provide Internet access, to comply with an industry code, which must impose obligations relating to ‘family-friendly’ filtering, in relation to content stored outside Australia. Implementing the recommendations of a departmental review of convergent content in relation to mobile access to Internet content, the CSA amended Schedule 5 to allow the Minister to determine that the filtering obligations do not apply to particular devices, such as mobile telephone handsets (BSA, Schedule 5, sub-clause 60(8A)). Access to Internet content stored outside Australia continues to be regulated by Version 10.5 of the Internet Industry Association's Internet Industry Codes of Practice, which was established pursuant to Schedule of the BSA and (IIA, 2005), and registered by ACMA on 26 May 2005 (IIA 2005). The IIA’s Schedule 5 codes of practice, which are under review, require ISPs to make ‘family friendly’ filters available to end users, and to provide information to end users about ‘family friendly’ filters.

EXCLUSIONS FROM CONTENT SERVICES REGIME

The extensive list of exclusions from the definition of content service include services, such as broadcasting and datacasting services, that are dealt with under established content regulatory regimes, as well as services that are intended to remain unregulated, for example, because they are either low risk services or services, such as traditional voice telephony, for private communications.

For mobile service providers, the most important exempt services are as follows:

• exempt point-to-point content services – services that are produced or packaged by the service provider, which deliver content by email, instant messaging, SMS or MMS, and which do not specialise in prohibited or potential prohibited content. Commercial services that are provided for a fee, and adult chat services, fall outside this exemption. Adult premium SMS or MMS services also fall outside the exemption, as they specialise in potential prohibited content (BSA, Schedule 7, cl. 2 (definition of ‘content service’, para. (k); definition of ‘exempt point to point content service’));
• services that enable end users to communicate with other end users by means of voice or video calls, or by means of email (BSA, Schedule 7, cl. 2 (definition of ‘content service’, paras (n),(o),(p)).
• instant messaging services, SMS services and MMS services – provided that the service enables end-users to communicate with other end-users, and is not an adult chat service ((BSA, Schedule 7, cl. 2 (definition of ‘content service’, paras (q),(r),(s)).

As is clear from the list of excluded services, the content services regime applies to services known as adult chat services, which are excluded from the exemptions from exempt point-to-point services, instant messaging services, SMS services and MMS services. Consequently, the
concept of adult chat services differentiates services that are subject to the content services regime from the forms of 'private' communications that are exempted from the regime. For the purpose of the regime, an 'adult chat service' is defined to mean a chat service where, having regard to:

- the name of the chat service;
- the way in which the service is advertised or promoted; and/or
- the reputation of the service;

it would be concluded that the majority of the content is reasonably likely to be prohibited content or potential prohibited content ((BSA, Schedule 7, cl. 2 (definition of 'adult chat service')). The content services regime therefore regulates content previously regulated as telephone sex services under Part 9A of the CPSSA, which forms a sub-set of services now classified as adult chat services. It should also be noted that whether or not a service is a proprietary network (or 'walled garden') service is not a relevant factor in determining whether the content services regime applies.

**DESIGNATED CONTENT/HOSTING SERVICES**

The substantive rules established by the content services regime apply to a sub-set of content services known as 'designated content/hosting services'. A 'designated content/hosting service' is defined to mean a hosting service, a live content service, a links service, or a commercial content service (BSA, Schedule 7, cl 2 (definition of 'designated content/hosting service')).

- A 'hosting service' is a content service provided to the public (whether for a fee or otherwise) by a person who hosts stored content, other than content consisting of voicemail messages, video mail messages, email messages, SMS messages or MMS messages (BSA, Schedule 7, cl. 4).
- A 'live content service' is a content service provided to the public (whether for a fee or otherwise) that provides live content (BSA, Schedule 7, cl. 3 (definition of 'live content service')).
- A 'links service' is a content service provided to the public (whether for a fee or otherwise) that provides one or more links to a content service that specialises in prohibited content or potential prohibited content (BSA, Schedule 7, cl. 3 (definition of 'links service'); cl. 8).
- A 'commercial content service' is a content service that is operated for profit and is provided to the public only on payment of a fee (BSA, Schedule 7, cl 3 (definition of 'commercial content service')).

Importantly, a content service only falls within one of the above four categories if the service is 'provided to the public'. Schedule 7 provides that a service is 'provided to the public' if it is provided to at least one person outside the 'immediate circle' of the person who provides the service (BSA, Schedule 7, cl 7). This means that the content service is not regulated if it is provided only to the 'immediate circle' of the service provider.

What amounts to a person's 'immediate circle' is set out in considerable detail in section 23 of the TA (BSA, Schedule 7, cl 2, (definition of 'immediate circle')). For example, if a person is an individual, the person's 'immediate circle' consists of that person and employees (TA, s. 23(1)(a)). This means that an individual can supply a content service to employees without the service being regulated by the content services regime.
The complexities involved in determining the circumstances in which a content service is provided to the public may be illustrated by examining the position of universities. Section 23 of the TA provides that the 'immediate circle' of a tertiary education institution consists of the institution, together with the following persons:

- a member of the governing body of the tertiary education institution;
- an officer or employee of the tertiary education institution;
- a student of the tertiary education institution (TA, s. 23(m)).

Moreover, in addition to the members of the 'immediate circle' identified in section 23, ss 23(2) of the TA provides for Ministerial determinations that can specify additional persons who are part of the 'immediate circle'. A Ministerial determination made in 1998 extended the 'immediate circle' to contractors and to for-profit joint venture partners (Alston, 1998). Provided a university provides content services only to those persons who fall within the institution’s immediate circle, those services are not regulated by the content services regime. Insofar as the university supplies content services to persons outside of the institution’s immediate circle, however, such as by a generally accessible web-site or mobile service, the service falls within the content services regime.

The categories of service regulated by the content services regime are divided into 'stored content' and 'live content'. 'Stored content' is defined to mean content kept on a data storage device, other than content stored 'on a highly transitory basis as an integral function of the technology used in its transmission' (BSA, Schedule 7, cl. 2 (definition of 'stored content')). 'Live content' is content other than stored content (BSA, Schedule 7, cl. 2 (definition of 'live content')).

CLASSIFICATION OF CONTENT

The content services regime, like the stored content regime before it, uses the classification structure established by the existing national scheme for classifying submittable print publications, films and computer games. In particular, in order to ensure consistency with the regulation of offline content, the terms 'prohibited content' and 'potentially prohibited content' in the content services regime are defined by reference to classifications under the national classification scheme. To appreciate the operation of the content service regime, it is therefore necessary to have an understanding of the national classification scheme.

THE NATIONAL CLASSIFICATION SCHEME

The national classification scheme is a cooperative arrangement between the Commonwealth, States and Territories, established by the Classification (Publications, Films and Computer Games) Act 1995 (the 'Classification Act'). The Classification Act is mirrored by State and Territory legislation, which complements the Commonwealth Act, and provides for the enforcement of the scheme.

The Classification Act establishes the Classification Board, that has responsibility for classification decisions, and the Classification Review Board, that is responsible for reviewing classification decisions. The Classification Operations Branch of the Federal Attorney-General’s Department provides secretariat support to the Classification Board and the Classification Review Board, and classification training for industry and government bodies. The national scheme in-
cludes separate schemes for the classification of submittable publications; films, DVDs and videos; and computer games. The Classification Act expressly provides that the following matters are to be taken into account in making classification decisions:

- the standards of morality, decency and propriety generally accepted by reasonable adults;
- the literary, artistic or educational merit (if any) of the publication, film or computer game;
- the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
- the persons, or class of persons, to or amongst whom it is published, or is intended or likely to be published (Classification Act, s. 11).

Material must be classified in accordance with the National Classification Code (NCC), which is set out in a Schedule to the Classification Act, and the classification guidelines (Classification Act, s. 9). The Classification Act establishes the types of classifications, while the material falling within each classification is set out in the NCC. The classification guidelines, namely the Guidelines for the Classification of Publications and the Guidelines for the Classification of Films and Computer Games, explain the application of the NCC in greater detail, as well as defining the terms used in the NCC. The NCC sets out the following principles to which classification decisions should endeavour to give effect:

- adults should be able to read, hear and see what they want;
- all people should be protected from exposure to unsolicited material that they find offensive;
- minors should be protected from material likely to harm or disturb them;
- the need to take account of community concerns about:
  - depictions that condone or incite violence, particularly sexual violence; and
  - the portrayal of persons in a demeaning manner (NCC, cl. 1).

The Classification Act sets out the following classifications for publications, films and computer games:

**PUBLICATIONS**

- Unrestricted;
- Category 1 restricted;
- Category 2 restricted;
- RC Refused Classification (Classification Act, s. 7(1)).

**FILMS**

- G General;
- PG Parental Guidance;
- M Mature;
- MA 15+ Mature Accompanied;
- R 18+ Restricted;
- X 18+ Restricted;
• RC Refused Classification (Classification Act, s. 7(2)).

COMPUTER GAMES

• G General;
• PG Parental Guidance;
• M Mature;
• MA 15+ Mature Accompanied;
• RC Refused Classification (Classification Act, s. 7(3)).

PROHIBITED CONTENT

The content services regime is aimed at preventing or restricting access to particular content, referred to as 'prohibited content' or 'potential prohibited content'. These categories of regulated content are defined by reference to the classification categories established under the national classification scheme.

'Prohibited content' refers to content that has received certain classifications by the Classification Board. While the national classification scheme only provides for the classification of submittable publications, films and computer games, the content services regime allows for applications to be made to the Classification Board for classification of all content regulated by the regime. Films and computer games are to be classified in a corresponding way to the way in which they have been, or would be, classified under the Classification Act (BSA, Schedule 7, cl. 24). Eligible electronic publications, which are electronic editions or audio recordings of print publications, are to be classified in the same way as the corresponding print publications have been, or would be, classified under the Classification Act (BSA, Schedule 7, cl. 11, 24). If the content does not consist of the entire unmodified contents of a film, a computer game, or an eligible electronic publication, then the content is to be classified in a corresponding way to the classification of a film under the Classification Act (BSA, Schedule 7, cl. 25).

In relation to films, computer games and all content other than eligible electronic publications, the relevant classification categories are RC, X18+, R18+ and MA15+. RC classified material is defined by the NCC to refer to items that:

• depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
• describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18; or
• promote, incite or instruct in matters of crime or violence (NCC, cl. 3, item 1).

The NCC defines X18+ classified material as material that contains real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers in a way that is likely to cause offence to a reasonable adult, and which is unsuitable for a minor to see (NCC, cl. 3,
item 2). R18+ material is defined as material that is unsuitable for a minor to see (NCC, cl. 3, item 3). Finally, MA15+ material is defined by the NCC to mean material that depicts, expresses or otherwise deals with sex, violence or coarse language in such a manner as to be unsuitable for viewing by people under 15 (NCC, cl. 3, item 4). In each case, material that falls within the immediately preceding and more serious category is excluded. For example, material that would be classified X18+ is excluded from the R18+ classification.

The following forms of content (other than eligible electronic publications) are defined as prohibited content under the content services regime:

- Content classified as RC or X18+;
- Content classified as R18+, where access to the content is not subject to a restricted access system;
- Content classified as MA15+, that is commercial content provided on payment of a fee, that does not consist of text or still visual images, where access to the content is not subject to a restricted access system and is provided by a content service that is operated for profit; and
- Content classified as MA15+, where access is provided by means of a mobile premium service, and is not subject to a restricted access system (BSA, Schedule 7, cl. 20(1)).

A 'mobile premium service' is defined to mean a commercial content service where a charge for the supply of the service is either expected to be included in a bill sent by a mobile carriage service provider, or a charge for the content service is otherwise payable to the mobile carriage service provider (BSA, Schedule 7, cl. 3 (definition of 'mobile premium service')).

In relation to eligible electronic publications, prohibited content is defined in terms of the classifications that apply to printed publications, to mean publications classified as RC, category 2 restricted or category 1 restricted (BSA, Schedule 7, cl. 20(2)). RC classified publications are defined by the NCC to essentially refer to the same categories of material falling within the RC classifications for films and computer games (NCC, cl. 2, item 1). Category 2 restricted publications are defined to mean publications that explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read (NCC, cl. 2, item 2). Category 1 restricted publications are defined to mean publications that explicitly depict nudity, or describe or implicitly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult; or describe or express in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or are unsuitable for a minor to see or read (NCC, cl. 2, item 3).

**POTENTIAL PROHIBITED CONTENT**

Potential prohibited content refers to content that has not been classified by the Classification Board, but if it were to be classified, there is a substantial likelihood that the content would be prohibited content (BSA, Schedule 7, cl 21). However, content that consists of an eligible electronic publication is not taken to be potential prohibited content if there is no substantial likelihood that it would be classified RC or category 2 restricted (BSA, Schedule 7, cl 21(2). Content likely to be classified category 1 restricted is not regarded as potential prohibited content. Nev-
ertheless, if the content is actually classified as category 1 restricted, it becomes prohibited content.

The category of potential prohibited content is required as, given the vast amount of material regulated by the regime and its inclusion of ephemeral content, it is not feasible to require all such content to be actually classified under the national classification scheme. As the EM to the implementing legislation explained:

The DCITA review has found that it would be unreasonably burdensome to require classification of convergent content services under the national classification scheme. This is because of the dynamic nature of the content, the number of content items likely to be involved, their time specific value and their rapid refreshment rate. (EM, paragraph 58).

**COMPLAINTS ABOUT CONTENT**

In general, regulatory action under the content services regime is initiated by a complaint made about the availability of prohibited content or potential prohibited content. Complaints can be made where a person has reason to believe that end-users in Australia can access prohibited or potential prohibited content, where a person has reason to believe that a hosting service is hosting prohibited or potential prohibited content, or where a person has reason to believe that end-users in Australia can access prohibited or potential prohibited content by using a link provided by a links service (BSA, Schedule 7, cl. 37).

ACMA is generally required to investigate complaints made to it under the content services regime, but need not investigate a complaint that could have been made under a registered industry code (BSA, Schedule 7, cl. 43). As explained below, ACMA has registered a content services industry code prepared by the Internet Industry Association (IIA). This means that complaints should, in the first instance, be made to the content service provider, and not ACMA. The requirements for dealing with complaints under the Internet Industry Association’s industry code are explained further below. If the complainant is not satisfied with the service provider’s response, it may then complain to ACMA.

In addition, ACMA has the ability to investigate the availability of prohibited or potential prohibited content to end-users in Australia on its own initiative (BSA, Schedule 7, cl. 44).

**TAKE DOWN AND SERVICE CESSATION PROCEDURES**

The content services regime establishes a framework for ACMA to issue notices to designated content/hosting service providers that require the removal of, or disabling of access to, prohibited or potential prohibited content.

The regime provides for ACMA to issue two main forms of notice: final notices and interim notices. A final notice is issued in relation to content that has been classified as prohibited by the Classification Board. An interim notice, on the other hand, is the means by which the regime deals with unclassified content. It is issued in relation to potential prohibited content, and directs the service provider to take certain action pending classification of the content by the Classification Board. Where ACMA issues an interim notice, it must apply to the Classification Board to have the content classified. If, in response to the application, the Classification Board classifies the material as prohibited content, ACMA must issue a final notice. The Schedule does not specifically
address what is to happen if the material is not classified as prohibited content. Presumably either the ACMA would formally revoke the interim notice, or it would lapse.

The precise form of final and interim notices depends upon the category of service provider to whom the notice is given, and on the classification of the content. Notices may be given to hosting service providers, live content service providers and links service providers. Hosting service providers may be given take-down notices which, in general, require them to cease hosting the content or to cease providing the content service to the public (BSA, Schedule 7, cl. 47). Live content service providers may be given service-cessation notices that, in general, require them to cease providing the service (BSA, Schedule 7, cl. 56). Links service providers may be given link-deletion notices which, in general, require them to cease providing a link to content or to cease providing the content service to the public (BSA, Schedule 7, cl. 62).

Regardless of the service provider to whom the notice is given, notices issued by ACMA must direct service providers to take action to ensure that one of two forms of situation, known as a 'type A remedial situation' or a 'type B remedial situation', comes into existence. An ACMA notice must require action to ensure a type A remedial situation where the content (other than an eligible electronic publication) is classified, or likely to be classified, as RC or X18+. An ACMA notice must, on the other hand, direct a type B remedial situation to come into existence where the content (other than an eligible electronic publication) is classified, or likely to be classified, as R18+ or MA15+. Reflecting the difference in the classifications applied to the material, a type A remedial situation exists, in general, where the content is removed or is not able to be accessed by the public, whereas a type B remedial situation may exist where the content is removed, or is not able to be accessed by the public, or is subject to a restricted access system.

Table 1 summarises the notices that may be issued by ACMA in relation to complaints about particular content services with an Australian connection, and the actions that must be taken by service providers in response to ACMA notices.

In addition to the above notices, provision is made for ACMA to issue 'special' take down, service-cessation and link-deletion notices that require the removal, or disabling of access to, material that is similar to the material that was the subject of the complaint (BSA, Schedule 7, cls 52, 59A, 67). This measure is designed to deal with attempts at avoiding the regime by simply removing the specific material identified in a notice and replacing it with similar material.

Service providers are required to comply with notices as soon as practicable after the notice was given or, in any case, by 6 pm on the next business day (BSA, Schedule 7, cls 53, 60, 68). The rules requiring service providers to comply with ACMA notices are known as designated content/hosting service provider rules. Apart from notices, the content services regime establishes a procedure for ACMA to accept written undertakings from service providers as an alternative to issuing formal notices. Provision is also made for the voluntary withdrawal of content or the voluntary deletion of links.

Service providers may seek a merits-based review of ACMA decisions to issue take-down notices, service-cessation notices or link-deletion notices by means of an application to the Administrative Appeals Tribunal (AAT) (BSA, Schedule 7, cl. 113).
<table>
<thead>
<tr>
<th>Service</th>
<th>Content</th>
<th>Notice</th>
<th>Remedial situation</th>
</tr>
</thead>
</table>
| Hosting service (not eligible electronic publication) | Prohibited content classified RC or X18+. | Final take-down notice. | Type A:  
  - content not hosted;  
  - content not provided to the public. |
| Hosting service (not eligible electronic publication) | Prohibited content classified R18+ or MA15+. | Final take-down notice. | Type B:  
  - content not hosted;  
  - content not provided to the public;  
  - access to content subject to restricted access system. |
| Hosting service (eligible electronic publication) | Prohibited content classified RC, category 2 restricted, or category 1 restricted. | Final take-down notice. | Type A:  
  - content not hosted;  
  - content not provided to the public. |
| Hosting service (not eligible electronic publication) | Potential prohibited content likely to be classified RC or X18+. | Interim take-down notice. | Type A:  
  - content not hosted;  
  - content not provided to the public. |
| Hosting service (not eligible electronic publication) | Potential prohibited content likely to be classified R18+ or MA15+. | Interim take-down notice. | Type B:  
  - content not hosted;  
  - content not provided to the public;  
  - access to content subject to restricted access system. |
| Hosting service (eligible electronic publication) | Potential prohibited content likely to be classified RC or category 2 restricted. | Interim take-down notice. | Type A:  
  - content not hosted;  
  - content not provided to the public. |
| Live service | Prohibited content classified RC or X18+. | Final service-cessation notice. | Type A:  
  - provider does not provide service. |
| Live service | Prohibited content classified R18+ or MA15+. | Final service-cessation notice. | Type B:  
  - provider does not provide service;  
  - access to content subject to restricted access system. |
| Live service | Potential prohibited content likely to be classified RC or X18+. | Interim service-cessation notice. | Type A:  
  - provider does not provide service. |

Table 1 Take-Down and Service-Cessation Notices
<table>
<thead>
<tr>
<th>Service</th>
<th>Content</th>
<th>Notice</th>
<th>Remedial situation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Live service</strong></td>
<td>Potential prohibited content likely to be classified R18+ or MA15+.</td>
<td>Interim service-cessation notice.</td>
<td>Type B:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• provider does not provide service;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• access to content subject to restricted access system.</td>
</tr>
<tr>
<td><strong>Links service</strong></td>
<td>Prohibited content classified RC or X18+.</td>
<td>Final link-deletion notice.</td>
<td>Type A:</td>
</tr>
<tr>
<td>(linked content not</td>
<td></td>
<td></td>
<td>• provider ceases to provide link;</td>
</tr>
<tr>
<td>eligible electronic</td>
<td></td>
<td></td>
<td>• content not provided to the public;</td>
</tr>
<tr>
<td>publication)</td>
<td></td>
<td></td>
<td>• access to content subject to restricted access system.</td>
</tr>
<tr>
<td><strong>Links service</strong></td>
<td>Prohibited content classified R18+ or MA15+.</td>
<td>Final link-deletion notice.</td>
<td>Type B:</td>
</tr>
<tr>
<td>(linked content not</td>
<td></td>
<td></td>
<td>• provider ceases to provide link;</td>
</tr>
<tr>
<td>eligible electronic</td>
<td></td>
<td></td>
<td>• content not provided to the public;</td>
</tr>
<tr>
<td>publication)</td>
<td></td>
<td></td>
<td>• access to content subject to restricted access system.</td>
</tr>
<tr>
<td><strong>Links service</strong></td>
<td>Prohibited content classified RC, category 2 restricted or category 1</td>
<td>Final link-deletion notice.</td>
<td>Type A:</td>
</tr>
<tr>
<td>(linked to eligible</td>
<td>restricted.</td>
<td></td>
<td>• provider ceases to provide link;</td>
</tr>
<tr>
<td>electronic publication)</td>
<td></td>
<td></td>
<td>• content not provided to the public;</td>
</tr>
<tr>
<td><strong>Links service</strong></td>
<td>Potential prohibited content likely to classified RC or X18+.</td>
<td>Interim link-deletion notice.</td>
<td>Type A:</td>
</tr>
<tr>
<td>(linked content not</td>
<td></td>
<td></td>
<td>• provider ceases to provide link;</td>
</tr>
<tr>
<td>eligible electronic</td>
<td></td>
<td></td>
<td>• content not provided to the public;</td>
</tr>
<tr>
<td>publication)</td>
<td></td>
<td></td>
<td>• access to content subject to restricted access system.</td>
</tr>
<tr>
<td><strong>Links service</strong></td>
<td>Potential prohibited content likely to be classified R18+ or MA15+.</td>
<td>Interim link-deletion notice.</td>
<td>Type B:</td>
</tr>
<tr>
<td>(linked content not</td>
<td></td>
<td></td>
<td>• provider ceases to provide link;</td>
</tr>
<tr>
<td>eligible electronic</td>
<td></td>
<td></td>
<td>• content not provided to the public;</td>
</tr>
<tr>
<td>publication)</td>
<td></td>
<td></td>
<td>• access to content subject to restricted access system.</td>
</tr>
<tr>
<td><strong>Links service</strong></td>
<td>Potential prohibited content likely to be classified RC or category 2</td>
<td>Interim link-deletion notice.</td>
<td>Type A:</td>
</tr>
<tr>
<td>(linked to eligible</td>
<td>restricted.</td>
<td></td>
<td>• provider ceases to provide link;</td>
</tr>
<tr>
<td>electronic publication)</td>
<td></td>
<td></td>
<td>• content not provided to the public;</td>
</tr>
</tbody>
</table>

*Table 1 (cont’d) Take-Down and Service-Cessation Notices*
THE CONTENT SERVICES CODE (CSC)

The content services regime is a co-regulatory regime, with significant details dealt with by an industry code, and with ACMA having the power to make mandatory industry standards in the absence of a satisfactory code. Under clause 81 of Schedule 7 of the BSA, the following matters must be dealt with in an industry code that applies to commercial content service providers:

- the engagement of trained content assessors;
- ensuring that unclassified content that is potentially prohibited content – other than live content or an eligible electronic publication – is not provided by commercial content services, other than news or current affairs services, unless it has been assessed by a trained content assessor;
- ensuring that live content is not provided by commercial content services, other than news or current affairs services, unless there is no reasonable likelihood that the content would be classified RC, X18+, R18+ or MA15+, or the content has been assessed by a trained content assessor;
- ensuring that an unclassified eligible electronic publication that is substantially likely to be classified RC or Category 2 restricted, is not provided by commercial content services, other than news or current affairs services, unless it has been assessed by a trained content assessor.

Clause 85 of Schedule 7 of the BSA provides that ACMA must register an industry code once it is satisfied of certain matters.

The Internet Industry Association (IIA) facilitated the development of the Content Services Code (the CSC), which was registered by ACMA on 10 July 2008 (IIA 2008). In doing so, ACMA was required to be satisfied that the IIA is an association that represents hosting service providers, live content service providers, links service providers and commercial content services providers, with an Australian connection (BSA, Schedule 7, cl. 85). The CSC deals with arrangements for classifying content by trained content assessors, complaints handling and procedures for complying with ACMA notices.

ASSESSMENT OF CONTENT AND CLASSIFICATION

Clause 8 of the CSC sets out the circumstances in which a commercial content service provider must arrange for a trained content assessor to classify content. It provides that unclassified content must be assessed in the following circumstances:

- Stored content (other than an eligible electronic publication) – where the service provider, acting reasonably, considers the content to be substantially likely to be prohibited or potential prohibited content;
- Live content (other than a news or current affairs service) – where the service provider, acting reasonably, considers the likely or anticipated content to be of a kind which is substantially likely to be potential prohibited content;
- Eligible electronic publication (other than a news or current affairs service) – where the service provider, acting reasonably, considers the content to be of a kind which is substantially likely to be classified RC or Category 2 restricted.
COMPLAINTS
Clause 9 of the CSC requires designated content/hosting service providers to investigate complaints in the following circumstances:

- **Hosting service provider** – should investigate a complaint regarding stored content if it is reasonable to believe that end-users in Australia can access prohibited or potential prohibited content; the complaint is not frivolous or vexatious, and is made in good faith; the content is hosted by the service provider; and the complaint is made within 30 days of the content being made available to the complainant.

- **Commercial content service provider** – should investigate a complaint regarding stored content if it is reasonable to believe that end-users in Australia can access prohibited or potential prohibited content; the complaint is not frivolous or vexatious, and is made in good faith; the content is provided to end users in Australia by the service provider; and the complaint is made within 30 days of the content being made available to the complainant.

- **Links service provider** – should investigate a complaint if it is reasonable to believe that end-users in Australia can access prohibited or potential prohibited content using a link; the complaint is not frivolous or vexatious, and is made in good faith; and the complaint is made within 30 days of the link being made available to the complainant.

- **Live content service provider** – should investigate a complaint regarding live content if it is reasonable to believe that end-users in Australia can access prohibited or potential prohibited content; the complaint is not frivolous or vexatious, and is made in good faith; the content is provided to end users in Australia by the live content service provider; and the complaint is made within 30 days of the occurrence of the incident complained of.

The CSC requires designated content/hosting service providers to publish complaints handling procedures, and to provide an end user with a copy of, or electronic access to, the published procedures when requested to do so (CSC, cl. 9.7, 9.8).

TAKE DOWN AND SERVICE CESSION PROCEDURES
The CSC includes diagrammatic summaries of the procedures for service providers to follow in response to ACMA notices. Although the diagrams do no more than summarise the rules established by the content services regime, and dealt with in Table 1, they are reproduced here in figures 1 to 4, with minor modifications, to assist in clarifying the relevant processes that must be followed.3

RESTRICTED ACCESS SYSTEM (RAS)
As explained above, content (other than an eligible electronic publication) that is classified R18+ or MA15+ is not prohibited content if it is subject to a restricted access system. Given the difficulties encountered in establishing standards for restricted access systems, the requirement to implement restricted access systems for R18+ and MA15+ material has been one of the most controversial aspects of the content services regime.
Figure 1 Final Notices: Content other than Eligible Electronic Publications (EEPs)
Source: IIA

Figure 2 Final Notices: EEPs
Source: IIA

Figure 3 Interim Notices: Content other than EEPs
Source: IIA
Clause 14 of Schedule 7 of the BSA requires ACMA to make a declaration that a specified access-control system is a restricted access system for the purposes of the content services regime. To comply with this requirement, ACMA introduced the RAS Declaration which came into effect with other aspects of the new regime on 20 January 2008. The RAS Declaration, which replaced the previous ACMA Restricted Access Systems Declaration 1999 (No 1), also supplanted access control rules established under the MPS Determination. The RAS Declaration deals separately with the minimum standards for MA15+ content and for R18+ content.

MA15+ CONTENT

The minimum requirements for an access-control system that restricts access to MA15+ content are as follows:

- **Application for access.** The content must be accessed by means of an application, and the applicant must provide a written or electronic declaration that he or she is at least 15 years of age.
- **Warnings and safety information.** The access-control system must provide, for each application for access, a warning about the nature of the content and safety information about how a parent or guardian may control access to the content by persons under 15.
- **Limitation on access.** The system must not provide access to the content unless it has verified that an application has been made in the required form (together with a declaration) and the required warnings and safety information have been given. Access may, however, be granted if the applicant has previously submitted an application (and declaration) in the required form, and the required warnings and safety information have previously been given to the applicant. Repeat access may, for example, be authorised by means of a Personal Identification Number (PIN), or by some other means of limiting access.
- **Quality assurance measures.** The system must include measures that will remove an applicant’s access to the content without delay where the limitations on access are not complied with (RAS Declaration, cl. 5-9).

R18+ CONTENT

The minimum requirements for an access-control system that restricts access to R18+ content are more stringent than those that apply to MA15+ content. They are as follows:
• **Application for access.** The content must be accessed by means of an application.

• **Warnings and safety information.** The access-control system must provide, for each application for access, a warning about the nature of the content and safety information about how a parent or guardian may control access to the content by persons under 18.

• **Age verification.** The system must verify that the applicant is at least 18 years of age by requiring the applicant to supply evidence of age, and applying a risk analysis.

• **Limitation on access.** The system must not provide access to the content unless it has verified that an application has been made, that the required warnings and safety information have been given, and that the applicant is at least 18 years of age. Access may, however, be granted to repeat applicants if there is some means of verifying compliance with the system, such as by use of a PIN.

• **Risk analysis.** The system must include a risk analysis that identifies and assesses the risk that the evidence of age submitted to the system could be used by someone other than the applicant, or by a person who is younger than the age identified in the evidence.

• **Quality assurance measures.** The system must include measures that will remove an applicant’s access to the content without delay where the limitations on access are not complied with, and must provide for periodic reviews of the effectiveness of the required risk analysis.

• **Record keeping requirements.** The system must provide for the keeping of records, for a period of two years, to demonstrate how the age of applicants has been verified (RAS Declaration, cll. 10-17).

The requirements imposed on content service providers under the RAS Declaration are supplemented by provisions of the CSC, which provide service providers with some practical guidance on complying with the obligations to provide warnings and safety information (in relation to MA15+ and R18+ content), and age verification and risk analysis (in relation to R18+ content). Importantly, the CSC provides the following guidance in relation to the obligation to engage in risk analysis before providing access to R18+ content.

• **Age authentication methods.** It is unlikely that the age of the applicant would be falsified where the service provider obtains a credit card number in the name of the applicant, or sights an original or copy of one of the following documents that indicate the age of the applicant: an identification card issued by a tertiary education institution; a licence or permit issued under a law of the Commonwealth, State, Territory, or another country; a passport; or a birth certificate (CSC, cl. 19.3).

• **Mitigating risk.** The risk of an applicant falsifying his or her age can be mitigated by the service provider collecting the applicant’s name, and, if applicable, the account number or other unique identifier of the user’s contractual relationship with the service provider. The risk that the person who accesses the content might be younger than the evidence of age indicates can be mitigated by obtaining a declaration that the user is at least 18 years of age (CSC, cll. 19.4, 19.5).

• **Confirmation of access.** The risk of falsification of identity can be mitigated by the service provider providing confirmation of access to the named user in written or electronic form, or instigating an authorised charge on the user’s credit card (CSC, cl. 19.6).
ENFORCEMENT

The content services regime establishes two enforcement regimes: the enforcement of the designated content/hosting service provider rules and the enforcement of the industry code.

DESIGNATED CONTENT/HOSTING SERVICE PROVIDER RULES

As explained above, the rules requiring service providers to comply with ACMA notices are known as designated content/hosting service provider rules (the 'service provider rules'). Moreover, provision is made for ACMA to determine additional service provider rules (BSA, Schedule 7, cl. 104).

The content services regime establishes a tiered regime for the enforcement of the service provider rules. The flexible enforcement options available to ACMA allow for regulatory responses to be calibrated in accordance with a number of relevant considerations, such as the seriousness of the breach and whether the service provider is a repeat offender (Ramsay 2005). The tiered regime that applies to the enforcement of the service provider rules consists of the following options:

- **Formal warnings** – ACMA may issue a formal warning to a content service provider where it is satisfied that the service provider has contravened, or is contravening, a service provider rule (BSA, Schedule 7, cl. 109).

- **Remedial directions** – ACMA may give a content service provider a written remedial direction, requiring the service provider to take specified action to remedy a contravention, where it is satisfied that the service provider has contravened, or is contravening, a service provider rule (BSA, Schedule 7, cl. 108). It is an offence for a person to contravene an ACMA remedial direction.

- **Civil penalty** – A person who contravenes a service provider rule is subject to civil penalties (BSA, Schedule 7, cl. 107). 4

- **Criminal offence** – A person who engages in conduct that contravenes a service provider rule commits a criminal offence (BSA, Schedule 7, cl. 106).

- **Federal Court order** – If ACMA is satisfied that a content service provider is contravening a service provider rule, it may apply to the Federal Court for an order that the service provider cease providing the service (BSA, Schedule 7, cl. 110).

In proceedings relating to 'special' take-down notices, or 'special' link-deletion notices, it is a defence for the service provider to establish that it did not know, or could not, with reasonable diligence, have ascertained, that the content was prohibited or potential prohibited content (BSA, Schedule 7, cll. 53(4), 68(4)).

ENFORCEMENT OF THE CSC

As explained above, the IIA CSC imposes obligations on service providers in relation to matters including pre-assessment of commercial content services, complaints handling, and Take Down and Service Cessation procedures. The content services regime establishes a tiered regime for the enforcement of compliance with the CSC. The tiered regime provides for ACMA to take the following actions to enforce compliance with the CSC:
• **Formal warnings** – ACMA may issue a formal warning to a participant in a section of the content industry where the content service provider contravenes a registered industry code (BSA, Schedule 7, cl. 90).

• **Direction to comply with CSC** – If ACMA is satisfied that a participant in a section of the content industry has contravened, or is contravening, a registered industry code, it may give a written direction to the content service provider to comply with the code (BSA, Schedule 7, cl. 89).

The requirement to comply with an ACMA direction relating to a registered industry code is a service provider rule. This means that, once ACMA has issued a written direction to comply with an industry code, the full range of options that are available for enforcing compliance with the service provider rules becomes available to enforce the ACMA direction.

**PRELIMINARY OBSERVATIONS**

Regulatory regimes imposing controls over content involve establishing a balance between protecting the freedom of adults to access content, on the one hand, and protecting children from unsuitable material, on the other. New technologies for delivering content, especially multifunction mobile devices, threaten the balance traditionally struck, insofar as they enable users, including children, to access a vast amount of unclassified material, wherever and whenever the user wishes.

The increasing use of mobile devices by children, and the ability of such devices to access the full range of available content, poses problems, as mobile devices are far less amenable to parental supervision than other ways of accessing content. Moreover, available research suggests that children may be unlikely to report instances of accessing unsuitable material (Livingstone and Bober 2005). This means that greater emphasis is necessarily placed on age-verification systems for restricting access to age-inappropriate material, and on content filtering solutions (Ofcom 2008).

The content services regime is a novel solution to the problems posed by new technologies for delivering content in so far as it seeks to impose a uniform regime across the complete range of content services that fall outside of established regimes, such as the classification regimes that apply to broadcast content, print publications, films and computer games. The new regime purports to apply to content as diverse as premium rate mobile services (including adult chat services), live Internet streaming, online games and even online virtual worlds. Whether it is possible to apply the relatively complex regulatory regime explained in this article to new forms of communications content, without incidentally chilling Australian innovation, remains to be seen. Meanwhile, it is important to acknowledge that differences between traditional technologies for delivering content and the newer technologies have necessitated policy choices relating to the classification regime that, in our view, require further consideration. In particular, there are at least three aspects of the content services regime that merit further analysis.

First, as explained above, the regime is designed to regulate access to commercial content that is classified, or is likely to be classified, as MA15+, where access is provided by means of a mobile premium service and is not subject to a restricted access system. As further explained, the RAS Declaration requires access to such content to be subject to an application process, in-
cluding a declaration that the applicant is at least 15 years of age. Given user demands for instantaneous access to mobile content, the regime clearly imposes costs on adult users in terms of the additional time taken to access services, as well as on service providers. Furthermore, in the absence of any accepted means for distinguishing users that are under the age of 15 from those that are over that age, the effectiveness of the regime in limiting access to MA15+ material must be questioned. Finally, it is important for policy-makers in this area to recognise that it is important for children to actively engage with technology, and to balance that imperative against the need to protect them from unsuitable material. In this respect, the findings of the UK Byron Review, which has no equivalent in Australia, offer a much-needed corrective to some of the more unbalanced views surrounding children and new technologies (Byron 2008). As the Byron Review points out, interaction with technologies is an important part of child development in the twenty-first century, and it is just as important for children to make decisions for themselves, as it is to manage the risks associated with unsuitable material. This is not to say that such risks do not exist, but merely that we should be careful about tilting the balance too far in favour of an over-protective and 'risk averse' culture.

Secondly, the content services regime applies only to content with an Australian connection. As explained above, stored Internet content hosted outside Australia remains subject to Schedule 5 of the BSA, which essentially requires ISPs to supply ‘family-friendly’ filtering software to end-users. The Commonwealth government is currently considering imposing more onerous requirements on ISPs relating to filtering of Internet content (Conroy 2008). An assessment of these proposals falls outside the scope of this article. Nevertheless, the global nature of content delivery platforms, especially the Internet, continues to pose significant challenges for national jurisdictions seeking to regulate access to content.

A predictable response to the imposition of more onerous and costly restrictions in any one jurisdiction is for content providers to locate their services in jurisdictions where they are subject to less regulatory burdens. For example, while an Australian provider of an online game or virtual world would be subject to obligations under the content services regime, a US based service provider is under no such legal obligations. In this respect, the extent to which the regime fulfils the statutory regulatory policy objectives of encouraging 'the development of communications technologies and their application', and 'the provision of services made practicable by those technologies to the Australian community', or whether it simply encourages elements of the content industry to move offshore, must be questioned.

Thirdly, the complexities associated with determining whether or not a content service falls within the content services regime would seem to impose relatively high regulatory costs. The regime deliberately extends content regulation to forms of delivering content, or making content available, that have previously been unregulated, including Internet streaming and providing links to prohibited or potential prohibited content. There are, however, considerable uncertainties arising from the complex way in which the regime distinguishes regulated from unregulated services. For example, determining when a service is provided 'to the public' may require expert legal analysis. Furthermore, decisions about the classification of content, which are required in order to determine whether content is prohibited or potentially prohibited, are far from black and white.

The overall effect of the complexities and legal uncertainties associated with the regime may well be that risk averse content service providers decide against providing some material aimed
at an adult audience. Moreover, it seems likely that the regulatory framework, which requires complaints to be directed to service providers in the first instance, is likely to result in service providers removing material, rather than risking complaints to ACMA. In this respect, it is notable that, while provision is made for service providers to appeal from an ACMA notice to the AAT, there is no provision for those who are responsible for content, such as a person who requests a hosting service provider to host content, to appeal against a decision of the service provider to remove content.

CONCLUSION

The content services regime represents an important attempt to establish a consistent, uniform regulatory regime that applies to the full range of content delivered over diverse new communications platforms. As such, it amalgamates and harmonises existing regimes, specifically the stored Internet content regime under Schedule 5 of the BSA, the telephone sex services regime under Part 9A of the CPSSA, and the premium rate mobile services regime under the MPS Determination. In addition, the regime extends content regulation to previously unregulated content services, including live Internet streaming services and services providing links to prohibited or potential prohibited content.

The introduction of the regime has the benefit of establishing uniform standards, and removing potential inconsistencies from the previous disparate regulatory regimes. At the same time, questions remain about the extent to which it has correctly balanced the competing policy objectives in this area. While it is important to ensure that children are appropriately protected from unsuitable content, it is also important to ensure that adults are free to access content and to foster an innovative local content industry. Moreover, in terms of child development, it is important to acknowledge the difficult balance to be struck between encouraging children to use and explore new technologies, while ensuring adequate protection from age-inappropriate material. This is a more complex social problem than simply prohibiting all access to material that some sections of the community may consider offensive or challenging.

Given that the regime has only recently been established, there is insufficient information about how it will work in practice for any definitive views to be expressed about its effectiveness. Nevertheless, an analysis of the overall regulatory framework suggests that the legislatively mandated review, which is required to take place within three years after commencement (BSA, Schedule 7, cl 118), should take the regulatory costs of the regime fully into account. These costs include not only the compliance costs imposed on industry, but also the costs that may arise from useful material not being available as a result of the regulatory incentives to remove material, and of Australian content services moving offshore. If the regime proves to have more symbolic value, in allowing politicians to make claims that they are protecting children, than actual effectiveness in controlling access to material, then a full assessment of the costs clearly becomes more important.
ENDNOTES

1 In 2005, the Australian Communications Authority merged with the Australian Broadcasting Authority to become the Australian Media and Communications Authority.

2 Sub-clause 1.3 of the MPS Determination defined a ‘premium SMS or MMS service’ to mean a carriage service or content service supplied by way of a call to a number with the prefix 191, 193, 194, 195, 196, 197 or 199. A ‘proprietary network’ was defined to mean ‘a telecommunications network used by a mobile carriage service provider that enables customers of that provider to access, by way of a mobile device, a premium content service that is not otherwise generally available’.

3 These diagrammatic summaries are reproduced in this article with the permission of the Internet Industry Association.

4 A civil penalty, which may include non-monetary as well as monetary orders, is a penalty imposed by courts imposing civil rather than criminal processes (Ramsay 2005).

REFERENCES


Cite this article as: Lindsay, David; Rodrick, Sharon; de Zwart, Melissa. 2008. ‘Regulating Internet and convergent mobile content: The new content services regime’. *Telecommunications Journal of Australia* 58 (2-3): pp. 31.1–31.29. DOI: 10.2104/tja08031.