2004-2005-2006-2007

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMMUNICATIONS LEGISLATION AMENDMENT (CONTENT SERVICES) BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications, Information Technology and the Arts, Senator the Honourable Helen Coonan)

OUTLINE

The Communications Legislation Amendment (Content Services) Bill 2007 (the Bill) amends the *Broadcasting Services Act 1992* (BSA) to provide for the regulation of content services delivered over convergent devices, such as broadband services to mobile handsets, and new types of content provided over the Internet.

The existing Schedule 5 to the BSA already provides a regulatory framework for stored content made available over the Internet. However, this framework does not currently extend to ephemeral content such as live streamed audiovisual services, nor to services over other types of networks such as the mobile telephone network. Therefore, the Bill establishes a new regulatory framework for content that will be provided by a new Schedule 7 to the BSA. The new Schedule will replace Schedule 5 to the extent that it regulates Internet content hosts, and will in addition regulate live streamed content services, mobile phone-based services, and services that provide links to content.

The new framework imposes obligations on content providers that supply content services to ensure that they are provided in a manner which is not likely to result in children being exposed to material that would be likely to offend a reasonable adult. Service providers who do no more than provide a carriage service that enables content to be accessed or delivered are excluded from the regime.

The main elements of the proposed new framework are:

- content that is, or potentially would be rated X 18+ and above must not be delivered or made available to the public, and access to material that is likely to be rated R18+ must be subject to appropriate age verification mechanisms;

- where access to content is provided by a content service to the public for a fee (other than a news or current affairs service), and the content does not wholly consist of text or still visual images, and is likely to be classified MA 15+ or above, access to that content must be subject to appropriate age verification mechanisms. Similar arrangements will apply to content provided by premium mobile services;

- the above limitations relating to prohibited content and age verification mechanisms will also apply in relation to live streamed services;

- electronic editions of publications such as books and magazines which have been classified ‘Restricted-Category 1’, ‘Restricted – Category 2’ or ‘Refused Classification’ will be prohibited;

- certain types of content services, including those which provide content regulated under existing broadcasting regulatory frameworks, and the content of private users’ personal communications will be excluded from the scope of the new regulatory framework;

- carriage service providers who do no more than provide a carriage service that enables content to be delivered or accessed are not providing a content service, but may be required to remove access to a service where it is considered to contain prohibited material;

- the scheme will be based on a model which removes access to prohibited content or potential prohibited content via the issuing of 'take-down' notices for stored or static content, or 'service-cessation' notices for live content and 'link deletion' notices for links to content;

- to strengthen the ability of the scheme to respond to repeated and deliberate offences, the Bill proposes to enable the Australian Communications and Media Authority (ACMA) to issue a notice to a content service provider to remove content that is substantially similar to content already subject to a take-down notice;

- where a content service provider fails to comply with a take-down, service-cessation or link deletion notice, including where, in ACMA's opinion it supplies content that is substantially similar to content which is already subject to such a notice, civil or criminal penalties may be pursued;

- industry codes of practice will be required to give effect to certain content service provider obligations, such as engaging appropriately trained content assessors to provide advice on the likely classification of live services, arrangements for the provision of consumer information and awareness mechanisms; and

- where necessary, ACMA will have the power to determine industry standards where it considers that industry codes are deficient in ensuring that content services are provided in accordance with prevailing community standards.

Schedule 3 to the Bill would amend the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to include the Indian Ocean Territories in reviews by the Regional Telecommunications Independent Review Committee.

FINANCIAL IMPACT STATEMENT

The proposed new regulatory framework for emerging content services includes a significant role for ACMA, including registration and approval of industry codes of practice, and the determination of industry standards and service provider rules.

ACMA's existing role as a complaints handling body in relation to broadcasting and online content regulation would be expanded to include complaints relating to new content services. Under the proposed arrangements for new content services, ACMA will be empowered to receive direct complaints relating to possible breaches of content service provider rules, as well as possible breaches of code of practice requirements.

As a result of these additional responsibilities, ACMA will be required to periodically refer material that has been the subject of complaint to the Classification Board for classification and to pay the associated fee.

The financial impact on content service providers of the new legislative arrangements is not expected to be great. A considerable proportion of the proposed obligations which will apply to mobile phone-based services are broadly consistent with those currently in place under the ACMA Determination for mobile premium services, which have been accepted and supported by industry. Further, it is reasonable that, where content service providers offer services on a commercial basis, they should meet the costs of ensuring that adequate safeguards are in place to protect children in particular from the risk of exposure to offensive or harmful content that could be accessed using their service.

The inclusion of the Indian Ocean Territories in reviews by the Regional Telecommunications Independent Review Committee is expected to have a negligible impact on the cost of the reviews.

REGULATION IMPACT STATEMENT

Background

The Review of the Regulation of Content Delivered over Convergent Devices

1. On 13 May 2004, the then Minister for Communications, Information Technology and the Arts tabled the Report of the Review of the Operation of Schedule 5 to the *Broadcasting Services Act 1992* (the Schedule 5 review). This review evaluated the Australian Government's online content scheme, which is enacted through Schedule 5 to the *Broadcasting Services Act 1992* (BSA).

2. One of the issues considered by the Schedule 5 review was the impact that convergent devices may have on the operation of the online content scheme. In this context, the term 'convergent devices' is used to mean mobile phones and other mobile communications devices that can act as multimedia platforms, and, in particular, deliver audiovisual content.

3. The Schedule 5 review found that:

> …there is a need to ensure that appropriate protections are in place for end-users, especially children who may access this audiovisual content as it becomes available on convergent devices.[1]

4. Further, the Schedule 5 review noted that:

> In the short-term, these protections may be achieved in relation to content delivered on SMS and MMS through service provider rules imposed under the *Telecommunications Act 1997*. In the longer term, a review should consider whether future regulatory arrangements are required and take into account the nature of these and other new and emerging services.[2]

5. To address this in the short-term, also on 13 May 2004, the then Minister directed the Australian Communications Authority (ACA) to establish controls on access to adult content supplied via mobile phones, whether that content was supplied by premium rate SMS and MMS or on proprietary content portals or so-called 'walled gardens'.[3]

6. The ACA made the *Telecommunications Service Provider (Mobile Premium Services) Determination (No. 1) 2005* (the SPD) to establish these rules on 29 June 2005.[4] Together with industry codes of practice made by the Internet Industry Association (IIA), this measure is serving as an interim arrangement, pending the outcome of a review by the Department of Communications,

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[1] DCITA, *Report of the Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992*, DCITA, Canberra, 2004, p. 42.
[2] Ibid.
[3] ACA (Service Provider Determination) Direction 2004 (No 2), clause 4.
[4] Further information about the service provider determination can be found at www.acma.gov.au/ACMAINTER.1900860:STANDARD:453308348:pc=PC_2547, viewed 6 July 2005.

Information Technology and the Arts (DCITA) into the appropriate longer-term regulatory approach.

7. The Review of the Regulation of Content Delivered over Convergent Devices (the DCITA review), has reported its findings to the Minister. The review report proposes establishment of a new regulatory framework for convergent content services in Australia.

Content Regulation in Australia

8. The *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) establishes the classification system for film, computer games and certain publications, including the National Classification Code (the Code) and the Guidelines for the Classification of Films and Computer Games (the Classification Guidelines).

9. The Classification Board and the Classification Review Board are the statutory bodies that, under the Classification Act, respectively classify and review classification decisions in relation to films, computer games and certain publications.

10. The Code sets out a number of principles that classification decisions are required to give effect to. These principles include:

- that adults should be able to read, hear and see what they want;
- that everyone should be protected from exposure to unsolicited material that they find offensive; and
- the need to take account of community concerns about depictions that condone or incite violence and the portrayal of a person in a demeaning manner.

11. Classifications are ranked in a hierarchy of 'impact' that take into account the treatment in the film or computer game of 'classifiable elements' and also their cumulative effect. These include violence, sex, nudity and language.

12. Decisions on the classification categories are conveyed to consumers through the use of accessible symbols and consumer advice that are determined from time to time under the provisions of the Classification Act. With respect to film content, the 'G', 'PG' and 'M' categories are 'advisory' categories, and do not legally restrict anyone from seeing or hiring the film. The 'MA15+', 'R18+' and 'X18+' categories are 'legally restricted' and age restrictions apply.

13. The BSA sets the regulatory framework for broadcasting, datacasting and Internet content in Australia. The approach to content regulation under the BSA is co-regulatory. Legislation underpins the development of industry codes of practice that are registered and enforced by the Australian Communications and Media Authority (ACMA), which is the independent statutory regulator.

14. While there are variations in the regulatory obligations on different types of broadcasting services under the BSA, there are nonetheless objects that apply consistently across all broadcasting services regulation, including:

    - to encourage providers of broadcasting services to respect community standards in the provision of program material; and
    - to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them.

15. Under the BSA, all broadcasting industry sectors are prohibited from providing content that has been classified X18+ or refused classification by the Classification Board.

16. Further, specific requirements that have to be addressed in the development of all industry sector codes of practice include:

    - preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry;
    - methods of ensuring that the protection of children from exposure to program material which may be harmful to them;
    - methods of classifying programs that reflect community standards; and
    - complaints procedures for dealing with concerns about programming matters, with escalated complaints to be referred to ACMA.

17. The national broadcasting services, the ABC and the SBS, operate independently of Government under their own legislation. However, the ABC and SBS are required to submit codes of practice to ACMA, which uses them to assess complaints against the national broadcasters.

18. Schedule 5 to the BSA provides for the Online Content Scheme (the Scheme), which has been in operation since 1 January 2000. The Scheme establishes a complaints-based regime, using the national classification system established under the Classification Act to regulate the Internet content delivered via an Internet carriage service and seeks to protect end-users, especially children, from inappropriate content online. It has three main components: complaints investigation; Internet industry codes of practice; and non-legislative initiatives such as community education, research and international liaison.

19. The *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the TCPSSA Act) regulates access to premium rate voice sex services. Voice sex services are identified as a certain ‘genre’ of services with associated restrictions and requirements placed on the operation of those services. This differs from the approach applied under Schedule 5 to the BSA which uses the national classification system established under the Classification Act as the basis for

defining *prohibited content* or *potentially prohibited content* under the Online Content Scheme.

Problem

20. The rapidly increasing bandwidth available over mobile communications networks and the advanced technical features of convergent devices, such as 3G mobile phones and hand-held computers, provides new business opportunities for mobile carriage service providers (CSPs). CSPs can now offer access to broadcasting, Internet and telephone content on a single, mobile device.

21. These convergent content services can be expected to bring substantial benefits including improved services for consumers and new business opportunities for CSPs and content service providers. In this context, the term 'convergent content services' is used to denote media-rich audiovisual services delivered over new platforms (mobile Internet access, online games, retransmitted broadcasting content, mobile chat rooms and proprietary network content portals are some examples of the kinds of services available over mobile phones and other communications devices).

22. Increasingly, consumers will expect to access audiovisual content, on the move and at any time. Platform-specific differences between content services are unlikely to be obvious.

23. At the same time, however, convergent content services potentially offer a new delivery platform for potentially offensive or harmful content, management of which is regulated over other media.

24. Existing arrangements for content regulation in Australia have been based on certain assumptions about how content is accessed and viewed. For example, that broadcasting content was watched on a large bulky device in the lounge room, enabling easy parental supervision; Internet content on a desktop computer and telephone sex services via the home telephone. Until now, mobile phones which may be less amenable to parental supervision, were unable to provide access to audiovisual material.

25. Convergent content services undercut these assumptions. A consumer with a single convergent communications device could access a premium voice service, a telephone sex service, a premium mobile service (text or audiovisual content) and Internet content. The platform specific nature of the current arrangements for content regulation mean that there would be differences in the regulation of each of these services.

26. This has given rise to uncertainty about the extent to which convergent content services are already regulated and concern about the potential for inconsistent regulatory treatment of essentially the same content.

27. The regulatory uncertainty that surrounds this market has already delayed the introduction of some services and may hinder new service development and deprive industry of potentially significant revenue streams.

28. Certain of the technical features and capabilities of convergent communications devices, notably their ability to connect strangers through interactive services such as chat and identify the location of the user with increasing accuracy, have also given rise to concern about their potential misuse to facilitate inappropriate contact, especially with children.

Objectives

29. The first objective of the proposed new regulatory framework is that providers of convergent content services should be required to respect community standards and to establish measures that protect children from exposure to content that would be inappropriate or harmful to them. In so doing, the framework will be consistent with content regulation over other media in Australia.

30. The second objective, which is again focussed on children, is that service providers should be required to establish safety measures to address the potential misuse of certain new services for the purpose of making inappropriate contact. In so doing, the framework recognises the important role of consumer education in promoting safe use in the modern communications environment.

31. The third objective is to provide a regulatory framework that has sufficient flexibility to accommodate changing technological developments and market structures in the communications sector. As noted in paragraph 24 above, existing regulatory approaches have tended to be platform-based.

32. The fourth objective of the new framework is to achieve the regulatory policy of the BSA that regulation should not impose unnecessary financial and administrative burdens on industry and should encourage the development of communications technologies and their take-up in Australia. This will be achieved through a co-regulatory approach that provides the flexibility of industry developed codes of practice.

33. Finally, the new framework aims to harmonise the regulation of existing communications content and to reduce the complexity encountered by consumers, industry and regulators.

Options

34. There are four broad issues to be addressed in assessing options for the regulation of convergent content services:

    - what arrangements should apply to ‘stored’ convergent content services;

- what arrangements should apply to live, or 'ephemeral' convergent content services;
- what is the appropriate response to the risk of inappropriate contact arising from content services which potentially combine live interactive services such as chat, audiovisual capabilities and location determination; and
- what arrangements should apply to mobile Internet access.

Stored Content

35. Content services can be categorised as being either stored or 'ephemeral'. Ephemeral services are essentially live and include streamed audiovisual material and interactive chat services. They are not pre-recorded or stored prior to delivery and so cannot be classified or pre-assessed in the same manner as stored content.

36. Stored content services, on the other hand, can be classified or otherwise assessed prior to delivery so that consumers can be given information to assist in making informed choices about the content they view and so that access restrictions can be imposed as necessary. There are essentially three options for regulating stored convergent content services that are offered commercially:
    - to rely entirely on industry self-regulation;
    - to continue the interim arrangements established by the ACA SPD and the IIA codes;
    - to establish a new framework as proposed in the DCITA review report.

Impact Analysis

Option (a) – Self regulation

37. To achieve an entirely self-regulatory outcome, it would be necessary to revoke the ACA's service provider determination for premium mobile services (SPD). Except for the restriction of adult SMS/MMS services to the 195 and 196 number ranges, industry would then self-regulate convergent content services. This would provide the mobile content industry with the greatest flexibility to introduce new services.

38. The SPD contains measures to prohibit content assessed as X18+ or refused classification, restrict content assessed as R18+ or MA15+ and requires industry members to establish a complaints-handling process including an independent escalated complaints-handling body.

39. The IIA codes which are, with respect to mobile content services, essentially self regulatory would continue. While they complement the rules imposed by the SPD, they only partially cover the range of service offerings possible on convergent devices. They do not, for example, apply to premium rate services and there is legal uncertainty about their application to CSP content portals.

40. Under this option, the community would not be assured of the same protections with respect to inappropriate content as exist for other media. Much convergent content is expected to be derivative of content on traditional media. For instance, 'mobisodes' drawn from television series, 'teasers' for cinema release movies and video-on-demand or information updates from news and sporting events. However, under this approach, mobile CSPs and content service providers would be subject to significantly lesser obligations than those imposed, for example, on broadcasters or film distributors.

41. Further, in the absence of guidelines about assessment of content and consumer information, an entirely self-regulatory approach may lead to a proliferation of approaches to content assessment which are unlikely in themselves to be well understood by consumers and may have a negative impact on consumer awareness of the categories of the national classification scheme.

42. Without a legislative basis to industry self-regulation, there would not be an effective remedy to address service providers that failed to comply with the self-regulatory scheme. Nor would there be any guarantee that industry would develop appropriate safety measures and community education initiatives to address the risk of inappropriate contact.

43. Mobile CSPs and content service providers actively engaged in the development of the SPD and worked cooperatively in that process. It is unlikely, however, that industry groups would have progressed so far towards a self-regulatory scheme without the prospect of stronger regulatory intervention suggested by the SPD.

44. Mobile CSPs and content service providers have allocated staffing resources and are in the process of undertaking adjustments to their operations to meet the obligations imposed by the SPD. These regulatory costs would have been imposed unnecessarily in the event the SPD was to be revoked.

Option (b) – Continue the interim arrangements

45. Under this option, the SPD and the IIA codes of practice would provide the regulatory framework for convergent content services in the longer term.

46. This would not be an optimal approach. It would perpetuate platform-specific regulation which is already anachronistic. There would be co-existing regulatory structures operating under different legislation and with different industry self-regulatory bodies. There are also different complaints handling processes, enforcement provisions and penalties for non-compliance between the two measures that would be inappropriate and potentially burdensome in the longer term.

47. While sub-optimal, this approach was adopted pending the outcome of the DCITA review because of legal constraints that prevented existing regulatory models

under either broadcasting or telecommunications legislation having effect across the range of convergent content services.

48. While industry would be assured that resources allocated to the development of the SPD and IIA were not wasted, there would be the potential for unforeseen regulatory burdens. Further, while the SPD and IIA codes are broadly consistent, they potentially overlap with respect to certain services and may create confusion for consumers and lead to regulatory 'shopping'.

49. In order to mitigate the potential for regulatory 'shopping', ACMA has underlined to industry that where the SPD imposes stronger requirements than the IIA codes of practice, they are legally bound to meet those stronger obligations. Compliance with the IIA codes would not be sufficient. While this approach is acceptable as an interim measure, it would not be appropriate that it continue in the longer term.

Option (c) – New legislative framework for convergent content services

50. The DCITA review has found that new convergent content services cut across existing regulatory approaches under the BSA and telecommunications legislation. These approaches have been implemented to address public interest considerations about access to inappropriate content, especially by minors, as they have arisen. They are underpinned by assumptions about how and where content will be accessed that can no longer be made with any certainty.

51. In the face of rapid technology and market developments, the challenge for government is to provide a coherent regulatory framework for all non-broadcasting content that is provided commercially over communications networks.

52. As mentioned previously, while audiovisual services on convergent devices, such as new-generation mobile handsets, are new and potentially innovative because they are delivered to people on the move, much of the content is likely to be derivative of traditional media. In this context, it would be preferable to align regulation of these services with the general approach to content regulation under the BSA and to provide that consumers receive broadly equivalent levels of consumer information expressed in consistent terms with traditional media.

53. The DCITA review has found that mobile CSPs are generally able to control the convergent content services that are accessed on their networks either directly because they are offered as branded content, or indirectly through contractual arrangements, with CSPs taking a share of revenue for the sale of content or information services. The review has found that mobile CSPs and content service providers should be required to exercise this ability to provide consumer information and restricted access to content that would not be suitable for children.

54. The review recommends that where CSPs offer content services over which they have either direct control (branded content on their own content portal), or contractual control (such as third party content made available on a revenue share basis), they will be subject to obligations that would require pre-assessment of content, consumer information and complaints handling.

55. Further, regulation based on the level of control exercised by service providers rather than the communications delivery platform is likely to be more robust and adaptable in the face of new and innovative service offerings. By avoiding platform specificity, the proposed approach will be better able to accommodate technological and market change. The proposed framework would be co-regulatory.

56. Industry participants who develop complaints-handling procedures under an Industry code of practice to which they agree to be bound would receive consumer complaints in the first instance. This mechanism provides service providers with the opportunity to investigate whether prohibited or potentially prohibited content has been erroneously supplied as part of their service and quickly remedy the problem. If the situation can not be resolved the complaint would be escalated to the ACMA. In cases where a service provider has not implemented code-compliant mechanisms, consumers would be able to complain directly to ACMA for its investigation as to whether a breach has occurred.

57. ACMA would have a range of options to prevent regulatory breaches, including the power to determine service provider rules and issue remedial directions to ensure ongoing compliance with regulatory obligations.

58. 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.

59. Rather, the framework proposed under this option would implement an adapted model. While aligned with the national classification scheme, the requirements for pre-assessment of convergent content would reflect the commercial and technical realities of the mobile convergent environment.

60. Under this option, material meeting the descriptors for the X18+ and RC classifications would be prohibited in Australia from delivery over convergent communications devices. Material likely to meet the classifiable elements associated with MA15+ and R18+ would be so assessed and subject to restricted access systems approved by ACMA. Except for the restriction of content that would be MA15+ to persons of 18 years and over, these requirements are generally comparable with those imposed on traditional media.

61. The requirement that material that would be MA15+ should be restricted is a more stringent one than applies, for instance, with respect to cinema release films

classified MA15+ which are not legally restricted for minors aged 15 years or over. At the current time, however, the only reliable and efficient mechanisms to verify the age of consumers is to do so by reference to whether or not they are 18 years of age.

62. In relation to convergent content that had already been classified under the national classification scheme or assessed under the framework for regulating broadcasting services provided by the BSA, the classification granted under those arrangements would stand within the meaning of the proposed new regulatory framework.

63. By utilising the expertise of ACMA in relation to broadcasting and online content regulation, the proposed framework can be expected to generate regulatory efficiencies and to be aligned to the greatest extent practicable with broadcasting content regulation which is generally well understood by consumers and industry alike.

64. However, as it is proposed to include much of the detail of the proposed new framework in industry codes of practice, the specific impact in terms of compliance costs for the four main mobile network operators, and the broader mobile content industry, is difficult to quantify at this early stage.

65. The framework proposed under this option would not extend to general communications consumer issues such as prices, terms and conditions. These would continue to be regulated under telecommunications legislation with cross-referrals between regulatory agencies as appropriate.

Conclusion and recommended option

66. While option (a) would provide the mobile content industry with maximum flexibility in the introduction of convergent content services, it is highly likely to result in lesser consumer protections than are required for traditional media. This would run counter to the objective of achieving consistency between the regulation of content delivered over traditional and new media. It would also fail to address valid community expectations about the safe availability of new communications services.

67. Option (b) would be a sub-optimal outcome in that it utilises existing regulatory measures that were either not designed for content regulation or cannot apply to the full range of convergent content service offerings. This approach can provide sufficient protection from inappropriate content and contact in the short to medium term but, if extended further, is likely to lead to unforeseen regulatory burdens.

68. Option(c) which is consistent with what was proposed by the DCITA review is, therefore, the recommended option. It will provide certainty for mobile CSPs and content service providers and enable the responsible rollout of innovative services for consumers.

69. Regulation based on the level of control exercised by service providers rather than the communications delivery platform, as provided by option (c), is likely to be more robust and adaptable in the face of new technologies and the development of innovative content services.

Ephemeral Content Services

70. Ephemeral content services that are offered commercially include interactive chat and streamed audiovisual services. Except for the regulation of telephone sex services, content regulation in Australia is currently focussed overwhelmingly on stored content. In considering whether this is appropriate to continue in the future, three options have been identified:
    - no action;
    - to extend the existing 'genre' based approach used in the regulation of telephone sex services to new and emerging services;
    - to establish a new framework as proposed in the DCITA review report.

Impact Analysis

Option (a) – No action

71. As mentioned above, content regulation in Australia is currently focussed on stored content. The national classification scheme does not extend to transitory or ephemeral content. Schedule 5 to the BSA which establishes the online content scheme explicitly defines Internet content as information that is kept on a data storage device. And content streamed over the Internet is excluded from the definition of a broadcasting service under the BSA.

72. This lack of focus on regulating ephemeral content services is partly explained by the inherent difficulty of regulating live content and partly by the fact that, until now, there has not been a significant market for ephemeral content that is offered on a commercial basis.

73. While chat services on the Internet are highly popular and have experienced considerable growth, they are generally not offered commercially. And it would be inappropriate to seek to regulate the free exchange of information between individuals except to the extent it breaches the criminal law.

74. In translating chat services from the Internet to mobile platforms, however, service providers have developed a commercial proposition for service delivery. Early experience suggests that, unlike on the Internet, mobile consumers are prepared to pay for chat and potentially other ephemeral, interactive services.

75. Given the popularity of chat services generally and the early growth of commercially provided chat services over mobile platforms, it is likely that

ephemeral services offered on a commercial basis will become significant drivers of the growth of convergent content services.

76. There is community concern in Australia and overseas about potential risks arising from children engaging with live services. These risks fall into two broad types. The first is that children might be exposed to material that is inappropriate or harmful to them. The second is that they may be lured into unsafe contact. Options to mitigate this second risk are addressed below.

77. Where mobile CSPs and content service providers offer ephemeral services commercially, they have a measure of control over the service. They target particular demographics or interest groups - both through the labelling of the service and through the means and placement of advertisements. For commercial reasons, therefore, service providers make informed assessments about the types of content particular services are likely to attract.

78. The IIA codes that were developed pending the outcome of the DCITA review provide that service providers may assess the likely or anticipated nature of content that has a live or real-time component. Where services are likely or anticipated to contain adult content, the codes require that an appropriate warning message should be displayed prior to the consumer accessing the service. These provisions of the codes are currently entirely self-regulatory. Given the likely revenue stream to the mobile content industry from these services, it would not be overly burdensome or unreasonable to require more than would be provided under this option.

79. The DCITA review has found that it would be feasible to develop an assessment model for ephemeral content services that are offered commercially that, by reference to the classification categories of the national classification scheme, provides information to consumers about the strength of the content to which they or their families are likely to be exposed.

80. While ephemeral services are not amenable to classification in the strict sense, they could be assessed in terms that are consistent with the national classification scheme. This would have the benefit of providing generally consistent levels of consumer information as commercial ephemeral services move into the mainstream on convergent devices.

81. Under option (a), however, the only consumer protections against inappropriate material on commercial ephemeral content services would be those provided by the IIA codes. They are significantly weaker obligations than those that apply to commercial stored content and have no legislative basis. There would be no effective remedy in the event of non-compliance.

82. Given the likely popularity of commercial ephemeral services on convergent devices, especially amongst children, it would be inappropriate to regulate them as though they are, or will continue to be, niche services. Rather, it would be desirable to align the regulation of such services, to the extent possible, with other

content regulation in Australia and with the approach proposed for commercial stored content.

Option (b) – Extend the genre-based framework for telephone sex services to other commercial ephemeral content services

83. The regulatory framework for telephone sex services in Australia is provided by Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSSA). It is conceptually different from other content regulation in Australia.

84. Telephone sex services regulation relies on a 'genre-based' technique which does not contain consumer information of the sort provided by reference to classification categories of the national classification scheme. Under this approach, a service either is or is not a telephone sex service as defined by the TCPSSA. In the event that it is, it is required to be placed behind a restricted access system.

85. While this binary test provides adequate consumer information where services are targeting a niche market and are offered only on restricted number ranges, it is not nuanced and does not provide consumers with information that is expressed in terms that are consistent with other media.

86. ACMA is responsible for the administration of telephone sex service regulation in Australia and has advised the DCITA review of practical concerns with respect to effective enforcement of the scheme. ACMA's role as regulator of Part 9A derives from the statement of its telecommunications functions in the *Australian Communications and Media Authority Act 2005*.

87. Prior to the establishment of the merged regulator, the ACA would refer suspect services for investigation to the Australian Broadcasting Authority (ABA). Part 9A provides for the ABA to issue an evidentiary certificate which would constitute prima facie evidence that a service was a telephone sex service. Where the ABA concluded that a service was likely to be a telephone sex service, the ACA could take enforcement action if the CSP or telephone sex service provider was in breach of the legislative requirements. This procedural separation is to be continued within ACMA.

88. The process to determine whether to issue an evidentiary certificate requires ACMA staff to interact with the service under investigation. This has proved problematic and also presents difficulties in accurately determining the nature of the service.

Option (c) – Establish a new framework as proposed in the DCITA review report

89. As foreshadowed in the discussion of option (a) above, the DCITA review has found that it would be feasible to develop a co-regulatory framework for the regulation of commercial ephemeral content services that requires pre-assessment

of content, access restrictions or prohibition where appropriate and complaints handling processes. The DCITA review has also found that it would be desirable to align this framework with that proposed for commercial stored content where practicable. In order to do this effectively, industry assessors would be required to receive appropriate content assessment training.

90. This approach would have the benefit of providing generally consistent levels of consumer information as commercial ephemeral services move into the mainstream on convergent devices. Consumers are also likely to better understand and feel more generally comfortable with content information expressed in familiar terms.

91. As mentioned in the discussion of option (b) above, there have been practical problems with the evidentiary certificate process for the enforcement of telephone sex service regulation. In that context, the DCITA review has found that it would be preferable to establish a process for investigating complaints about commercial ephemeral content services that does not require interaction with the service by employees of either the CSP or the regulator.

92. The complaints handling processes for ephemeral content proposed under this option would be generally consistent with those for stored content as outlined in paragraph 56. Where a content service provider has developed a complaints mechanism in accordance with an industry code of practice, they will be identified as the first point of complaint about services that are thought to have been incorrectly assessed. Escalated complaints and complaints about content provided by service providers who have not instituted code-compliant complaints mechanisms would be decided by ACMA.

93. Under this option, consumers would have the benefit of increased information about the services that they and their children access. They would be able to complain about content that they believed had been incorrectly assessed and, from the consumers' perspective the procedures to be followed would be consistent with complaints processes for content available on other media.

94. There would be some additional costs for industry as a result of this option. As the first point of complaint, however, they would be able to respond in a timely manner to breaches and would, appropriately, be aware of community reaction to the services they make available on their networks. Being aligned with the framework for stored content, service providers should be able to streamline their operations so as to reduce compliance costs. Costs to industry would, moreover, be minimised as a result of the complaints-based nature of the framework.

95. Providing scope for complaints to be directed to ACMA where a content service provider has not established a complaints handling mechanism strikes an appropriate balance between allowing for flexibility in industry self-regulation and ensuring that consumer complaints are always dealt with appropriately.

96. Under this option, the regulation of telephone sex services would be brought under the proposed framework for commercial ephemeral content. Historically, these and other premium rate services have been regulated under telecommunications legislation because they have been services delivered specifically to telephone handsets. The DCITA review has found, however, that market and technology developments will lead to the availability of significantly similar audiovisual content services across a range of platforms and devices, including fixed and mobile phone handsets.

97. In this context, there would be little justification for retaining a discrete regulatory framework for premium rate services under telecommunications legislation. Moreover, the new framework would address the practical problems that have been identified in the enforcement of telephone sex service regulation.

Conclusion and recommended option

98. The DCITA review has found that commercial ephemeral content services are likely to become mainstream on convergent devices. There is community concern about the exposure of minors to inappropriate content through services such as chat rooms – including, for instance, a recent example of a chat room focussed on the discussion of rape.

99. While the IIA have moved some way to addressing these concerns with respect to the mobile environment, the obligations imposed are considerably weaker than those that would apply under the proposed framework for commercial stored convergent content.

100. Under option (a) there is an unacceptable risk that children will be able to access inappropriate commercial ephemeral content. This would fall short of the policies of successive governments for content regulation in Australia.

101. In the light of an identified and practicable alternative that would provide consumer protections consistent with traditional media and those proposed for commercial stored content, option (a) is unjustified.

102. Option (b) would not be optimal. It would perpetuate platform-specific regulation of content when essentially the same content services are expected to be widely available through a range of delivery platforms. It would create inflexible regulatory silos in the face of technology and market developments.

103. The level of consumer information possible under option (b) is restricted and would not be consistent with that proposed for stored convergent content.

104. Further, option (b) would not address the practical problems that have been identified with the enforcement of current telephone sex service regulation. Extending that approach to services that are likely to become mainstream will only exacerbate those problems and may lead to ineffective regulation.

105. Option (c) would utilise the well understood concepts of the national classification scheme and leverage the proposed approach to commercial stored convergent content to establish a practicable solution. As a complaints-based, co-regulatory scheme, this option would not impose unjustifiable regulatory burdens on industry. For these reasons, option (c) is recommended.

Inappropriate Contact

106. Convergent communications devices combine live interactive services such as chat, audiovisual capabilities and increasingly accurate device location determination. This has given rise to concerns about personal safety, especially with respect to children. While the provisions of the criminal code address illegal behaviour, there is scope for mobile CSPs and content service providers to implement preventive measures that would mitigate those risks. It may also be desirable to impose legislated restrictions on the offering of certain services. Three options have been identified:
    - no regulatory action;
    - to rely on the chat safety obligations imposed by the ACA SPD;
    - to implement a co-regulatory approach with industry codes of practice underpinned by legislative requirements as appropriate.

Impact Analysis

Option (a) – Self regulation

107. To achieve an entirely self regulatory outcome, the chat safety obligations of the ACA SPD would need to be revoked. In that event, there would be no guarantee that the mobile content industry would develop appropriate safety measures and community education initiatives to address the risk of inappropriate contact.

108. As in the case of other aspects of the SPD, mobile CSPs and content service providers actively engaged in the development of the chat safety provisions and worked cooperatively in that process. It is unlikely, however, that industry groups would have progressed so far towards a self-regulatory scheme without the prospect of stronger regulatory intervention suggested by the SPD.

109. As noted in the discussion of option (a) for stored content, mobile CSPs and content service providers have allocated staffing resources and are in the process of developing safety measures to meet the obligations imposed by the SPD. These regulatory costs would have been imposed unnecessarily in the event the SPD was to be revoked.

Option (b) – Continue the interim arrangements

110. Recognising the potential risks associated with certain types of chat services and the scope for preventive interventions by industry, the SPD requires that mobile CSPs and chat service providers develop and implement chat safety measures. In

this respect the SPD goes further than the direction given to it by the then Minister.

111. Under the SPD, service providers will be guided by a safety measures notice developed by ACMA. The scheme will be enforced through codes of practice at the industry-wide level and compliance plans at the service provider level. By this means, mobile CSPs and chat service providers can tailor their response to the obligations imposed by the SPD to suit their particular technical and commercial structures.

112. This approach recognises the operational and commercial differences that exist between members of the mobile content industry and allows them to develop and implement safety measures that are likely to be most effective in their circumstances. It is expected to avoid unforeseen or variable regulatory burdens.

113. The compliance plan and code development processes required by the SPD recognise that mobile CSPs and chat service providers are best able to understand their service offerings and assess the effectiveness of potential safety measures.

114. While this approach is likely to result in effective chat safety measures, it would not be appropriate to rely on the SPD to address potential safety concerns arising from convergent communications devices in the long term. The ACA did not consider the potential impact of location-based (LB) services which were considered in the DCITA review. Nor would the SPD flexibly encompass new, as yet unidentified, services that raised safety concerns. As a result, this option would only partially address concerns about inappropriate contact associated with convergent communications devices.

Option (c) – Implement a co-regulatory approach with industry codes of practice underpinned by legislative requirements as appropriate

115. The DCITA review has found that there are grounds for community concern that mobile chat and other interactive services will potentially lead to inappropriate contact, especially with children. However, it has also identified countervailing factors that, utilised correctly, mitigate that concern.

116. For instance, in submissions to the DCITA review, mobile CSPs have all attested to the commercial importance of brand image and to community expectations about the safe provision of services. Such considerations will be effectively harnessed under a co-regulatory approach.

117. Further, mobile CSPs have greater control over the content accessed by consumers where they are receiving a share of the revenue of the content service. This applies both to content on their portals and to third-party content accessed through their portals. The control that they can exercise extends to the application of safety measures to certain services, including chat and potentially other interactive content.

118. Under this option, mobile CSPs that offer chat services commercially, would be required to ensure that safety measures are in place that are appropriate to the risk associated with the particular service. The mobile content industry would be required to develop codes of practice addressing contact issues in the mobile environment. These codes would be approved and registered by ACMA.

119. Recognising that this is a dynamic market in which new types of chat and interactive services are constantly being created, the DCITA review suggests that industry is best placed to anticipate and understand service offerings. Likewise, the range of safety measures that can be applied to new services can be expected to be dynamic. Some safety measures may be more practicable and effective for one service than for another.

120. As a result, the proposed co-regulatory framework would be designed to allow individual industry members some flexibility to determine the combination of safety measures that best suit their service offerings and their commercial and network structures. In circumstances where ACMA considers that safety concerns are not being adequately dealt with through the co-regulatory framework, it could require certain measures to be implemented through the development of a service provider rule or industry standard.

121. The work being undertaken by industry and ACMA on chat safety under the SPD is expected to provide a valuable basis for the co-regulatory approach under this option. Understanding that the SPD was to be an interim measure pending the outcome of the DCITA review, the two processes were coordinated so that there could be as smooth as possible a transition from one to the other. This will minimise any unnecessary regulatory burdens and facilitate the efficient implementation of the long term approach.

122. While, in an immediate sense, the obligation to implement safety measures would be focussed on chat services, it would encompass other convergent services that potentially raise safety concerns. For instance, certain location-based (LB) services that are not currently available in Australia would raise concerns about inappropriate contact with children. In the event that those services were to be made commercially available, the mobile content industry safety codes would be required to address those concerns. ACMA and industry, in cooperation with law enforcement agencies, would work together to identify services of potential concern.

123. Under the framework proposed by this option, one of the legislative requirements upon mobile CSPs would be to ensure that LB services are commercially available only with the consent of the account holder. This would go a significant way towards addressing the concern that commercial LB services could be offered to identify the location of an end-user to another person without that user's consent or knowledge.

124. Notwithstanding this requirement, there would be residual concerns about a service which allowed an account holder to track the location of a second handset

(operated under the same account). In this scenario, a tracking service could be initiated by the account holder without the knowledge or consent of the person operating that handset.

125. Under this option, the mobile content industry safety codes would be required to provide safeguards so that where account holders agree to location-based services that would locate secondary account holders that are minors, they have the legal authority as parent or guardian to do so.

126. This option would require the mobile content industry to address community concerns about the safe use of convergent content services. It will flexibly encompass new service offerings in a highly dynamic commercial environment. Being co-regulatory, it recognises that the mobile content industry is best placed to anticipate and understand service offerings and that some safety measures may be more practicable and effective for one service than for another. At the same time, its legislative basis provides an assurance that non-compliance can be addressed.

Conclusion and recommended option

127. There is a risk that interactive or other convergent services could potentially facilitate inappropriate contact. While the provisions of the Criminal Code will address illegal behaviour, mobile CSPs and content service providers have the capacity to develop and implement preventive interventions that would mitigate the risk of that occurring. They should be required to do so.

128. Option (a) would not provide a sufficient response to community expectations about the safe provision of convergent services. It would lack an effective mechanism to address non-compliance and would not provide a reliable process for the identification of new services that would potentially raise safety concerns.

129. Option (b) only provides measures to address services of current concern. It will not flexibly encompass new and emerging services and does not provide measures to address certain LB services - already available overseas - that are known potentially to be of concern.

130. Option (c) would require the Australian mobile content industry to be actively engaged in identifying services of potential risk and in developing and implementing preventive safety measures. It would be sufficiently flexible to encompass new services and to accommodate operational and commercial differences between service providers. This would provide regulatory certainty to the mobile content industry. The service provider rule and industry standard mechanisms also allow for ACMA to cause measures to be put in place if it considers that service providers are not adequately addressing safety issues related to ephemeral services.

131. While there will be compliance costs for industry in meeting the obligations of option (c), they will only be in response to services with an identifiable potential

for misuse. Further, these would be services which industry had identified as providing a viable revenue stream that would mitigate the compliance costs of a safety measures requirement.

132. Also, work being undertaken in the context of the SPD will be utilised under option (c) thereby minimising unnecessary regulatory burdens. Option (c) is therefore the recommended approach.

Mobile Internet Access

133. Convergent communications devices have the technical capability to access the Internet. Whether mobile CSPs make Internet access available as part of their service offering is likely to be a commercial decision. The potential popularity of mobile Internet access, is however, expected to be high.

134. Where mobile CSPs provide access to the open Internet using convergent communications devices, they are providing the same service as a traditional Internet service provider (ISP) and do not have control over the content accessed by consumers. While they would not be subject to the proposed regulatory framework for convergent content, they would be subject to the regulatory obligations imposed by the online content scheme, namely, Schedule 5 to the BSA and the Internet industry codes of practice.

135. The requirement under the online content scheme that ISPs make content filters available to their customers upon request on a cost price basis, is not currently practicable for mobile CSPs that provide Internet access. This potentially impacts on the effectiveness of the online content scheme and two options have been identified:
- no action;
- amend the online content scheme to provide the Minister with flexibility to determine a non-filtering protocol.

Impact Analysis

Option (a) – No action

136. Filtering technologies can limit the Internet content consumers can access by preventing or blocking access to specified types of content. Their availability of filter products is a central component of the online content scheme.

137. Filter products are not yet commercially available in the mobile environment with the effect that mobile CSPs offering Internet access would appear to be non-compliant with the code requirements of the online content scheme.

138. In the event mobile CSPs were directed by ACMA to comply with the codes, they would currently be unable to do so and would be guilty of an offence under the BSA.

Option (b) - Amend the online content scheme to provide the Minister with flexibility to determine a non-filtering protocol

139. This is the option proposed in the DCITA review report. It would require amendment to Schedule 5 of the BSA to provide the Minister with the flexibility to exempt ISPs from filtering requirements in situations where the development of filter technologies lags behind new devices and operating systems that enable Internet access. Such exemptions would be conditional on CSPs providing Internet access having implemented sufficient non-filtering based community safeguards.

140. Parliament's intention in establishing the online content scheme was that inappropriate Internet content be addressed in some way. The explanatory memorandum to the Bill that enacted Schedule 5 stated the Government's view that

> '…it is not acceptable to make no attempt at all on the basis that it may be difficult'.[5]

141. Under this option CSPs would be required to investigate the application of filters and alternative access controls as technologies emerge for which filter products are initially not available. At such time as filter technologies become commercially feasible, the Minister should remove the exemption from filtering requirements for that access technology.

142. In the meantime, the Internet industry would be required to implement procedures so that consumers purchasing Internet enabled devices or Internet access services for which content filters are not available are advised of that fact and offered the option of selecting another device or barring Internet access.

143. This arrangement would approximate the requirement that a scheduled content filter be available to ISPs' subscribers on demand and that ISPs have a responsibility to promote content filters to their subscribers.

Conclusion and Recommended Option

144. Option (a) would do nothing to address the possible difficulties that may be encountered by mobile CSPs that provide Internet access in complying with the online content scheme. Given the commercial investments made already, the likely consumer demand for mobile content services and the significant economic and personal benefits likely to be gained from greater connectivity, this would not be a desirable outcome.

145. Further, given that the development of filter technologies can be expected to lag behind the development of access technologies, this situation is likely to be repeated in the future as new access technologies are developed. This would lead

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[5] Broadcasting Services Amendment (Online Services) Bill 1999 Revised Explanatory Memorandum, p. 2.

to the risk of stifled innovation, delayed service availability and revenue streams together with regulatory uncertainty for industry.

146. On the other hand, option (b) would provide the Minister with flexibility to determine an alternative approach to providing community safeguards pending development of filter products. It would provide that Parliament's intention to address inappropriate Internet content is addressed in a way that avoids delaying valuable service introduction. It is the recommended approach.

Consultation

147. The DCITA review involved wide-ranging consultation including 19 submissions from industry, government agencies and other interested parties. DCITA also conducted a series of interviews with industry and other stakeholders so as to understand the commercial and technical structures that support the convergent content industry.

148. The ACA's SPD involved extensive consultation including release of a draft SPD for public comment and industry submissions. Where appropriate, these views informed the DCITA review. Discussions with CSPs and mobile content service providers in the context of the ACA's SPD indicate that a favourable response to the kinds of measures proposed by the review is likely.

149. A draft report of the review was provided to ACMA, the OFLC, and the Attorney-General's Department. Further, the proposed regulatory framework for convergent content has been discussed in broad terms with industry.

Implementation and review

150. The new framework for the regulation of convergent content would be introduced through amendment to the BSA.

151. The new framework would be administered by ACMA and would be the subject of statutory review within three years.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

AAT	Administrative Appeals Tribunal
ACMA	Australian Communications and Media Authority
ACMA Act	*Australian Communications and Media Authority Act 2005*
BSA	*Broadcasting Services Act 1992*
Classification Act	*Classification (Publications, Films and Computer Games) Act 1995*
Consumer Protection Act	*Telecommunications (Consumer Protection and Service Standards) Act 1999*
Minister	Minister for Communications, Information Technology and the Arts

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2 – Commencement

Clause 2 provides that this Act would commence on the day it receives Royal Assent.

Schedules 1 and 2 would commence on a day to be fixed by Proclamation. However, if Parts 1 and 2 of Schedule 1 have not commenced within six months of Royal Assent, that Schedule will commence on the first day following that six month period. If Schedule 2 has not commenced within 12 months of Royal Assent, that Schedule will commence on the first day following that 12 month period. Schedule 3 commences on the day on which the Act receives the Royal Assent.

Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in Schedules 1 and 2 is amended or repealed as set out in that Schedule, and that any other item in a Schedule has effect according to its terms.

Schedule 1 – General Content Amendments

Part 1 – General Amendments

Australian Communications and Media Authority Act 2005

Item 1 - Section 3 (paragraph (c) of the definition of *investigation*)
Item 2 - Subsection 4(5)
Item 3 - At the end of section 4

Items 1 to 3 would make consequential amendments to the *Australian Communications and Media Authority Act 2005* (ACMA Act), so that references to 'investigations' in the ACMA Act include investigations conducted pursuant to the proposed Schedule 7.

Item 1 inserts a reference to Schedule 7 into the definition of 'investigation' contained in section 3 of the ACMA Act.

Item 2 amends subsection 4(5) of the ACMA Act, which determines when an investigation ends. This item would bring investigations under proposed clause 43 of Schedule 7 within the operation of this sub-section.

Item 3 inserts a new subsection (7) at the end of section 4 of the ACMA Act, which defines when an investigation under clause 44 of Schedule 7 ends, namely at the end of the day the ACMA completes the investigation.

Item 4 - Paragraph 10(1)(a)

Section 10 of the ACMA Act enumerates the ACMA's functions. The function of regulating designated content/hosting services is added to paragraph 10(1)(a). The concept of a designated content/hosting service is defined in clause 2 of Schedule 7.

Item 5 - Paragraph 53(2)(k)
Item 6 - Paragraph 53(2)(o)
Item 7 - After paragraph 53(2)(p)

These items would make consequential amendments to section 53 of the ACMA Act, which limits the delegation of certain ACMA powers under this Act.

Items 5 would amend paragraph 53(2)(k) to make clear that the power to issue, or extend the time for compliance with, a notice issued under Schedule 7 is delegable. This amendment would ensure consistency in this regard between the Schedules 5 and 7 to the *Broadcasting Services Act 1992* (the BSA).

Item 6 would amend paragraph 53(2)(o) to provide that the power to determine, vary or revoke an industry standard under Schedule 7 to the BSA is not delegable under the ACMA Act.

Item 7 would insert a new paragraph in section 53 of the ACMA Act, which would provide that a decision by the ACMA to make, vary, or revoke a designated content/hosting service provider determination under Schedule 7 to the BSA is not delegable under the ACMA Act.

Broadcasting Services Act 1992

Item 8 - Title

This item adds a reference to content services to the long title of the BSA.

Item 9 - After paragraph 3(1)(h)
Item 10 - Subsection 3(2)

Items 9 and 10 would amend the objects of the BSA. Item 9 would add a new object (proposed paragraph 3(1)(ha)) which is to ensure that designated content or hosting services providers respect community standards in the provision of that content.

Item 10 would amend subsection 3(2) of the BSA to make clear that a designated content or hosting services provider (as referred to in item 9 above) has the same meaning as in Schedule 7. Item 77, clause 2, below, provides a definition for a content or hosting services provider.

Item 11 - Subsection 4(3)
Item 12 - Paragraph 4(3)(a)
Item 13 - After subsection 4(3)
Item 14 – subsection 4(4), definition of *designated content/hosting service*
Item 15 - Subsection 4(4) (definition of *Internet content host*)

These items would make amendments to the regulatory policy set out in section 4 of the BSA, which would accommodate the enactment of Schedule 7.

Item 13 would provide a statement of regulatory policy in relation to the regulatory framework established by Schedule 7. The statement of regulatory policy will record Parliament's intention that designated content or hosting services 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 service;
- will readily accommodate technological change;
- encourages the development and application of communications technologies; and
- encourages the provision of services made practicable by those technologies to the Australian Community.

Complementary to the amendment proposed by Item 13, items 11 and 12 would amend subsection 4(3) to delete all references to Internet content hosts and the hosting of Internet content. This is because these people and activities would be relevantly covered by the new subsection 4(4) of the BSA. In addition, Item 14 would amend subsection 4(4) of the BSA to make clear that a designated content/hosting service referred to that section has the same meaning as in Schedule 7 (refer item 77, clause 2). Item 15 would repeal the definition of Internet content host which would no longer be needed upon the enactment of Schedule 7.

Item 16 – paragraph 5(1)(a)
Item 17 – At the end of section 5

Items 16 and 17 would amend section 5 of the BSA, which sets out the ACMA's role under the BSA. Item 16 would amend paragraph 5(1)(a) so as to add the commercial content service industry (which would be regulated by Schedule 7) to the matters for which the ACMA has monitoring responsibility. In addition, item 17 adds a new subsection at the end of section 5 to make clear that commercial content service has the same meaning as in Schedule 7 (refer item 77, clause 2).

Item 18 – Subsection 6(1) (at the end of the definition of *registered code of practice*)

Section 6 of the BSA sets out definitions of words and phrases used in the Act, including *registered code of practice*. Since the proposed Schedule 7 provides for codes of practice in relation to the commercial content service industry, item 18 would

amend the BSA's definition of a registered code of practice to include a code that is made and registered under Schedule 7 (item 77, clause 85 refers).

Item 19 – At the end of section 130L

Part 9B of the BSA provides for the development of industry codes and standards. Section 130L of the BSA provides that a code or standard made under Part 9B cannot regulate a matter that is already regulated by one of the codes or standards listed in that section.

Item 19 would add to the list in section 130L a new paragraph (fa) regarding a code registered or a standard determined under Part 4 of Schedule 7.

Item 20 – Insertion of section 216D

This item inserts a new section 216D into the BSA to gives effect to proposed Schedule 7, to be added to the BSA by this bill by item 77, which deals with the regulation of content services.

Item 21 - Clause 1 of Schedule 5
Item 22 - Clause 2 of Schedule 5
Item 23 - Clause 2 of Schedule 5
Item 24 - Clause 2 of Schedule 5

These items make a number of amendments to Schedule 5 of the BSA.

Item 21 would repeal clause 1 of Schedule 5. Clause 1 of Schedule 5 places that Schedule into a broader regulatory context. Clause 1 would no longer be needed upon the enactment of Schedule 7, which comprehensively regulates content on the Internet.

Item 22 would omit those provisions in the simplified outline to Schedule 5 that concern the process by which the ACMA can receive and investigate complaints about prohibited, or potentially prohibited, content on the Internet. Those provisions in the simplified outline will become redundant upon the enactment of Schedule 7, which comprehensively regulates the ACMA's complaints handling process with respect to content on the Internet.

Item 23 would omit and substitute that provision in the Schedule 5 simplified outline that mentions the development of industry codes by bodies and associations that represent sections of the Internet industry. The new provision will only relate to the Internet service provider section of the Internet industry. Those sections of the Internet industry that host content will instead be regulated by Schedule 7.

Item 24 would omit and substitute that provision in the Schedule 5 simplified outline that mentions the ACMA's ability to make online provider determinations that regulate Internet service providers and Internet content hosts. The new provision will exclude Internet content hosts from the scope of such determinations. This is because Internet content hosts will instead be regulated by Schedule 7.

Item 25 - Clause 3 of Schedule 5 (definition of *access-control system*)
Item 26 - Clause 3 of Schedule 5 (definition of *Classification Review Board*)
Item 27 - Clause 3 of Schedule 5 (definition of *classified*)
Item 28 - Clause 3 of Schedule 5 (definition of *final take-down notice*)
Item 29 - Clause 3 of Schedule 5 (definition of *interim take-down notice*)
Item 32 - Clause 3 of Schedule 5 (definition of *restricted access system*)
Item 33 - Clause 3 of Schedule 5 (definition of *special take-down notice*)

These items would repeal defined terms that would be redundant to Schedule 5 once Schedule 7 is enacted.

Item 30 - Clause 3 of Schedule 5 (definition of *potential prohibited content*)
Item 31 - Clause 3 of Schedule 5 (definition of *prohibited content*)

These items make minor consequential amendments to certain defined terms in clause 3 of Schedule 5. These defined terms will now be defined by Schedule 7 (refer item 77, clause 2). Accordingly, the defined terms will be amended to delete internal references and instead refer to the meaning as provided in Schedule 7.

Item 34 - Clauses 4 and 6 of Schedule 5
Item 35 - Part 3 of Schedule 5
Item 36 - Clause 22 of Schedule 5

These items repeal certain clauses of Schedule 5, and Part 3 of Schedule 5, which will become redundant when Schedule 7 is enacted.

Item 37 - Clause 23 of Schedule 5
Item 38 - Paragraphs 23(a) and (b) of Schedule 5

These items delete references to the hosting of internet content, since Schedule 7 would comprehensively regulate content on the Internet.

Item 39 - Clause 27 of Schedule 5

This item repeals and replaces clause 27 of Schedule 5. The new clause would authorize the ACMA to initiate an investigation on its own initiative regarding whether an Internet service provider has contravened an applicable registered code of practice or online provider rule that is in force under this Schedule. The new clause reflects the narrower scope of Schedule 5 generally as a consequence of this bill. Internet content hosts would become subject to Schedule 7 which has equivalent provisions regarding investigations on the ACMA's own initiative (Item 77, clause 44 refers).

Item 40 - Division 3 of Part 4 of Schedule 5

This item repeals the Division, which empowers the ACMA to take certain actions in relation to a complaint about prohibited internet content that is hosted in Australia.

Proposed Schedule 7 would empower the ACMA to take action in relation to such content (refer Item 77, clause 47).

Item 41 - Subclause 40(1) of Schedule 5
Item 42 - Paragraph 41(1)(a) of Schedule 5

These items amend these provisions to remove an internal reference and replace it with a reference to Part 3 of the new Schedule 7. This is because Part 3 of Schedule 7 would provide for the ACMA to investigate complaints about the provision of prohibited or potential prohibited content, including Internet content (refer Item 77, clauses 37ff).

Item 43 - Paragraph 42(1)(a) of Schedule 5
Item 44 - Paragraph 44(1)(a) of Schedule 5

These items omit references to subclause 12(1) of Schedule 5, and substitute references to subclause 24(1) or (2) of Schedule 7. These amendments reflect the fact that Internet content would no longer be classified under Schedule 5 and would be classified under Schedule 7 instead.

Item 45 - Clause 52 of Schedule 5
Item 47 - Clause 56 of Schedule 5

These items would amend the scope of industry codes of practice and industry standards that are developed under Part 5 of Schedule 5, so as to reflect the reduced scope of Schedule 5 upon the enactment of Schedule 7.

Item 45 would amend the simplified outline to Part 5 by replacing the first dot point with a new dot point that notes that industry codes may be developed by bodies and associations that represent the Internet service provider section of the Internet industry. Industry codes and standards that apply to the other sections of the Internet industry (eg, Internet content hosts) would be developed under proposed Part 4 of Schedule 7 (Item 77, clauses 74ff refer).

Similarly, item 47 would make a complementary amendment to clause 56 of Schedule 5, which defines sections of the Internet Industry. The amended clause 56 will limit 'section of the Internet industry' for the purpose of Part 5, to the group consisting of Internet service providers. Other sections of the Internet industry (eg, Internet content hosts) would be regulated under Part 4 of Schedule 7.

Item 46 - Clause 55 of Schedule 5

Clause 55 of Schedule 5 defines 'Internet activity' for the purpose of identifying the subject matter to be covered by industry codes and standards. This item would delete the reference to the hosting internet content in Australia. As a result, the only internet activity to be regulated by Part 5 of Schedule 5 is activity that consists of supplying an Internet carriage service.

Item 48 - Subclause 59(1) of Schedule 5
Item 49 - Subclause 59(4) of Schedule 5

Clause 59 of Schedule 5 contains a statement of regulatory policy for Part 5. These items would repeal the subclauses, as subclause (4) is obsolete, and subclause (1) would become redundant upon the enactment of Schedule 7.

Item 50 - Subclause 60(1) of Schedule 5

Clause 60 of Schedule 5 of the BSA makes provisions relating to matters which must be dealt with by the internet industry by means of industry codes and industry standards. Subclause 60(1) sets out a list of matters which are to be dealt with in an industry code or industry standard, or a number of industry codes or industry standards.

Item 50 would amend subclause (1) to omit 'both sections' of the Internet industry, and substitute 'the Internet service provider section' of the Internet industry. This reflects the fact that Schedule 5 would only regulate the internet service provider of the internet industry following the enactment of Schedule 7.

Note: The heading to subclause 60(1) of Schedule 5 will be replaced by the heading "*General matters*".

Item 51 - Paragraph 60(1)(g) of Schedule 5
Item 52 - Paragraph 60(1)(h) of Schedule 5

These items amend these paragraphs to delete references to clause 22 of Schedule 5, which is to be repealed by item 36 (noted above).

Item 53 – Paragraph 60(1)(j) of Schedule 5
Item 54 – Paragraph 60(1)(k) of Schedule 5
Item 55 – Paragraph 60(1)(l) of Schedule 5
Item 58 – Paragraph 60(2)(d) of Schedule 5

Clause 60 of Schedule 5 of the BSA provides matters which must be dealt with by the internet industry by means of industry codes and industry standards. The scope of clause 60 is proposed to be amended by item 50 above, so that industry codes and standards would only apply to the internet service provider section of the Internet industry.

Items 53-55 and 58 amend those paragraphs of clause 60 that concern internet content filtering devices. In future, industry codes and standards made under Schedule 5 would not need to deal with these matters if, as provided by proposed subclause 60(8A) [item 59 below refers], the Minister has made a legislative instrument that exempts one or more of these paragraphs on account of internet content filtering being unviable in relation to access to Internet content using a particular device.

Item 56 – New subclause 60(1a) of Schedule 5

Item 56 provides that a new subclause (la) is to be inserted after paragraph 60(1)(l) of Schedule 5, providing that, where a determination is in effect under subclause 60(8A) of Schedule 5 in relation to a device (item 59 refers below), the matters which are to be dealt with by means of industry codes or industry standards include:

- procedures to be followed in order to inform the users of such a device of the unavailability of Internet content filtering; and
- procedures directed towards the achievement of the objective of ensuring that customers have the option of blocking access to the Internet using such a device.

Item 57 – Paragraph 60(1)(m) of Schedule 5

This item would amend the paragraph to delete the reference to the 'relevant' section of the Internet industry, and replace it with a reference to the 'Internet service provider' section of the Internet industry. This reflects the new scope of Schedule 5.

Item 59 – After subclause 60(8) of Schedule 5

Item 59 of the Bill inserts a new subclause 60(8A), which provides that, if the Minister is satisfied that internet content filtering is not viable in relation to access to Internet content using a particular device, (for example, a mobile telephone handset), the Minister may, by legislative instrument, determine that paragraphs (1)(j), (k) and (l) and 2(d) do not apply in relation to access to Internet content using that device.

Item 60 - Paragraph 62(1)(h) of Schedule 5
Item 61 - Paragraphs 79(a), (b), (c) and (d) of Schedule 5

These items would repeal the paragraphs. Item 60 reflects other amendments in this bill which reduce the scope of Schedule 5 (by no longer applying it to Internet content hosts) upon the enactment of the new Schedule 7 (which would apply to Internet content hosts). Item 61 is consequential to the repeal of clause 37 that would be effected by item 40 (noted above).

Item 62 - Subclause 80(2) of Schedule 5
Item 63 - Subclause 80(3) of Schedule 5

Item 62 would repeal subclause 80(2) which enables the ACMA to make online provider determinations with respect to the hosting of internet content in Australia. This subclause will become redundant upon the enactment of Schedule 7, which empowers the ACMA to make determinations with respect to designated content/hosting service providers (refer item 77, clauses 104-105 in conjunction with the definition of *designated content/hosting service* in clause 2). Item 63 makes a consequential amendment to subclause 89(3) in light of the repeal proposed by item 62.

Item 64 - Subclauses 81(1) and (2) of Schedule 5
Item 65 - Subclause 83(1) of Schedule 5
Item 66 - Subclause 83(2) of Schedule 5
Item 67 - Subclause 83(3) of Schedule 5
Item 68 - Paragraphs 83(3)(a) and (b) of Schedule 5
Item 69 - Paragraph 83(3)(b) of Schedule 5

These items would delete the various derivations of 'Internet content host' or hosting that appear in clauses 81 and 83 of Schedule 5. These items reflect other amendments in this bill which reduce the scope of Schedule 5 (by no longer applying it to Internet content hosts) upon the enactment of Schedule 7 (which would apply to Internet content hosts).

Item 70 - Clause 85 of Schedule 5

This item repeals and replaces clause 85 of Schedule 5. The new clause would give the ACMA standing to apply to the Federal Court of Australia for an order to stop a person from supplying an Internet carriage service, if the ACMA is satisfied that the service is being supplied in contravention of an online provider rule. The Court may grant the order sought if it is satisfied, on the balance of probabilities, that that the service is being supplied in contravention of an online provider determination.

Item 71 - Subclause 88(3) of Schedule 5

Subclause 88(3) of Schedule 5 provides an Internet content host with immunity from civil suit in relation to actions taken by the host to comply with Schedule 5's rules relating to prohibited content. This item would repeal the subclause, since proposed Schedule 7 would comprehensively regulate content on the Internet. An equivalent protection would be provided by Schedule 7 (refer item 77, clause 111).

Note 1: The heading to clause 88 is altered by omitting "**and Internet content hosts**".
Note 2: The heading to subclause 88(1) is deleted.

Item 72 - Clause 89 of Schedule 5

This item repeals clause 89 of Schedule 5 which provides the ACMA, the Classification Board and the Classification Review Board, and associated people, with immunity from prosecution. An equivalent immunity would be provided by proposed Schedule 7 (refer item 77, clause 112).

Item 73 - Paragraphs 92(1)(a), (b), (c) and (d) of Schedule 5
Item 74 - Subparagraphs 92(1)(g)(i), (ii) and (iii) of Schedule 5
Item 75 - Paragraph 92(1)(h) of Schedule 5
Item 76 – Subclause 92(2) of Schedule 5

These items would amend clause 92 of Schedule 5 which enables the Administrative Appeals Tribunal (AAT) to review certain decisions made under this Schedule by the ACMA.

Item 73 repeals those paragraphs of clause 92 that enables the AAT to review certain decisions relating to Internet content classification or the issue of notices to Internet content hosts by the ACMA. These paragraphs would be redundant upon the enactment of Schedule 7, which provides an equivalent scheme for AAT review of these classes of decisions (Item 77, clause 113 refers).

Items 74 and 75 would amend those paragraphs that enable AAT review of certain decisions by the ACMA concerning directions to ensure compliance with industry codes of standards in force under this Schedule. These amending items would remove all references to an Internet content host. This is because internet content hosts would be subject to Schedule 7, instead of Schedule 5. Schedule 7 provides an equivalent scheme for AAT review of these classes of decisions (Item 77, clause 113 refers).

Item 76 would amend subclause 92(2), which enables particular persons to make an application for AAT review of a decision under subclause (1). Item 76 would delete the reference to an internet content host. Upon enactment of proposed Schedule 7, an internet content host would be able to apply for AAT review of particular decisions by the ACMA (Item 77, clause 113 refers).

Item 77 – At the end of the Act

Item 77 provides for the insertion of a new schedule at the end of the Act. Proposed Schedule 7 would provide a regulatory framework for the provision of content services to the public.

The Schedule includes a note referring to section 216D, inserted by item 20. Section 216D will provide that Schedule 7 has effect.

Schedule 7 – Content Services

Part 1 - Introduction

Clause 1 - Simplified Outline

Clause 1 of this Schedule sets out a simplified outline of the Schedule to assist readers.

Clause 2 – Definitions

Clause 2 of this Schedule sets out the key definitions used in the proposed Schedule. Some of these definitions are discussed below.

Access

Examples of the use of the term ‘access’ are used in the definitions of ‘access-control system’ and ‘content service’.

The definition of ‘access’ is included to avoid doubt and to avoid the term being given an unduly narrow meaning. Access will include access that is subject to a pre-condition

(such as the use of a password), access by way of push technology (such as where a customer requests a content provider to provide him or her with online material on a regular basis, for example, subscription to an Internet 'channel') and access by way of a standing request to an Internet content host to send material stored on the Internet.

Access-control system

For the purposes of this Schedule, the term 'access-control system' means (in relation to content) a system under which 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. The term also means a system under which persons seeking access to the content have been provided with some other means of limiting access by other persons to the content.

The term is used in clause 14 (Restricted access system). Clause 14 provides that the ACMA may, by legislative instrument, declare that a specified access-control system is a restricted access system in relation to content for the purposes of this Schedule.

Adult chat service

An 'adult chat service' is a chat service through which end-users will be able to access content that will predominantly be prohibited content or potential prohibited content.

For the purposes of this Schedule, the distinguishing characteristics of an adult chat service, as compared to other chat services, include any or all of the following: the name of the chat service; the way in which the chat service is advertised or promoted; and the reputation of the chat service.

The concept of the adult chat service is used in this Schedule to draw a line between those content services that are subject to this Schedule and other content services (principally content comprising communications of a private nature) that are exempt from this Schedule. In this regard, refer to the following exceptions to the definition of 'content service' that use 'adult chat service' as a point of delineation:

- exempt point-to-point content service;
- instant messaging service;
- SMS service; and
- MMS service.

Classified

The term 'classified' is defined to mean classified under this Schedule . This term is used in Part 3 of this Schedule which deals with prohibited content. The definition is intended to make it clear that the classification scheme under this Schedule is distinct from the classification scheme under the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act), although there is a close correlation between the two as provided by this Schedule.

Commercial content service

For the purposes of this Schedule, a commercial content service is a content service which is operated for profit or as part of a profit-making enterprise, and but which is only provided to the public on payment of a fee (including periodical subscriptions or 'pay per view' fees).

Computer game

The term 'computer game' is defined to have the same meaning as in the Classification Act. Section 5A of that Act defines 'computer game' to mean a computer program and associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game, but does not include:

- an advertisement for a publication, a film or a computer game; or
- business, accounting, professional, scientific or educational computer software unless the software contains a computer game that would be likely to be classified M or a higher classification.

Content

The definition of 'content' has the effect that content will be subject to regulation under Schedule 7, regardless of its form. Content may comprise:

- text;
- data;
- speech, music or other sounds;
- visual images, animated or otherwise;
- any other form;
- any combination of forms.

Content service

The regulatory scheme of this Schedule imposes substantial obligations on providers of 'content services'. The definition of 'content service' is broad in scope to ensure that all of the categories of content providers are covered.

As a starting proposition, 'content service' is defined as:

(a) a service that delivers content to persons having equipment appropriate for receiving that content, where the delivery of that content is by means of a carriage service (which is defined in clause 2); or

(b) a service that allows end-users to access content using a carriage service.

This definition is then amplified by clause 8 (noted below) which treats 'links to content' as being 'content' for the purpose of regulating 'content services' under this Schedule. Therefore a content service that is subject to this Schedule includes a service that provides links to particular content.

However, the Bill also provides for specified exemptions to the starting definition of 'content service'. These are discussed in further detail below. In addition to the specified exemptions, the definition of 'content service' is further narrowed by reference to:

- its Australian connection (clause 3 refers); and
- the provision of content by a content service (clause 6 refers); and
- the provision a content service to the public (clause 7 refers).

Exclusions from the definition of 'content service'

However the definition of 'content service' explicitly excludes certain services set out in paragraphs (c) to (x) of the definition. They are:

(c) a licensed broadcasting service – for example, free-to-air and subscription television and radio services;

(d) a national broadcasting service- that is, broadcasting services provided by the ABC and SBS;

(e) a re-transmitted broadcasting service;

(f) a licensed datacasting service (datacasting being regulated under Schedule 6 to the BSA);

(g) a re-transmitted datacasting service;

(h) an 'exempt Parliamentary content service', which is further defined as a service which delivers or provides access to content consisting of Parliamentary proceedings;

(i) an 'exempt court/tribunal content service', which is further defined as a service to the extent to which it delivers, or provides access to, content that consists of court or tribunal proceedings;

(j) an 'exempt official-inquiry content service', which is further defined as a service to the extent to which it delivers, or provides access to, content that consists of official-inquiry proceedings. 'Official-inquiry proceedings' are defined in turn as words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a Royal Commission or official inquiry, including evidence given and documents tendered or submitted, and

documents issued or published by, or with the authority of, the Royal Commission or official inquiry;

(k) An ‘exempt point-to-point content service’, which is further defined as

(i) a service that delivers content by email, Instant messaging, or SMS;

but which

(ii) does not specialise in content that is prohibited content or potential prohibited content; and

(iii) is not an adult chat service;

(iv) is not provided on payment of a fee;

(v) is not a service that is specified in the regulations; and

(vi) complies with any other requirements specified in the regulations.

Adult premium SMS or MMS services will not be exempted under this definition because such services would specialise in content that is potential prohibited under this Schedule.

(l) an exempt Internet directory service, which is further defined to mean an Internet directory service that:

(i) does not specialise in providing links to, or information about, Internet sites that specialise in prohibited content or potential prohibited content; and

(ii) is not a service specified in the regulations; and

(iii) complies with such other requirements (if any) as are specified in the regulations.:

(m) An ‘exempt Internet search engine service’, which is further defined as an Internet search engine service which

(i) does not specialise in providing links to, or information about, Internet sites that specialise in prohibited content or potential prohibited content; and

(ii) is not a service specified in the regulations; and

(iii) complies with any other requirements of the regulations.

(n) a service that enables end-users to communicate, by means of voice calls, with other end-users. However, this exemption does not exempt phone sex services because such a phone call is between an end-user and a service provider (not another end-user);

(o) a service that enables end-users to communicate, by means of video calls, with other end-users;

(p) a service that enables end-users to communicate, by means of email, with other end-users;

(q) an instant messaging service (other than an adult chat service) that enables end-users to communicate with other end-users who are supplied with the same service;

(r) an SMS service (other than an adult chat service) that enables end-users to communicate with other end-users who are supplied with the same service;

(s) an MMS service that enables end-users to communicate with other end-users, and is not an adult chat service;

(t) a service that delivers content by fax;

(u) an exempt data storage service, which is further defined to mean a data storage service, where each end-user's access is restricted to the end-user's stored content.

(v) an exempt back-up service, which is further defined to mean a back-up service, where each end-user's access is restricted to the end-user's backed-up content;

(w) until the commencement of Part 2 of Schedule 1, a telephone sex service with the meaning of Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or

(x) a service specified in the regulations.

Designated content/hosting service
Designated content/hosting service provider
Designated content/hosting service provider rule

A 'designated content/hosting service' means

- a hosting service (which is defined by clause 4, discussed below); or
- a live content service (defined in clause 2, and discussed below); or
- a links service (defined in clause 2 and by clause 8, which is discussed below); or
- a commercial content service (defined in clause 2).

A designated content/hosting service denotes those services which are subject to the regulatory scheme established by this Schedule.

The term ‘designated content/hosting service provider’ means a person who provides a designated content/hosting service. Such providers would be bound to follow the designated content/hosting service provider rules that apply to them, which include:

- notices issued by the ACMA that require providers of hosting services or live content services to remove access to, or cease to provide, prohibited content or potential prohibited content, or require links service providers to remove links to prohibited, or potential prohibited, content;

- the terms of industry codes of practice that apply to each of the designated content/hosting services; and

- the terms of industry standards or designated content/hosting service provider determinations made by the ACMA in the circumstances provided by this Schedule.

Links service

For the purposes of this Schedule, a ‘links service’ means a ‘content service’ that provides one or more links to content, and is provided to the public (whether on payment of fee or otherwise). Links services are regulated by Division 5 of Part 3 of this Schedule.

Live content service

A live content service means a content service that provides live content , and is provided to the public (whether on payment of fee or otherwise). Live content does not include stored content. Live content services are dealt with in Division 4 of Part 3 of this Schedule.

Stored content

Stored content means content kept on a data storage device. For this purpose, disregard any storage of content on a highly transitory basis as an integral function of the technology used in its transmission (e.g. momentary buffering including momentary storage in a router in order to resolve a path for further transmission).

Clause 3 – Australian connection

The existence of an ‘Australian connection’ is integral to the terms ‘content service’ and ‘hosting service’. A content service will only be subject to Schedule 7’s regulatory scheme to the extent that it has an Australian connection. This approach is similar to the approach in existing Schedule 5.

An Australian connection is established if, and only if, one or more of the following situations exists:

(a) any of the content provided by the content service is hosted in Australia;

(b) any live content provided by the content service originates in Australia;

(c) in the case of a content service supplied by way of a voice call or video call using a carriage service, any of the participants in the call, other than an end-user of the service, are physically present in Australia.

Live content originates in Australia if the content is located in Australia. For example, the audio-visual content of a live streaming of a concert is 'live content' that would be subject to Schedule 7 if the concert is being held in Australia.

A hosting service has an Australian connection for the purposes of this Schedule if, and only if, any of the content hosted by the hosting service is hosted in Australia.

Clause 4 – Hosting Service

For the purposes of this Schedule, a person is deemed to be providing a hosting service to the public if:

- that person hosts stored content; and
- the person (or another person) provides a content service that:
  - provides the hosted content; and
  - is provided to the public (whether on payment of fee or otherwise).

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However, the hosted content referred to in clause 4 excludes:

- voicemail messages; or
- video mail messages; or
- email messages; or
- SMS messages; or
- MMS messages; or
- messages specified in the regulations.

Clause 5 – Content service provider

Clause 5 makes it clear that a person who supplies a mere carriage service which enables content to be delivered or accessed does not thereby provide a content service.

Clause 6 – When content is provided by a content service

Under clause 6, content is *provided* by a content service if the content is delivered by, or accessible by to end-users using, the content service.

Clause 7 – When a content service is provided to the public

Clause 7 provides that a service is 'provided to the public' if and only if the service is provided to at least one person outside the 'immediate circle' of the person who provides the service. The 'immediate circle' is defined by section 23 of the *Telecommunications Act 1997* (see definition in clause 2).

Clause 8 – Links to Content

Clause 8 concerns content services which provide links to other content services that contain prohibited or potential prohibited content.

For example, suppose John has a personal web page at URL www.john.homespace.net.au. The home page may contain no prohibited or potential prohibited content on it. However, it may include a link to another web page that contains offensive images that would be prohibited content under Schedule 7 (e.g. a link to an X-rated web site, which may also have an innocuous home page).

For the purposes of this Schedule, end-users of the content services providing the links are taken to be able to access the content on the other content service using those links, and that link is taken to be a link to the content service.

The effect of clause 8 is to apply the content services regulatory framework to links to other content services that contain prohibited or potential prohibited content.

Clause 9 – Services supplied by way of a voice call or video call

Clause 9 provides that a service supplied by way of a voice or video call is taken to be a content service that allows end-users to access the relevant content. This clause removes any doubt that a service supplied by means of a voice call or video call can be a 'content service' for the purposes of Schedule 7 (see paragraph (b) of the definition of 'content service' at clause 2).

Clause 10 – Classification of live content etc

This clause concerns live content, and how it may be dealt with for the purposes of classification.

Subclause 10(1) provides that a recording of live streamed content is taken to be the content for the purposes of classifying it under Schedule 7.

As live streamed content may have an indefinite or very long duration, it is necessary to consider live content in short duration segments.

Subclause 10(2) provides that, if the duration of live content on a particular day has a duration of more than 60 minutes (or another time period specified in regulations), the content is considered in 'short duration segments', and examined separately for the purpose of classifying the content. Any such segment can be classified under this Schedule in a corresponding way to the way in which a film would be classified under the Classification Act (see clause 25).

Subclause 10(3) provides that the duration of each 'short duration segment' is to be 60 minutes (or other time period prescribed by regulations).

Subclauses 10(4) and 10(5) make it clear that it is immaterial when a 'short duration segment' begins and that such segments may overlap. This makes it clear that it is not necessary to identify the commencement of live streamed content from a particular source. Nor is there a need to be able to measure the entire duration of that live streamed content to examine a short duration segment for the purposes of classifying the content under this Schedule.

The effect of these provisions will be that a content service provider could be liable for each instance of prohibited content supplied in a segment, albeit over a continuous streamed service.

Clause 11 – Eligible electronic publication

Clause 11 defines the terms *eligible electronic publication* and *corresponding print publication.*

Content is an eligible electronic publication if it consists of an electronic edition of a book, magazine or newspaper, or an audio recording of the text, or abridged text, of a book, magazine or newspaper, and a print edition is or was available to the public (whether by way of purchase or otherwise).

The print edition of the book, magazine or newspaper is the corresponding print publication in relation to the eligible electronic publication.

Clause 12 – Re-transmitted broadcasting services
Clause 13 - Re-transmitted datacasting services

Clauses 12 and 13 define the terms 're-transmitted broadcasting service' and 're-transmitted datacasting service' (see paragraphs (e) and (g) of the definition of 'content service' in clause 2).

Clause 14 – Restricted access system

The use of restricted access systems is required where content is, or is likely to be, classified R18+ (see clauses 20 and 21). It is also required where content is, or is likely to be, MA 15+ (subject to certain exemptions). Clause 14 provides the definition of *restricted access system*.

Subclause (1) provides that ACMA may by legislative instrument declare a specified access-control system to be a restricted access system for the purposes of this Schedule. Under subclause (2), the instrument may make different provision about R 18+ content, and MA 15+ content.

Subclause (4) provides that, in making an instrument under subclause (1), the ACMA must have regard to the objective of protecting children from exposure to content that is unsuitable for children, the objective of protecting children who have not reached 15 years of age from unsuitable content, and to such other matters as the ACMA considers relevant.

Subclause (5) provides that the ACMA must ensure that an instrument under subclause (1) is in force at all times after the commencement of this Schedule.

Clause 15 – R 18+ content and MA 15+ content

Clause 15 clarifies that content (other than content that consists of an eligible electronic publication) that has been classified R 18+ by the Classification Board is considered R 18+ for the purposes of Schedule 7 (paragraph 15(1)(a)).

In circumstances where content (other than content that consists of an eligible electronic publication) has not been classified R 18+ by the Classification Board, but there is a substantial likelihood that it would be if it were classified by the Classification Board, then that content is also considered R 18+ under this Schedule (subparagraphs 15(1)(b)(i) and (ii)).

For the purposes of this Schedule, MA 15+ content will be treated in the same way (subparagraphs 15(2)(a) and (b)).

See clause 11 for the meaning of ‘eligible electronic publication’.

For the purposes of clause 15, it is assumed that this Schedule authorised the Classification Board to classify the content (subclause 15(3)).

Clause 16 - Content that consists of a film

This clause provides that technical differences in the way in which content is delivered are disregarded in determining whether content consists of the ‘unmodified contents of a film’, and therefore classified under clause 24.

Clause 17 – Extended meaning of *use*

Clause 17 is based on section 24 of the *Telecommunications Act 1997*, and provides that, unless the contrary intention appears, a reference to the use of a thing is a reference to its use either in isolation, or in conjunction with one or more other things.

This overcomes potential difficulties in attributing instrumentality to a single element of a system, where the whole system is required to perform an act.

Clause 18 – Trained content assessor

Clause 18 explains the term *trained content assessor*. A person is a trained content assessor if they have, at any time during the preceding 12 months, completed training in:

- the making of assessments of the kinds referred to in paragraphs 81(1)(d) and (f) of this Schedule; and
- giving advice of the kind referred to in subparagraph 81(1)(e)(ii) of this Schedule,

and the training was approved by the Director of the Classification Board under subclause 18(2).

Subclause (2) provides that the Director of the Classification Board may, by writing, approve specified training for the purposes of paragraph 18(1)(b).

In accordance with item 106, the Director's power to approve specified training under paragraph 18(1)(b) may be exercised before the commencement of this Schedule (subitem 106(1)). In addition, the 12 month period referred to in paragraph 18(1)(a) may begin before this Schedule comes into operation. The purpose of item 106 is to allow the development and approval of the specified training referred to in clause 18, which may then commence upon the coming into operation of this Schedule.

Subclause (3) confirms that the Director's written approval is not a legislative instrument. The instrument made under this subclause is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. Although the Director's written approval would apply generally to persons seeking to meet the requirements of subsection 5(1) of that Act, the approval would not itself affect a privilege or interest, impose an obligation, create a right or vary or remove an obligation or right. This is because the general requirements for the training are set out by paragraph 18(1)(a) of this Schedule. The Director's written approval under subclause (2) does not supplement those requirements; rather it merely adds precision by endorsing a particular course of training for the purposes of paragraph (1)(a).

Clause 19 – extra-territorial application

Clause 19 extends the operation of this Schedule to acts, omissions, matters and things outside Australia.

The purpose of this clause is to ensure that regulatory provisions will not be interpreted so narrowly as to be applied only to acts, omissions, matters and things done or situated within Australia, where the necessary Australian links are otherwise present.

Subclause (2) negates the application of section 14.1 of the *Criminal Code* in relation to offences under this Schedule. That section sets out the standard geographical jurisdiction of offences contained in Commonwealth Acts.

Part 2—Classification of content

Division 1—Prohibited content and potential prohibited content

Division 1 would provide the concepts of prohibited content and potential prohibited content, which are the cornerstones of the regulatory framework established by this Schedule.

Clause 20 – Prohibited content

Clause 20 is an interpretative provision which sets out when content will be prohibited content.

For the purposes of this Schedule, content (other than content that consists of an eligible electronic publication) will be prohibited content if:

- it has been classified RC or X 18+ by the Classification Board; or
- both:
  - the content has been classified R18+ by the Classification Board; and
  - access to the content is not subject to a restricted access system; or
- all of the following conditions are satisfied:
  - the content has been classified MA 15+ by the Classification Board;
  - access to the content is not subject to a restricted access system;
  - the content does not consist of text and/or one or more still visual images;
  - access to the content is provided by means of a content service (other than a news service or a current affairs service);
  - the content service is provided upon payment of a fee (whether periodical or otherwise); or
- all of the following conditions are satisfied:
  - the content has been classified MA 15+ by the Classification Board;
  - access to the content is not subject to a restricted access system;
  - access to the content is provided by means of a mobile premium service.

Mobile premium service is defined in clause 2.

Content that consists of an eligible electronic publication (as defined in clause 11) is prohibited content if the content has been classified RC, category 2 restricted or category 1 restricted by the Classification Board.

Clause 24 makes it clear that the classification of an eligible electronic publication is the same as the classification of the corresponding print publication.

Clause 21 – Potential prohibited content

For the purposes of this Schedule, content will be potential prohibited content if:

- it has not been classified by the Classification Board; and
- if it were to be classified, there is a substantial likelihood that it would be prohibited content as defined by clause 20 (subclause 21(1)).

However, subclause 21(2) makes it clear that content is not prohibited content if:

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

The purpose of this approach is to minimise the regulatory burden on the publishers of eligible electronic publications, and to maintain, as far as possible, equivalency between what is unrestricted in the print world and what can be made available electronically. The definition of potential prohibited content in relation to eligible electronic publications is framed accordingly.

The classification of an eligible electronic publication is the same as the classification of the corresponding print publication (see clause 24).

To avoid doubt, in determining whether particular content is potential prohibited content, it is to be assumed that this Schedule authorised the Classification Board to classify the content (subclause 21(3)).

Division 2 – Classification of content

Division 2 sets out arrangements for classifying content for the purposes of this Schedule. Content may be classified either by applications for classification made under this Schedule, or by applications made under the Classification Act. In the latter circumstance, classifications made under the Classification Act are deemed to be classifications for the purpose of this Schedule.

Clause 22 - Applications for classification of content

Clause 22 sets out the persons who may apply to the Classification Board for the classification of content under this Schedule, and the manner in which that application must be made.

The persons who may apply to the Classification Board for classification of content include:

- in the case of content that has been delivered to, or accessed by, an end-user of a designated content service – the designated content service provider concerned; or

- in the case of content that a designated content service provider is considering whether to deliver to, or make available for access by, an end-user of the designated content service concerned – the designated content service provider; or

- in any case – the ACMA.

For special rules about classification of live content, see clause 10.

Clause 23 – Classifications of content

In response to applications for classification of content made under clause 22, the Classification Board is obliged to classify the content in accordance with whichever of clauses 24 (content that consists of a film, computer game or eligible electronic publication) and 25 (content that does not consist of a film, computer game or an eligible electronic publication) is applicable in the circumstances. The Classification Board must also notify the applicant in writing of the classification of the content.

Clause 24 - Classification of content that consists of a film, a computer game or an eligible electronic publication

Clause 24 provides for the classification of content for the purposes of this Schedule. Subclauses 24(1) and (2) are deeming provisions in relation to the classification of films computer games, and publications under the Classification Act. Subclauses 24(3) and (4) are provisions enabling the actual classification of a film, computer game, or eligible electronic publication under this Schedule where that content has not been classified already under the Classification Act.

Deemed classification

If content consists of the entire unmodified contents of a film (within the meaning of clause 2, read in conjunction with 16), or a computer game (within the meaning of clause 2), and the film or game has been classified under the Classification Act, the content will be deemed to have the same classification under this Schedule (subclause 24(1)). As a result, there is no need for the Classification Board to classify content under Schedule 7 if it has already been classified under the Classification Act. (Clause 34 would provide for corresponding treatment of films and computer games that have been classified under the Classification Act by the Classification Review Board.)

If content consists of an eligible electronic publication (within the meaning on clause 11), and the corresponding print publication has been classified under the Classification Act, the content will be deemed to have the same classification under this Schedule (subclause 24(2)). As a result, there is no need for the Classication Board to classify content under Schedule 7 if it has already been classified under the Classification Act. (Clause 35 would provide for corresponding treatment of publications that have been classified under the Classification Act by the Classification Review Board.)

Actual classification

If content consists of the entire unmodified contents of a film or a computer game and the film or game has not been classified under the Classification Act, the Classification Board must give the content the same classification under this Schedule as it would under the Classification Act (subclause 24(3)). That is, the Classification Board is to use the same classification rules under this Schedule that would apply if such content were to be classified under the Classification Act.

A similar arrangement would apply in relation to the classification of content that comprises of an eligible electronic publication, in that the Classification Board must classify the content using the same classification rules that would apply to the classification of the corresponding print publication (subclause 24(4)).

Clause 25 – Classification of content that does not consist of a film, a computer game or an eligible electronic publication

Clause 25 provides for the classification of content other than the entire unmodified contents of a film, a computer game, or an eligible electronic publication. Such content will be classified by the Classification Board under this Schedule using the classification rules that apply to a film under the Classification Act.

This clause will apply if, for example, content consists of a webpage containing a mixture of text and moving images. It will enable such content to be classified as if it were a film. Similarly, an edited film that unable to be classified under clause 24 would be classified under this clause.

Clause 26 – Deemed classification of content classified under Schedule 5

Clause 26 provides that content classified by the Classification Board under Schedule 5 is taken, for the purposes of this Schedule, to have been classified the same way by the Classification Board under this Schedule. This avoids the lapsing of classifications of Internet content consequential to the proposed repeal by this bill of the operative provisions in Part 3 of Schedule 5 (item 35 refers).

Clause 27 – Fees

Clause 27 provides for the payment of fees in relation to applications made to the Classification Board for classification of content under clause 22. A person who makes such an application must pay the relevant fee (subclause 27(1)).

The fee amount will be determined by reference to the type of content for which a classification is sought (ie, film, computer game, eligible electronic publication, or other content) (subclause 27(2)). The fee must not amount to taxation (subclause 27(7)).

Subclauses 27(3)-(6) each provide that, in relation to each type of content, the relevant fee prescribed for that content by the Classification Act will apply, unless that amount is modified by regulations made under this clause in relation to the classification under this Schedule.

Division 3—Reclassification

Division 3 of Part 2 would provide arrangements for the reclassification of content over time. These provisions largely mirror the corresponding arrangements in the Classification Act.

Clause 28 – Reclassification of content

If content has been classified under this Schedule by the Classification Board (otherwise than because of subclause 24(1) or (2)):

- the Board must not reclassify the content within the 2-year period beginning on the day the classification occurred; and

- after that 2-year period the Board may reclassify the content:

  - if required to do so by the Minister for Communications, Information Technology and the Arts, the ACMA or a designated content service provider who has applied, under clause 22, for classification of the content and must act on such a requirement; or

  - on the Classification Board's own initiative (subclauses 28(1) to (3)).

If the Classification Board reclassifies content, it must provide written notification to the Minister for Communications, Information Technology the Arts, the ACMA or a designated content service provider who has applied under clause 22 for classification of content (subclause 28(4)).

Clause 29 – Notice of intention to reclassify content

If content has been classified by the Classification Board under this Schedule (otherwise than because of subclause 24(1) or (2)) and the Board intends to reclassify the content then the Director of the Board must:

- give notice of that intention, inviting submissions about the matter – this notice must specify the day on which the Board proposes to consider the matter; and

- arrange for the contents of the notice to be published, in such manner as the Director decides, at least 30 days before the Board proposes to consider the matter; and

- give a copy of the notice to the Minister, the ACMA and a designated content service provider (if they applied under clause 22) at least 30 days before the Board proposes to consider the matter (subclauses 29(1) and (2)).

The matters that the Classification Board is to take into account in reclassifying the content include issues raised in submissions made to the Board about the matter (subclause 29(3)).

Division 4—Review of classification decisions

Division 4 would establish arrangements for the review by the Classification Review Board of classification decisions that are made under this Schedule (subdivision A refers), or under the Classification Act (subdivisions B and C refer).

Subdivision A—Review of classification of content

Clause 30 – Persons who may apply for review

Clause 30 sets out the persons who may apply to the Classification Review Board for a review of a decision by the Classification Board to classify content under this Schedule (otherwise than a deemed classification under subclause 24(1) or (2)).

These persons are the Minister, the ACMA, a designated content service provider (who has applied for classification of content under clause 22), and a person aggrieved by the classification.

For the purposes of clause 30, the term *restricted classification* means the classification MA 15+, R 18+, X 18+ or RC for content that does not consist of a computer game or an eligible electronic publication. For content that consists of a computer game, the term means the classification MA 15+ or RC. For content that consists of an eligible electronic publication, the terms means the classification category 1 restricted, category 2 restricted or RC (subclause 30(4)).

If the classification referred to in paragraph 30(1)(d) is a restricted classification, the following persons are taken to be persons aggrieved by the classification:

- a person who has engaged in a series of activities relating to, or research into, the contentious aspects of the theme or subject matter of the content concerned;

- an organisation or association, whether incorporated or not, whose objects or purposes include, and whose activities relate to, the contentious aspects of that theme or subject matter (subclause 30(2)).

Subclause 30(2) does not limit paragraph 30(1)(d).

However, a person or body is not taken to be aggrieved by a restricted classification because of subclause 30(2) if the classification was made before:

- the person engaged in a series of activities relating to, or research into, the contentious aspects of the theme or subject matter of the content concerned; or

- the organisation or association was formed, or its objects or purposes included and its activities related to, the contentious aspects of that these or subject matter (subclause 30(3)).

Clause 31 – Applications for review

Subclause 31(1) sets out the form in which an application for review of a classification must be made.

Subclause 31(2) empowers the Minister, or the ACMA to apply for review of a classification at any time.

Subclause 31(3) provides that any other application for review of a classification must be made within 30 days after the applicant is notified of the classification or within such longer time as the Classification Review Board allows.

In circumstances in which a person applied for classification of content under clause 22 and an applicant (not covered by paragraph 31(1)(c)) has applied for review of the classification of that content, the Convenor of the Board must provide written notification to the person of the application for review and the day on which it will be considered (subclause 31(4)).

Regulations made under paragraph 43(1)(d) of the Classification Act prescribing fees to accompany certain applications to the Classification Review Board for review of certain decisions of the Classification Board will apply in a corresponding way, subject to such modifications, including additions, omissions and substitutions (if any) as are specified in regulations made for the purposes of subclause 31(5) (subclauses 31(5) and (7)).

Any such fees will be limited and will not be able to amount to taxation (subclause 31(6)).

Clause 32 – Classification Review Board may refuse to deal with review applications that are frivolous etc.

Clause 32 empowers the Classification Review Board to refuse to deal with, or to deal further with, applications for review of classification of content made by persons aggrieved by the classification (subclause 30(1)(d)) if it is satisfied that the applications is frivolous, vexatious or not made in good faith.

Clause 33 – Review

For the purposes of reviewing a decision to classify content under this Schedule, the Classification Review Board will be able to exercise all the powers and discretions that are conferred on it by this Schedule, and must make a written decision confirming the classification or reclassifying the content.

If the Classification Review Board reclassifies the content, that decision will have effect under this Schedule and existing Schedule 5 as if the content had been reclassified by the Classification Board (subclause 33(2)).

This means that references in this Schedule to content classified by the Classification Board also apply to content that has been reclassified by the Classification Review Board.

Subdivision B—Review of content that consists of a film or a computer game

Clause 34 – Review of classification of content that consists of a film or a computer game

Clause 34 deals with the classification of content comprising a film (within the meaning of clause 2, read in conjunction with clause 16), or a computer game by the Classification Review Board under the Classification Act.

Clause 34 provides that if the film or computer game has been classified under the Classification Act; and that classification is reviewed by the Classification Review Board under that Act, the resulting classification decision will have effect for the purpose of this Schedule and existing Schedule 5 to the BSA. This will ensure consistency of content classification.

For example, if the Classification Review Board reviews a decision under the Classification Act to classify a film as R18+, and decides to re-classify that film as X18+, the latter classification will apply to the film for the purpose of regulating the provision of that content under this Schedule and Schedule 5 to the BSA.

Subdivision C – Review of content that consists of an eligible electronic publication

Clause 35 – Review of classification of content that consists of an eligible electronic publication

Clause 35 deals with the classification of publications by the Classification Review Board under the Classification Act. Clause 35 provides that if a publication has been classified under the Classification Act; and that classification is reviewed by the Classification Review Board under that Act, the resulting classification decision will have effect in relation to content that consists of an eligible electronic publication (within the meaning of clause 11) for the purpose of this Schedule and Schedule 5 to the BSA. This will ensure consistency of content classification as between eligible electronic publications and the corresponding print publication.

For example, if the Classification Review Board reviews a decision under the Classification Act to classify a book of photographs as Unrestricted, and decides to re-classify that book as Category 1 Restricted, the latter classification will apply to the eligible electronic publication of that book.

Division 5—Miscellaneous

Clause 36 – Decisions of the Classification Board etc.

Clause 36 would provide that section 57 of the Classification Act, (which deals with procedural matters relating to decisions of the Classification Board), will apply in the same way to the consideration by the Classification Board of a matter arising under this Schedule .

To avoid doubt, subclause 36(2) lists a number of provisions of the Classification Act that will not apply to a classification under this Schedule:

- section 10, which requires classifications to be in writing;
- section 19, which deals with the ability of the Board to decline to deal with applications for classification of a film or a computer game in certain circumstances;
- section 20, which requires the Board to determine consumer advice giving information about the content of a film or computer game;
- section 22, which prohibits a film or computer game being classified if it contains certain advertisements;
- section 23A, which relates to calling in films published in the ACT for classification;
- section 24, which provides for the calling in for classification of computer games that contain contentious material and are published in the ACT;
- section 25, which requires the Director of the Classification Board to issue a classification certificate for each publication, film and computer game that is classified by the Board;
- section 26, which deals with notification of decisions of the Classification Board and the Classification Review Board;
- section 27, which allows a person to apply to the Director of the Classification Board for a copy of a classification certificate or of a notice under section 26;
- section 28, which provides that a decision takes effect on the day on which notice of the decision is given under section 26; and
- section 44A, which provides for the obtaining of copies of publications, films or computer games for review; and
- Division 6 of Part 2, which sets out the process for obtaining certificates for exempt films or computer games.

Part 3 Complaints to, and investigations by, the ACMA

Division 1—Making of complaints to the ACMA

Clause 37 – Complaints about prohibited content or potential prohibited content

A person may make a complaint to the ACMA under subclause 37(1) if they have a reason to believe that end-users in Australia can access prohibited content or potential prohibited content provided by a content service. If the complainant makes a complaint under subclause 37(1) about live content, and they believe that a particular incident depicted in the live content is sufficient to characterise the content as prohibited content or potential prohibited content, the complaint must be made within 60 days after the occurrence of the incident (subclause 37(7)).

Under subclause 37(2), a person may make a complaint to the ACMA if they have reason to believe that a hosting service is hosting prohibited content, or potential prohibited content. Clause 4 provides a definition for the term 'hosting service'.

Similarly, a person may make a complaint to the ACMA under subclause 37(3) if they have reason to believe that end-users in Australia can access prohibited content or potential prohibited content using a link provided by a links service (as defined in clause 2 of this Schedule).

Subclause 37(4) sets out the content to be included in complaints made under this Schedule. The requisite content will depend upon the circumstances giving rise to the complaint.

In making a complaint under subclauses 37(1), (2), or (3), a complainant must identify the content which is the subject of their complaint (paragraph 37(4)(a)).

If the content is *stored content* (as defined in clause 2) the complainant must set out how to access the content. This may be done by setting out a URL, a password, or the name of a newsgroup (paragraph 37(4)(b)). However, a complainant is not required to disclose how to access the content if to do so would cause the complainant to contravene a law of the Commonwealth, a State or a Territory (subclause 37(5)).

A complainant must also set out their reasons for believing that the content is prohibited or potential prohibited content, and any other information (if any) that the ACMA may require (paragraphs 37(4)(f) and (g)).

The complainant will also need to meet the following requirements, depending upon their relevance to the circumstances of giving rise to the complaint.

If the content is stored content and the complainant knows the country or countries in which the content is hosted, the complainant must set out the name of that country or those countries (subparagraphs 37(4)(c)(i) and (ii)).

If the content is live content, the complainant must set out details of how the content was accessed (for example: set out a URL or a password) (paragraph 37(4)(d)). However, a complainant is not required to disclose how to access the content if to do so would cause the complainant to contravene a law of the Commonwealth, a State or a Territory (subclause 37(6)).

Furthermore, if the content was live content and the complainant believes that a particular incident depicted in the live content is sufficient to characterize the content as prohibited content or potential prohibited content, they must set out the date and approximate time the incident occurred (paragraph 37(4)(e)).

Subclause 37(8) is a transitional clause which provides that a person is not entitled to make a complaint under subclauses 37(1), (2) or (3) about something that occurred before the commencement of this clause.

Clause 38 – Complaints relating to breach of a designated content/hosting service provider rule etc.

Subclause 38(1) provides that if a person has reason to believe that another person has breached a designated content/hosting service provider rule, or committed an offence against, or breached a civil penalty provision of, this Schedule, that person will be able to make a complaint to the ACMA about the matter.

In addition, a person is able to make a complaint to the ACMA if the person has reason to believe that a commercial content service provider has breached an industry code registered under Part 4 of this Schedule, and the code is applicable to the provider (subclause 38(2)).

Clause 39 – Form of complaint

Clause 39 would generally require a complaint made under Division 1 of Part 3 of this Schedule to be in writing. The ACMA will, however, be able to permit complaints to be given in accordance with specified software requirements, by way of a specified kind of electronic transmission, including email.

Clause 40 – Recordings of live content

Clause 40 concerns complaints made under subclause 37(1) about live content.

In circumstances where a complainant makes such a complaint, and provides a recording of that live content (or a segment thereof) to the ACMA as part of their complaint, then under subclause 40(1), the making of that recording, and the giving of it to ACMA by the complainant, is taken not to have infringed copyright.

However, subclause 40(1) will not apply if the ACMA is satisfied that the complaint is frivolous, vexatious, or not made in good faith (subparagraphs 40(2)(a)(i), (ii) and (iii)), nor will it apply where the making of the recording would cause the complainant to

contravene a law of the Commonwealth (other than the *Copyright Act 1968*), a law of a State, or a law of a Territory (subparagraphs 40(2)(c)(i), (ii) and (iii)).

Subclause 40(1) will also not apply if the ACMA has reason to believe that the complaint was made for the purpose of, or for purposes that include the purpose, of frustrating or undermining the effective administration of this Schedule (paragraph 40(2)(b)).

Clause 41 – Residency etc. of complainant

Clause 41 provides that a person will not be entitled to make a complaint under Division 1 of Part 3 of this Schedule unless the person resides in Australia, a body corporate that carries on activities in Australia or the Commonwealth, a State or a Territory.

Clause 42 – Escalation of complaints made under industry codes etc.

Clause 42 treats complaints made under a industry code or standard registered under Part 4, or a designated content/hosting service provider determination, as if the complaint had been made under subclause 37(1), (2) or (3), or 38(1) or (2), if:

- the complaint is about a particular matter; and
- the person could have made a complaint about the matter under subclause 37(1), (2) or (3), or 38(1) or (2); and
- the complaint is referred to the ACMA under the code, standard or determination.

Division 2—Investigations by the ACMA

Clause 43 – Investigation of complaints by the ACMA

The ACMA will be required under subclause 43(1) to investigate a complaint under Division 1 of Part 3 of this Schedule unless any of the following provide for another person to investigate the complaint:

- an industry code made and registered under Part 4;
- an industry standard determined and registered under Part 4; or
- a designated content service provider determination (subclause 43(4)(a)).

The purpose of paragraph 43(4)(a) is to provide for the investigation of complaints under Division 1 by industry in certain circumstances.

Furthermore, the ACMA need not investigate a complaint under Division 1 if it is satisfied that the complaint is frivolous, vexatious or not made in good faith, or has reason to believe that the complaint was made for the purpose, or for purposes that

include the purpose, of frustrating or undermining the effective administration of this Schedule (paragraphs 43(3)(a) and (b)).

The ACMA will be required to notify the complainant of the results of such an investigation (subclause 43(5)).

The ACMA will also be able to terminate such an investigation if it is of the opinion that it does not have sufficient information to conclude the investigation (subclause 43(6)).

Clause 44 – ACMA may investigate matters on its initiative

Clause 44 sets out the matters that the ACMA may investigate if it thinks it desirable to do so. These matters include, inter alia, investigating whether end-users in Australia can access prohibited content or potential prohibited content provided by a content service, and whether a person has committed an offence against, or breached a civil penalty of, this Schedule.

Clause 45 – Conduct of investigations

Clause 45 enables the ACMA to conduct investigations under Division 2 of Part 3 of this Schedule as it thinks fit.

The ACMA will be able to, for the purposes of an investigation, obtain information from such persons and make such inquiries as it thinks fit.

Clause 45 will apply in addition to Part 13 of the BSA, which deals with information gathering by the ACMA, including investigation powers and procedures.

Clause 46 – Protection from civil proceedings

Clause 46 provides an immunity from civil proceedings (such as proceedings for breach of contract in relation to the disclosure of a password or proceedings for defamation) for a person who in good faith makes a complaint under Division 1 of Part 3 of this Schedule or who makes a statement or gives information to the ACMA in connection with an investigation under Division 2 of Part 3.

Division 3 – Action to be taken in relation to hosting services

Clause 47 – Action to be taken in relation to hosting services

If in the course of an investigation under Division 2 of Part 3 of this Schedule to the BSA the ACMA is satisfied that content hosted by a hosting service provider is prohibited content, and the relevant hosting service has an Australian connection, the ACMA must, if the content does not consist of an eligible electronic publication and has been classified RC or X 18+ by the Classification Board, give the hosting service provider a written notice directing the hosting service provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content

(subclause 47(1)). Pursuant to subclause 47(6), a type A remedial situation exists in relation to content at a particular time if the provider does not host the content, or the content is not provided by a content service provided to the public (whether on payment of a fee or otherwise).

However, if the content does not consist of an eligible electronic publication and has been classified R 18+, or MA 15+ by the Classification Board, the ACMA must give the hosting service provider a written notice directing the hosting service provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the content (paragraph 47(1)(d)). Pursuant to subclause 47(7), a type B remedial situation exists in relation to content at a particular time if the provider does not host the content, or the content is not provided by a content service provided to the public (whether on payment of a fee or otherwise), or access to the content is subject to a restricted access system.

In circumstances where the content does consist of an eligible electronic publication, and the content has been classified RC, category 2 restricted, or category 1 restricted by the Classification Board, the ACMA must give the hosting service provider a written notice directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content (paragraph 47(1)(e)).

The notices referred to above are called final take-down notices and are intended to have ongoing effect.

The ACMA's decision to give a hosting service provider a final take-down notice will be reviewable by the AAT on the application of the hosting service provider concerned (paragraph 113(1)(b) and subclause 113(2)).

Subclause 47(2) sets out the procedure that will apply if, in the course of an investigation under Division 2 of Part 3 of this Schedule, the ACMA is satisfied that content hosted by a hosting service provider is potential prohibited content and the hosting service has an Australian connection.

If the ACMA is satisfied that, if the content were to be classified by the Classification Board under this Schedule, there is a substantial likelihood that:

- if the content does not consist of an eligible electronic publication – the content would be classified RC or X 18+; or

- if the content consists of an eligible electronic publication – the content would be classified RC or category 2 restricted;

the ACMA must:

- give the relevant hosting service provider a written notice (known as an interim take-down notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content until the

ACMA notifies the hosting service provider under subclause (4) of the Classification Board's classification of the content (paragraph 47(2)(c)); and

- apply to the Classification Board under clause 22 for classification of the content (paragraph 47(2)(d)).

Similarly, if the ACMA is satisfied that, if the content were to be classified by the Classification Board under this Schedule, there is a substantial likelihood that the content (which does not consist of an eligible electronic publication) would be classified R 18+ or MA 15+, the ACMA will be required to:

- give the relevant hosting service provider a written notice (known as an interim take-down notice) directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the content until the ACMA notifies the hosting service provider under subclause (4) of the Classification Board's classification of the content (paragraph 47(2)(d)); and

- apply to the Classification Board under clause 22 for classification of the content (paragraph 47(3)(e)).

If the ACMA makes a decision under subclause (2) or (3) to apply to the Classification Board for classification of content, the ACMA must give the relevant hosting service provider a written notice setting out the decision (subclause 47(5)).

The ACMA's decision to give a hosting service provider an interim take-down notice will be reviewable by the AAT on the application of the provider concerned (paragraph 113(1)(a) and subclause 113(2)). Furthermore, a decision under subclause 47(2) or (3) to apply to the Classification Board for classification of content hosted by a hosting service provider is reviewable by the AAT on application of the hosting service provider concerned (paragraph 113(1)(d) and subclause 113(2)).

If, in response to an application made under subclause (2) or (3), the ACMA is informed under paragraph 23(b) of the classification of the content, the ACMA must:

- give the relevant hosting service provider a written notice setting out the classification; and

- in a case where the content does not consist of an eligible electronic publication and the effect of the classification is that the content is prohibited content because it has been classified RC or X 18+ by the Classification Board – give the hosting service provider a written notice (known as a final take-down notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content; and

- in a case where the content does not consist of an eligible electronic publication and the effect of the classification is that the content is prohibited content because it has been classified R 18+ or MA 15+ by the Classification Board – give the hosting

service provider a written notice (known as a final take-down notice) directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the content; and

- in a case where the content does consist of an eligible electronic publication, and the effect of the classification is that the content is prohibited content because it has been classified RC, category 2 restricted or category 1 restricted by the Classification Board – given the hosting service provider a written notice (known as a final take-down notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content (subclause 47(4)).

The ACMA's decision to give a hosting service provider a final take-down notice will be reviewable by the AAT on the application of the provider concerned (paragraph 113(1)(b) and subclause 113(2)).

Clause 48 – Revocation of interim take-down notices – voluntary withdrawal of content

Clause 48 is intended to fast track the equivalent of a final take-down notice with the consent of an affected hosting service provider.

If:

- a particular hosting service provider is subject to an interim take-down notice relating to particular content; and

- before the Classification Board classifies the content, the provider ceases to host the content and gives the ACMA a written undertaking not to host the content;

the ACMA will be able to:

- accept the undertaking; and

- revoke the interim take-down notice; and

- by written notice given to the Classification Board, determine that the Classification Board is not required to comply with clause 23 in relation to the classification of the content (subclause 48(1)).

It is assumed that where this occurs, the fees for the Board's work will be adjusted accordingly.

If an interim take-down notice is revoked under clause 48, the ACMA will be required to notify the hosting service provider concerned to this effect (subclause 48(2)).

A hosting service provider will be required to comply with an undertaking given to the ACMA by the provider and accepted by the ACMA under clause 48 (see subclause 53(5)). This requirement will be a designated provider rule (see subclause 53(6)). Contravention of designated provider rules is an offence (subclause 106(1)).

Clause 49 – Revocation of final take-down notices – reclassification of content

The ACMA will be required to revoke a final take-down notice if:

- content has been classified by the Classification Board under this Schedule (otherwise than because of subclause 24(1) or (2)); and
- a particular hosting service provider is subject to a final take-down notice relating to the content;
- the Classification Board reclassifies the content; and
- as a result of the reclassification, the content ceases to be prohibited content (subclause 49(1)).

If a final take-down notice is revoked under clause 49(1), the ACMA will be required to give the hosting service provider concerned a written notice stating that the final take-down notice has been revoked (subclause 49(2)).

Clause 50 – Revocation of take-down notices – reclassification of content that consists of a film or a computer game

The ACMA will be required to revoke a final take-down notice if:

- content consists of the entire unmodified contents of a film or a computer game (see clauses 2 and 16); and
- the Classification Board reclassifies the film or computer game under the Classification Act; and
- a particular hosting service provider is subject to a final take-down notice relating to the content; and
- as a result of the reclassification, the content ceases to be prohibited content (subclause 50(1)).

If a final take-down notice is revoked under clause 50(1), the ACMA will be required to give the hosting service provider a written notice to this effect (subclause 50(2)).

Clause 51 – Revocation of final take-down notices – reclassification of corresponding print publication

Under clause 51, the ACMA must revoke a final take-down notice where:

- content consists of an eligible electronic publication; and
- the Classification Board reclassifies the corresponding print publication under the Classification Act; and
- a final take-down notice relating to the content is applicable to a particular hosting service provider; and
- as a result of the reclassification, the content ceases to be prohibited content.

In such circumstances, the ACMA is obliged under subclause 51(2) to give the relevant hosting service provider a written notice stating that the final take-down notice has been revoked.

For an explanation of the terms *eligible electronic publication* and *corresponding print publication*, see clause 11.

Clause 52 – Anti-avoidance – special take-down notices

As an anti-avoidance measure, clause 52 provides that if:

- a particular hosting service provider is subject to an interim or final take-down notice relating to particular content; and
- the ACMA is satisfied that the hosting service provider is hosting, or is proposing to host, content (the *similar content*) that is the same as, or substantially similar to, the content identified in the interim or final take-down notice; and
- the ACMA is satisfied that the similar content is prohibited content or potential prohibited content;

the ACMA will be able to give the hosting service provider - if the interim or final take-down notice was given under paragraph 47(1)(c), (1)(e) , (2)(c), (4)(b) or (4)(d) of this Schedule – a written notice (a *special take-down notice*) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the similar content at any time when the interim or final take-down notice is in force.

For the purposes of clause 52, a type A remedial situation exists in relation to the similar content at a particular time if the provider does not host the similar content, or the similar content is not provided by a content service to the public (whether on payment of a fee or otherwise) (sucblause 52(2)).

In any other case, the ACMA will be able to give the hosting service provider a special take-down notice directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the similar content at any time when the interim take-down notice or final take-down notice is in force.

For the purposes of clause 52, a type B remedial situation exists in relation to content at a particular time if:

- the provider does not host the similar content; or
- the similar content is not provided by a content service to the public (whether on payment of a fee or otherwise); or
- access to the similar content is subject to a restricted access system (subclause 52(3)).

Clause 53 – Compliance with rules relating to prohibited content etc.

A hosting service provider will be required to comply with any interim take-down notice, final take-down notice or special take-down notice that applies to the provider as soon as practicable, and in any event by 6pm on the next business day, after the notice was given to the provider (subclauses 53(1) to (3)).

It is a defence, in proceedings relating to a contravention of subclause (3), if the hosting service provider proves that he/she did not know, and could not, with reasonable diligence, have ascertained, that the relevant content was prohibited content or potential prohibited content (subclause 53(4)). The relevant hosting service provider will bear the legal burden in establishing this defence.

A hosting service provider will also be required to comply with an undertaking given to the ACMA by the provider and accepted by the ACMA under clause 48 (subclause 53(5)).

The rules set out in clause 53 are designated content/hosting service provider rules (see clause 104). Accordingly, a hosting service provider who contravenes any interim take-down notice, final take-down notice or special take-down notice that applies to the provider or any undertaking given to, and accepted by, the ACMA under clause 53 will be subject to an offence under clause 106 (subclause 53(6)).

Clause 54 – Identification of content

Clause 54 provides that content will be able to be identified in a notice under Division 3 by setting out the content, describing the content, or in any other way.

Clause 55 – Application of notices under this Division

Clause 55 concerns notices under Division 3, which relate to particular Internet content. Under clause 55, such a notice applies to the content only to the extent to which the

content is accessed, or available for access, from an Internet site, or a distinct part of an Internet site, specified in the notice.

Division 4 – Action to be taken in relation to live content services

Clause 56 – Action to be taken in relation to live content services

If in the course of an investigation under Division 2 of Part 3 of this Schedule the ACMA is satisfied that live content provided by a live content service is prohibited content, and the live content service has an Australian connection, the ACMA must, if the content has been classified RC or X 18+ by the Classification Board, give the live content service provider a written notice directing the live content service provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the live content service. Pursuant to subclause 56(6), a type A remedial situation exists in relation to a live content service if the provider does not provide the live content service.

However, if the content has been classified R 18+ or MA 15+ by the Classification Board, the ACMA must give the live content service provider a written notice directing the live content service provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the live content service. Pursuant to subclause 56(7), a type B remedial situation exists in relation to a live content service if the provider does not provide the live content service, or access to any R 18+ or MA 15+ content provided by the live content service is subject to a restricted access system.

The notices referred to above are called final service-cessation notices and are intended to have ongoing effect.

The ACMA's decision to give a live content service provider a final service-cessation notice will be reviewable by the AAT on the application of the live content service provider concerned (paragraph 113(3)(b) and subclause 113(4)).

Subclause 56(2) and (3) sets out the procedure that will apply if in the course of an investigation under Division 2 of Part 3 of this Schedule the ACMA is satisfied that live content provided by a live content service provider is potential prohibited content and the live content service has an Australian connection.

If the ACMA is satisfied that, if the content were to be classified by the Classification Board under this Schedule, there is a substantial likelihood that the content would be classified RC or X 18+, and the ACMA has a recording of the content, or a copy of such a recording, the ACMA will be required to:

- give the live content service provider a written notice (known as an interim service-cessation notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the live content service until the ACMA notifies the live content provider under subclause (4) of the Classification Board's classification of the content ; and

- apply to the Classification Board under clause 22 for classification of the content.

Similarly, if the ACMA is satisfied that, if the content were to be classified by the Classification Board under this Schedule, there is a substantial likelihood that it would be classified R 18+ or MA 15+, and the ACMA has a recording of the content, or a copy of such a recording, the ACMA will be required to:

- give the live content service provider a written notice (known as an interim service-cessation notice) directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the live content service until the ACMA notifies the live content provider under subclause (4) of the Classification Board's classification of the content ; and
- apply to the Classification Board under clause 22 for classification of the content.

If the ACMA makes a decision under subclause (2) or (3) to apply to the Classification Board for classification of content, the ACMA must give the relevant live content service provider a written notice setting out the decision (subclause 56(5)).

The ACMA's decision to give a live content service provider an interim service-cessation notice will be reviewable by the AAT on the application of the provider concerned (paragraph 113(3)(a) and subclause 113(4)). Furthermore, a decision under subclause 56(2) or (3) to apply to the Classification Board for classification of content hosted by a live content service is reviewable by the AAT on application of the live content service provider concerned (paragraph 113(3)(c) and subclause 113(4)).

If, in response to an application made under subclause (2) or (3), the ACMA is informed under paragraph 23(b) of the classification of the content, the ACMA must:

- give the relevant live content service provider a written notice setting out the classification; and
- in a case where the effect of the classification is that the content is prohibited content because it has been classified RC or X 18+ by the Classification Board – give the live content service provider a written notice (known as a final service-cessation notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content; and
- in a case where the effect of the classification is that the content is prohibited content because it has been classified R 18+ or MA 15+ by the Classification Board – give the live content service provider a written notice (known as a final service-cessation notice) directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the content (subclause 56(4)).

The ACMA's decision to give a live content service provider a final service-cessation notice will be reviewable by the AAT on the application of the provider concerned (paragraph 113(3)(b) and subclause 113(4)).

Clause 57 – Undertaking – alternative to service-cessation notice

Clause 57 applies to circumstances in which the ACMA is conducting an investigation under Division 2, and is satisfied that live content provided by a live content service (which has an Australian connection) is prohibited content, or potential prohibited content.

If, in such circumstances, ACMA would be required (apart from subclause 57(1)) to take action under subclause 56(1), (2) or (3) in relation to the content, and the live content service provider concerned gives the ACMA a written undertaking relating to the live content service, then:

- the ACMA may accept the undertaking; and
- if the ACMA may accept the undertaking – the ACMA is not required to take action under subclause 56(1), (2) or (3) in relation to the content (subclause 57(1)).

Subclause 57(1) has effect despite anything in clause 56 (subclause 57(2)).

Clause 58 – Revocation of service-cessation notices – undertaking

If:

- a particular live content service provider is subject to a final service-cessation notice or interim service-cessation notice; and
- the provider gives the ACMA a written undertaking relating to the live content service concerned;

the ACMA will be able to:

- accept the undertaking; and
- revoke the final service-cessation notice or interim service-cessation notice; and
- in the case of an interim service-cessation notice - by written notice given to the Classification Board, determine that the Classification Board is not required to comply with clause 23 in relation to the classification of the content (subclause 58(1)).

It is assumed that where this occurs, the fees for the Board's work will be adjusted accordingly.

If a final service-cessation notice or interim service-cessation notice is revoked under subclause 58(1), the ACMA will be required to notify the live content service provider concerned to this effect (subclause 58(2)).

A live content service provider will be required to comply with an undertaking given to the ACMA by the provider and accepted by the ACMA under clause 58 (see subclause 60(3)). This requirement will be a designated provider rule (see subclause 60(4)). Contravention of designated provider rules is an offence (subclause 106(1)).

Clause 59 – Revocation of final service-cessation notices – reclassification of content

The ACMA will be required to revoke a final service-cessation notice if:

- content has been classified by the Classification Board under this Schedule (otherwise than because of subclause 24(1) or (2)); and
- a particular live content service provider is subject to a final service-cessation notice; and
- the final service-cessation notice was given because the content was prohibited content; and
- the Classification Board reclassifies the content; and
- as a result of the classification, the content ceases to be prohibited content (subclause 59(1)).

If a final service-cessation notice is revoked under clause 59(1), the ACMA will be required to give the live content service provider concerned a written notice stating that the final service-cessation notice has been revoked (subclause 59(2)).

Clause 60 – Compliance with rules relating to prohibited content etc.

A live content service provider will be required to comply with an interim service-cessation notice or final service-cessation notice that applies to the provider as soon as practicable, and in any event by 6pm on the next business day, after the notice was given to the provider (subclauses 60(1) and (2)).

A live content service provider will also be required to comply with an undertaking given to the ACMA by the provider and accepted by the ACMA under clause 57 or 58 (subclause 60(3)).

The rules set out in clause 60 are designated content/hosting provider rules (see clause 104). Accordingly, a live content service provider who contravenes any interim service-cessation notice, final service-cessation notice that applies to the provider, or any undertaking given to, and accepted by, the ACMA under clause 57 or 58 will be subject to an offence under clause 106 (subclause 60(4)).

Clause 61 – Identification of content

Clause 61 provides that content will be able to be identified in a notice under this Division by setting out the content, describing the content, or in any other way.

Division 5 – Action to be taken in relation to links services

Clause 62 – Action to be taken in relation to links services

If, in the course of an investigation under Division 2 of Part 3 of this Schedule, the ACMA is satisfied that end-users in Australia can access content using a link provided by a links service, and the content is prohibited content, and the links service has an Australian connection, the ACMA must, if the content does not consist of an eligible electronic publication and has been classified RC or X 18+ by the Classification Board, give the links service provider a written notice directing the links service provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content. Pursuant to subclause 62(6), a type A remedial situation exists in relation to particular content if the provider ceases to provide a link to the content using the link service concerned, or the content is not provided by a content service provided to the public (whether on payment of a fee or otherwise).

If the content does not consist of an eligible electronic publication and has been classified R 18+ or MA 15+ by the Classification Board, the ACMA must give the links service provider a written notice directing the links service provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the content. Pursuant to subclause 62(7), a type B remedial situation exists in relation to particular content if:

- the provider ceases to provide a link to the content using the link service concerned; or
- the content is not provided by a content service provided to the public (whether on payment of a fee or otherwise); or
- access to the content is subject to a restricted access system.

However, if the content does consist of an eligible electronic publication and the content has been classified RC, category 2 restricted or category 1 restricted by the Classification Board, the ACMA must give the links service provider a written notice directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content (subclause 62(1)).

The notices referred to above are called final link-deletion notices and are intended to have ongoing effect.

The ACMA's decision to give a links service provider a final link-deletion notice will be reviewable by the AAT on the application of the links service provider concerned (paragraph 113(5)(b) and subclause 113(6)).

Subclause 62(2) and (3) sets out the procedure that will apply if in the course of an investigation under Division 2 of Part 3 of this Schedule the ACMA is satisfied that end-users in Australia can access content using a link provided by a links service, the content is potential prohibited content and the links service has an Australian connection.

If the ACMA is satisfied that, if the content were to be classified by the Classification Board under this Schedule, there is a substantial likelihood that:

- if the content does not consist of an eligible electronic publication – the content would be classified RC or X 18+; or

- if the content consists of an eligible electronic publication – the content would be classified RC or category 2 restricted;

the ACMA must:

- give the relevant links service provider a written notice (known as an interim link-deletion notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content until the ACMA notifies the links service provider under subclause (4) of the Classification Board's classification of the content; and
- apply to the Classification Board under clause 22 for classification of the content (subclause 62(2)).

Similarly, if the content does not consist of an eligible electronic publication and the ACMA is satisfied that, if it were to be classified by the Classification Board under this Schedule, there is a substantial likelihood that the content would be classified R 18+ or MA 15+, the ACMA will be required to:

- give the relevant links service provider a written notice (known as an interim link-deletion notice) directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the content until the ACMA notifies the links service provider under subclause (4) of the Classification Board's classification of the content; and
- apply to the Classification Board under clause 22 for classification of the content (subclause 62(3)).

If the ACMA makes a decision under subclause (2) or (3) to apply to the Classification Board for classification of content, the ACMA must give the relevant links service provider a written notice setting out the decision (subclause 62(5)).

The ACMA's decision to give a links service provider an interim link-deletion notice will be reviewable by the AAT on the application of the provider concerned (paragraph 113(5)(a) and subclause 113(6)). Furthermore, a decision under subclause 62(2) or (3) to apply to the Classification Board for classification of content that can be accessed using a link provided by a links service is reviewable by the AAT on application of the links service provider concerned (paragraph 113(5)(d) and subclause 113(6)).

If, in response to an application made as required under by subclause (2) or (3), the ACMA is informed under paragraph 23(b) of the classification of the content, the ACMA must:

- give the relevant links service provider a written notice setting out the classification; and
- in a case where the content does not consist of an eligible electronic publication and the effect of the classification is that the content is prohibited content because it has been classified RC or X 18+ by the Classification Board – give the links service provider a written notice (known as a final link-deletion notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content;
- in a case where the content does not consist of an eligible electronic publication and the effect of the classification is that the content is prohibited content because it has been classified R 18+ or MA 15+ by the Classification Board – give the links service provider a written notice (known as a final link-deletion notice) directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the content; and
- in a case where the content does consist of an eligible electronic publication and the effect of the classification is that the content is prohibited content because it has been classified RC, category 2 restricted or category 1 restricted by the Classification Board – give the links service provider a written notice (known as a final link-deletion notice) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the content (subclause 62(4)).

The ACMA's decision to give a links service provider a final link-deletion notice will be reviewable by the AAT on the application of the provider concerned (paragraph 113(5)(b) and subclause 113(6)).

Clause 63 – Revocation of interim link-deletion notices – voluntary deletion of link

Clause 63 is intended to fast track the equivalent of a final link-deletion notice with the consent of an affected links service provider.

If:

- a particular links service provider is subject to an interim link-deletion notice relating to particular content; and
- before the Classification Board classifies the content, the provider ceases to provide a link to the content and gives the ACMA a written undertaking not to provide a link to the content;

the ACMA will be able to:

- accept the undertaking; and
- revoke the interim link-deletion notice; and
- by written notice given to the Classification Board, determine that the Classification Board is not required to comply with clause 23 in relation to the classification of the content (subclause 63(1)).

It is assumed that where this occurs, the fees for the Board's work will be adjusted accordingly.

If an interim link-deletion notice is revoked under clause 66, the ACMA will be required to notify the links service provider concerned to this effect (subclause 63(2)).

A links service provider will be required to comply with an undertaking given to the ACMA by the provider and accepted by the ACMA under clause 63 (see subclause 68(5)). This requirement will be a designated content/hosting provider rule (see subclause 68(6)). Contravention of designated content/hosting provider rules is an offence (subclause 106(1)).

Clause 64 – Revocation of final link-deletion notices – reclassification of content

The ACMA will be required to revoke a final link-deletion notice if:

- content has been classified by the Classification Board under this Schedule (otherwise than because of subclause 24(1) or (2)); and
- a particular links service provider is subject to a final link-deletion notice relating to the content;
- the Classification Board reclassifies the content; and
- as a result of the classification, the content ceases to be prohibited content (subclause 64(1)).

If a final link-deletion notice is revoked under clause 64(1), the ACMA will be required to give the links service provider concerned a written notice stating that the final link-deletion notice has been revoked (subclause 64(2)).

Clause 65 – Revocation of final link-deletion notices – reclassification of content that consists of a film or a computer game

The ACMA will be required to revoke a final link-deletion notice if:

- content consists of the entire unmodified contents of a film or a computer game (see clauses 2 and 16); and
- the Classification Board reclassifies the film or computer game under the Classification Act; and
- a particular links service provider is subject to a final link-deletion notice relating to the content; and
- as a result of the classification, the content ceases to be prohibited content (subclause 65(1)).

If a final link-deletion notice is revoked under clause 65(1), the ACMA will be required to give the links service provider a written notice to this effect (subclause 65(2)).

Clause 66 – Revocation of final link-deletion notices – reclassification of a corresponding print publication

Under clause 66, the ACMA must revoke a final link-deletion notice where:

- content consists of an eligible electronic publication; and
- the Classification Board reclassifies the corresponding print publication under the Classification Act; and
- a final link-deletion notice relating to the content is applicable to a particular links service provider; and
- as a result of the reclassification, the content ceases to be prohibited content.

In such circumstances, the ACMA is obliged under subclause 66(2) to give the relevant links service provider a written notice stating that the final link-deletion notice has been revoked.

For an explanation of the terms *eligible electronic publication* and *corresponding print publication*, see clause 11.

Clause 67 – Anti-avoidance – special take-down notices

As an anti-avoidance measure, clause 67 provides that if:

- a particular links service provider is subject to an interim or final link-deletion notice relating to particular content; and
- the ACMA is satisfied that the links service provider is providing, or is proposing to provide, content (the *similar content*) that is the same as, or substantially similar to, the content identified in the interim or final link-deletion notice; and
- the ACMA is satisfied that the similar content is prohibited content or potential prohibited content;

the ACMA will be able to give the links service provider - if the interim or final link-deletion notice was given under paragraph 62(1)(d), (1)(f), (2)(c), (4)(b) or (4)(d) of this Schedule – a written notice (a *special link-deletion notice*) directing the provider to take such steps as are necessary to ensure that a type A remedial situation exists in relation to the similar content at any time when the interim of final link-deletion notice is in force.

For the purposes of clause 67, a type A remedial situation exists in relation to the similar content at a particular time if the provider ceases to provide a link to the similar content, or the similar content is not provided by a content service provided to the public (whether on payment of a fee or otherwise) (subclause 67(2)).

In any other case, the ACMA will be able to give the links service provider a special link-deletion notice directing the provider to take such steps as are necessary to ensure that a type B remedial situation exists in relation to the similar content at any time when the interim link-deletion notice or final link-deletion notice is in force.

For the purposes of clause 67, a type B remedial situation exists in relation to content at a particular time if:

- the provider ceases to provide a link to the similar content using the links service concerned; or

- the similar content is not provided by a content service provided to the public (whether on payment of a fee or otherwise); or

- access to the similar content is subject to a restricted access system (subclause 67(3)).

ACMA's decision to give a links service provider a special link-deletion notice is reviewable by the AAT on application of the links service provider concerned (paragraph 113(5)(c) and subclause 113(6)).

Clause 68 – Compliance with rules relating to prohibited content etc.

A links service provider will be required to comply with any interim link-deletion notice, final link-deletion notice or special link-deletion notice that applies to the provider as soon as practicable, and in any event by 6pm on the next business day, after the notice was given to the provider (subclauses 68(1) to (3)).

It is a defence, in proceedings relating to a contravention of subclause (3), if the links provider proves that he/she did not know, and could not, with reasonable diligence, have ascertained, that the relevant content was prohibited content or potential prohibited content (subclause 68(4)). The relevant links service provider will bear the legal burden in establishing this defence.

A links service provider will also be required to comply with an undertaking given to the ACMA by the provider and accepted by the ACMA under clause 63 (subclause 68(5)).

The rules set out in clause 68 are designated content/hosting provider rules (see clause 104). Accordingly, a links service provider who contravenes any interim link-deletion notice, final link-deletion notice or special link-deletion notice that applies to the provider or any undertaking given to, and accepted by, the ACMA under clause 63 will be subject to an offence under clause 106 (subclause 68(6)).

Division 6 – Law enforcement agencies

Clause 69 – Referral of matters to law enforcement agencies

Clause 69 concerns circumstances in which, in the course of an investigation under Division 2 of this Schedule, the ACMA is satisfied that content is prohibited content or potential prohibited content, and the content is of a sufficiently serious nature to warrant

referral to a law enforcement agency. In such circumstances, the ACMA must notify the content to:

- a member of an Australian police force; or
- another person or body - if there is an arrangement between the ACMA and the chief (however described) of an Australian police force under which the ACMA is authorised to notify the content that other person or body (subclause 69(1)).

The manner in which content will be able to be notified to the police under paragraph 69(1)(c) will include, but will not be limited to, a manner ascertained in accordance with an arrangement (such as an MOU) between the ACMA and the chief (however described) of the police force concerned (subclause 69(2)).

If a member of the Australian Federal Police or of a State or Territory police force is notified of particular content under clause 69, that person may notify the content to a member of another law enforcement body in Australia or overseas (subclause 69(3)).

Clause 69 will not, by implication, limit the ACMA's power to refer other matters to a member of an Australian police force (subclause 69(4)).

Under subclause 69(5), the ACMA is not obliged to notify the particular content under subclause (1) if the ACMA has already notified the content under paragraph 40(1)(a) of Schedule 5 to the BSA.

Clause 70,- Deferral of action in order to avoid prejudicing a criminal investigation – hosting services
Clause 71 - Deferral of action in order to avoid prejudicing a criminal investigation – live content services
Clause 72 – Deferral of action in order to avoid prejudicing a criminal investigation – links services

In cases of extreme concern, for example paedophiles providing illegal material or exploitation of children through the use of online services, it is possible that a police investigation may be concurrent with a complaint to the ACMA about particular material. The public nature of the ACMA complaints and investigations process proposed in the Bill could prejudice a police investigation in these circumstances. As a safeguard, therefore, it is proposed to give the ACMA discretion to defer action where a member of the Federal, State or Territory police satisfies the ACMA than an investigation should be deferred for a specified period.

Part 4 – Industry codes and industry standards

Division 1 – Simplified outline

Clause 73 – Simplified outline

Clause 73 provides a simplified outline of this Part.

Division 2 – Interpretation

Clause 74 Industry Codes

Clause 74 provides that 'industry code' for the purposes of this Part means a code developed under this Part, whether or not in response to a request under this Part. Codes will be developed by bodies and associations that represent sections of the content services industry.

Clause 75 – Industry Standards

Clause 75 provides that for the purposes of this Part, an 'industry standard' is a standard determined under this Part.

Clause 76 – Content activity

Clause 76 defines a *content activity* for the purposes of Part 4. A content activity is an activity that consists of:

- providing a hosting service that has an Australian connection; or
- providing a live content service that has an Australian connection; or
- providing a links service that has an Australian connection; or
- providing a commercial content service that has an Australian connection.

These are the activities to which industry codes and industry standards under Part 4 may relate.

Clause 77 – Sections of the content industry

Clause 77 defines sections of the content industry for the purposes of Part 4. Each of the following groups is a section of the content industry:

- hosting service providers, where the relevant hosting services have an Australian connection;
- live content service providers, where the relevant live content services have an Australian connection;
- links service providers, where the relevant links services have an Australian connection;
- commercial content service providers, where the relevant commercial content services have an Australian connection.

Such sections of the content industry are used so that codes will be developed by, and applied to, relevant sections and requests for codes by the ACMA (clause 86) may be directed to representatives of relevant sections.

The definition of 'sections of the content industry' is important in ensuring that it is clear for compliance and enforcement purposes to whom a particular code or standard applies.

Clause 78 – Participants in a section of the content industry

Clause 78 provides that a participant is a person who is a member of a group that constitutes a section of the content industry under Part 4. This provision establishes a link between persons and industry sections and is important for compliance and enforcement purposes.

Clause 79 – Designated body

Clause 79 empowers the Minister, by written instrument, to declare that a specified body or association is the designated body for the purposes of Part 4. Such a declaration will have effect accordingly and will be a disallowable instrument.

Before registering an industry code, the ACMA will be required to be satisfied that any such designated body has been consulted about the development of the code (see paragraph 85(1)(g)). The ACMA will also be required to consult any such designated body before determining, varying or revoking an industry standard (see clause 100).

Division 3 – General principles relating to industry codes and industry standards

Clause 80 – Statement of regulatory policy

Clause 80 is a statement of the Parliament's regulatory policy, and provides important guidance for the ACMA in performing its functions under Part 4. It states that Parliament intends that bodies or associations that the ACMA is satisfied represent sections of the content industry, should develop one or more codes, referred to as industry codes that are to apply to participants in the representative sections of the industry.

Subclause 80(2) provides that it is Parliament's intention that the ACMA should make reasonable efforts to ensure that, for each section of the content industry, either an industry code is registered under Part 4 of this Schedule within 6 months after the commencement of this Schedule, or an industry standard is registered under Part 4 within 9 months after the commencement of this Schedule. The later date for possible determination of an ACMA standard is intended to reflect the co-regulatory intent of the Bill in which industry is given an opportunity to develop its own procedures before any regulatory intervention by the ACMA.

Clause 81 – Matters that must be dealt with by industry codes and industry standards – commercial content providers

Clause 81(1) provides that it is the intention of Parliament that for the commercial content service provider section of the content industry, there should be an industry code or an industry standard that deals with, or an industry code and an industry standard that together deal with the matters set out in that subclause.

Clause 82 – Examples of matters that may be dealt with by industry codes and industry standards

Clause 82 sets out examples of matters that may be dealt with by industry codes and industry standards. The applicability of a particular example set out in clause 82 will depend on which section of the content industry is involved.

These matters include procedures directed towards promoting awareness of the safety issues associated with commercial content services or live content services, and procedures to be followed in order to assist parents and responsible adults to supervise and control children's access to content provided by commercial content services or live content services.

Clause 83 – Escalation of Complaints

If an industry code or standard includes procedures to be followed to deal with complaints about those matters referred to in paragraph 82(3)(a) (i.e. where the complainant could have made a complaint about the same matter under subclauses 37(1), (2) or (3), or 38(1) or (2)), that code or standard must also deal with the referral of those complaints to ACMA in circumstances where the complainant is dissatisfied with the way in which the complaint was dealt with (see paragraph 82(3)(d)).

Clause 84 – Collection of personal information

Clause 84 applies where an industry code or standard deals with the making and retention of records of content provided by a content service, or recordings of live content provided by a live content service. A provision of a code or standard may not authorise the collection of personal information, within the meaning of the *Privacy Act 1988*, about an end-user of a content service.

Division 4 – Industry codes

Clause 85 – Registration of industry codes

Clause 85 will enable a body or association representing a particular section of the content industry to submit to the ACMA for registration a draft industry code that applies to participants in the relevant section of the industry, and deals with one or more matters relating to the content activities of those participants.

Subclause 85(1) requires the ACMA to register an industry code if the ACMA is satisfied that:

- the code provides appropriate community safeguards and deals with other matters in an appropriate manner, depending on the nature of the matters (paragraph 85(1)(d));

- the body or association has published a draft of the code, invited members of the public to make submissions within a specified period (not less than 30 days) and considered any submissions (paragraph 85(1)(e));

- the body or association published a draft of the code and invited participants in that section of the industry to make submissions about the draft within a specified period (not less than 30 days), and gave consideration to their submissions (paragraph 85(1)(f); and

- any designated body (see clause 79) has been consulted about the development of the code.

The ACMA must register the code by including it in the Register of industry codes kept under clause 101 (subclause 85(2)).

Subclause 85(4) provides that when a new code is registered under Part 4 and it is expressed to replace another industry code, the other code ceases to be registered. A decision to refuse to register a code is subject to AAT review on the application of the body or association that developed the code (see subclause 113(7) and (8)).

Clause 86 – ACMA may request codes

Clause 86 performs the function of being a formal trigger for the development of an industry code. The failure to develop the code which has been requested provides a ground for the ACMA to develop an industry standard (clause 91). That provision has the effect of preventing the ACMA developing an industry standard before the industry has an opportunity to develop a code.

Subclause 86(1) provides that if the ACMA is satisfied that a body or association represents a particular section of the content industry, it may request in writing that the body or association develop a code that would apply to participants in that section of the industry and deals with one or more specified matters relating to the content activities of those participants.

The ACMA must specify a period of at least 120 days for a code to be developed and a copy be given to it (subclause 86(2)).

The ACMA will not be permitted to make a request under clause 86 unless it is satisfied that the development of the code is necessary or convenient to provide appropriate community safeguards or otherwise deal with the performance or conduct of

participants in that section of the industry, and it is unlikely that an industry code would be developed within a reasonable period without such a request (subclause 86(3)).

The ACMA will be able to vary the request by extending the period (subclause 86(4)). This will not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* which provides that where an Act confers a power to make an instrument, the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to revoke or vary any such instrument (subclause 86(5)).

The ACMA's notice under subclause 86(1) may specify indicative targets for achieving progress in developing the code (subclause 86(6)). A failure to meet such a target would provide grounds for ACMA to make an industry standard (subparagraph 91(1)(b)(ii)).

Clause 87 - Publication of notice where no body or association represents a section of the content industry

Clause 87 provides that, if the ACMA is satisfied that there is no body or association in existence that represents a particular section of the content industry, it may publish a notice on the ACMA's Internet site to the effect that if such a body were to come into existence, the ACMA would be likely to request it to develop a code under clause 86(1) about the matters in the notice. The notice must set a period of at least 60 days for the section to establish a representative body.

If no such body or association is formed within the period set out in the notice, this would be a consideration in whether an industry standard would be made under clause 92. Again, the provision has the effect of preventing the ACMA developing an industry standard before industry has an opportunity to develop a code.

Clause 88 – Replacement of industry codes

Clause 88 provides that changes to industry codes are to be achieved by replacement of the code instead of varying the code. However, when the changes are of a minor nature, the requirements for consultation with participants in the section and the public in paragraphs 85(1)(e) and (f) of this Schedule will not apply to the registration process. This will limit consultation to when matters of substance arise and facilitate the making of minor changes to registered codes.

Clause 89 – Compliance with industry codes

Clause 89 provides that a participant in a particular section of the content industry must comply with any ACMA direction to comply with an industry code registered under Part 4 that applies to them.

This requirement is a designated content/hosting service provider rule (see clauses 104 to 110). Contravention of designated content/hosting service provider rules is an

offence and a continuing offence (subclauses 106(1) and (2)) and entails liability to civil penalties (clause 107).

The ACMA's decision to give, vary or refuse to revoke a direction to a designated content/hosting service provider will be reviewable by the AAT on the application of the provider concerned (subclause 113(9)).

Clause 90 – Formal warnings – breach of industry codes

Clause 90 provides that, if a person who is a participant in a particular section of the content industry contravenes an industry code, the ACMA may issue a formal warning. It is intended to enable the ACMA to formally indicate its concerns about a contravention of a code to a person.

Division 5 – Industry standards

Clause 91 – ACMA may determine an industry standard if a request for an industry code is not complied with

Clause 91 will enable the ACMA to make a standard where it has requested industry to develop a code and it has failed to do so or to have made satisfactory progress. The provision works in tandem with clause 86. It prevents the ACMA from making a standard before an industry section has had an appropriate opportunity to develop a code.

Clause 91(1) provides that clause 91 applies where the ACMA makes a request under clause 86(1) for a code to be developed, and this request has not been complied with; indicative targets have not been met; or a code has been developed that the ACMA subsequently refused to register, and if the ACMA is satisfied that it is necessary or convenient for the ACMA to determine a standard in order to provide appropriate community safeguards or otherwise regulate adequately participants in that section of the industry in relation to the matter or matters that the requested code was intended to deal with.

Subclause 91(2) provides that, where the conditions in subclause (1) apply, the ACMA may by legislative instrument determine a standard that applies to that section of the industry. A standard under this subclause is to be known as an *industry standard.*

Subclause 91(3) requires the ACMA to consult the body or association to which it made the request before determining an industry standard.

Subclause 91(4) empowers the Minister to give the ACMA a written direction as to the exercise of its powers under clause 91.

Clause 92 – ACMA may determine industry standard where no industry body or association formed

Clause 92 will enable the ACMA to make a standard where no industry representative body has been established. The provision works in conjunction with clause 87. It prevents the ACMA from making a standard before an industry section has had an appropriate opportunity to develop a code.

If the ACMA is satisfied that participants in a particular section of the content industry are not represented by a body or association, has published a notice under subclause 87(1) and no such body or association comes into existence within the period in the notice, then the ACMA may determine an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise regulate adequately the participants of that section of the content industry.

Subclause 92(2) provides that such a standard is made by legislative instrument. This means that it will be notified on the Federal Register of Legislative Instruments, tabled in the Parliament and will be subject to Parliamentary disallowance.

Subclause 92(3) empowers the Minister to give the ACMA a written direction as to the exercise of its powers under clause 92.

Clause 93 – ACMA may determine industry standards – total failure of industry codes

Clause 93 enables the ACMA to make a standard where a code has totally failed.

If the ACMA is satisfied that an industry code is totally deficient; a written notice has been given to the developer of a code to address these deficiencies within a period of at least 30 days; and after that period the ACMA is satisfied that it is necessary or convenient to determine a standard, the ACMA may determine an industry standard.

This clause only applies to codes registered for at least 180 days to ensure that the implementation of a code has had adequate time before its success is judged and is intended to reinforce the preference for successful industry self-regulation.

If the ACMA is satisfied that a body or association represents that section of the industry, subclause 93(4) requires the ACMA to consult with the body or association before determining an industry standard. The industry code ceases to be registered on the day the industry standard comes into force (subclause 93(5)).

Subclause 93(3) requires the standard to be made by legislative instrument. This means that its making will be notified in the Federal Register of Legislative Instruments, tabled in the Parliament and will be subject to Parliamentary disallowance.

An industry code is totally deficient if, and only if, it is not operating to provide appropriate community safeguards or not otherwise operating to regulate adequately the relevant industry section (subclause 93(6)).

Subclause 93(7) empowers the Minister to give the ACMA a written direction as to the exercise of its powers under clause 93.

Clause 94 - ACMA may determine industry standards – partial failure of industry codes

Clause 94 enables the ACMA to make a standard where a code has partially failed. It is intended to provide flexibility in the scheme dealing with industry codes and industry standards. It is anticipated that the ACMA would make use of this provision only as a last resort.

If the ACMA is satisfied that an industry code is partially but not totally deficient; a written notice has been given to the developer of a code to address these deficiencies within a period of at least 30 days; and after that period the ACMA is satisfied that it is necessary or convenient to determine a standard, the ACMA may determine an industry standard. This clause only applies to codes registered for at least 180 days to ensure that the implementation of a code has had adequate time before its success is judged and is intended to reinforce the preference for successful industry self-regulation.

If the ACMA is satisfied that a body or association represents that industry section, subclause 94(4) requires the ACMA to consult with the body or association before determining an industry standard. The deficient matters in the industry code cease to have effect on the day the industry standard comes into force. This does not, however, affect the continuing registration of the remainder of the code or any pre-existing investigation, proceeding or remedy in respect of a contravention of the code or of an ACMA direction to comply with the code (subclause 94(5)).

Subclause 94(3) requires that such a standard is made by a legislative instrument. This means that its making will be notified in the Federal Register of Legislative Instruments, tabled in the Parliament and will be subject to Parliamentary disallowance.

An industry code is deficient if, and only if, it is not operating to provide appropriate community safeguards in relation to a matter or not otherwise operating to regulate adequately the relevant industry section in relation to that matter (subclause 94(6)).

Subclause 94(7) empowers the Minister to give the ACMA a written direction as to the exercise of its powers under clause 94.

Clause 95 - Compliance with industry standards

Clause 95 provides that participants in a particular section of the content industry must comply with any industry standard registered under Part 4 that applies to them.

This requirement is a designated content/hosting service provider rule (see clauses 104 to 110). Contravention of designated content/hosting service provider rules will be an offence (clause 106) and will entail liability to civil penalties (clause 107).

Clause 96 - Formal warnings – breach of industry standards

Clause 96 provides that if a person, who is a participant in a particular section of the content industry, contravenes an industry standard, the ACMA may issue a formal warning to the provider. It is intended to enable the ACMA to formally indicate its concerns about a contravention of a standard to a person. Such a warning may be a precursor to the taking of enforcement action, for example under clauses 106 and 107. However, in the case of a serious, flagrant or recurring breach, the ACMA may decide to institute enforcement action without giving a prior formal warning.

Clause 97 - Variation of industry standards

Clause 97 provides that the ACMA will be able to vary an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise adequately regulate participants.

A variation will be a legislative instrument, and accordingly must be notified in the Federal Register of Legislative Instruments, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 98 - Revocation of industry standards

Clause 98 provides that the ACMA will be able to revoke an industry standard by legislative instrument, which will accordingly be notified in the Federal Register of Legislative Instruments, tabled in the Parliament and will be subject to Parliamentary disallowance.

If an industry code is developed by a section of the industry to replace an industry standard, the industry standard is revoked when the new code is registered (subclause 98(2)). The process by which the code will be registered will ensure the code provides appropriate community safeguards or otherwise deals with its subject matter in an appropriate manner.

Clause 99 - Public consultation on industry standards

Clause 99 provides that, before the ACMA determines or varies a standard, it must make a copy of the draft available on its Internet site; and publish a notice on its Internet site stating that it has prepared a draft of the industry standard or variation, and inviting interested persons to give written comments on the draft industry standard within the period specified in the notice. Minor variations are exempted from this requirement (subclause 99(3)).

The ACMA must have due regard to any comments made (subclause 99(4)).

Clause 100 – Consultation with designated body

Clause 100 provides that before determining, varying or revoking an industry standard, the ACMA must consult any designated body (see clause 79).

Division 6 – Register of industry codes and industry standards

Clause 101 - ACMA to maintain Register of industry codes and industry standards

Clause 101 provides for the establishment and maintenance by the ACMA of a Register of industry codes and standards, requests under clause 86, notices under clause 87 and ACMA directions under clause 89. The Register may be maintained in electronic form and is to be made available for inspection on the Internet.

The maintenance of the Register is intended to provide industry and the public with ready information about the codes and standards that are in force.

Division 7 – Miscellaneous

Clause 102 - Industry codes may provide for matters by reference to other instruments
Clause 103 - Industry standards may provide for matters by reference to other instruments

These clauses provide that section 589 of the *Telecommunications Act 1997* applies to an industry code or industry standard in the same way as it applies to an instrument under that Act. Section 589 of the Telecommunications Act permits instruments made under that Act to adopt, apply or incorporate provisions of any Act, instrument or writing in force from time to time, such as legislative instruments and other official or non-official documents such as technical standards or various kinds of industry codes of practice.

Part 5 – Designated /hosting provider rules

Clause 104 - Designated content/hosting service provider determinations

Clause 104 enables the making of designated content/hosting service provider determinations by the ACMA. These determinations are to be made by legislative instrument, and so are notified and accessible through the Federal Register of Legislative Instruments, are tabled in Parliament, and are disallowable by motion of either house.

Subsection 33(3) of the *Acts Interpretation Act 1901* will allow content/hosting provider determinations to be varied or revoked by written determination.

Subclause 104(3) sets out additional constraints on the scope of designated content/service provider determinations. Determinations will have effect only to the extent that they are authorised:

- by paragraph 51(v) (either alone or when read together with paragraph 51(xxxix)) of the Constitution; or

- by section 122 of the Constitution if it would have been authorised by paragraph 51(v) (either alone or when read together with paragraph 51(xxxix)) if section 51 extended to the Territories.

Paragraph 51(v) of the Constitution gives the Parliament the power to make laws with respect to postal, telegraphic, telephonic and other like services. Paragraph 51(xxxix) of the Constitution gives the Parliament the power to make laws with respect to matters incidental to the execution of any power vested in the Constitution. Section 122 of the Constitution gives the Parliament the power to make laws in relation to the Territories. Subclause 104(4) is along the lines of subsection 99(3) of the *Telecommunications Act 1997*. This provision will ensure that the ACMA cannot make a designated content/hosting service provider determination unless the determination relates to a matter specified in regulations made under the BSA.

A designated content/hosting service provider determination will be able to empower the ACMA to make decisions of an administrative character (subclause 104(5)).

Clause 105 - Exemptions from designated content/hosting service provider determinations

The Minister will be empowered to determine that a specified designated content/hosting service provider is exempt from all (subclause 105(1)) or specified (subclause 105(2)) designated content/hosting service provider determinations.

Designated content/hosting service providers and designated content/hosting service provider determinations may be specified individually, in a class, or in any other way (see subsection 46(2) of the *Acts Interpretation Act 1901*).

A determination made under clause 105 will be able to be unconditional or conditiona l(subclause 105(3)). As a legislative instrument it will be required to be notified in the Federal Register of Legislative Instruments, tabled in the Parliament and will be subject to Parliamentary disallowance.

Part 6 - Enforcement

Clause 106 - Compliance with designated content/hosting service provider rules – offence

Clause 106 creates an offence regarding contravention of an applicable designated content/hosting service provider rule by a designated content/hosting service provider. Pursuant to the definition in clause 2 of this Schedule, a designated content/hosting service provider is a person who provides a designated content/hosting service (ie a hosting service, live content service, links service or commercial content service). A designated content/hosting service provider rule is any provision declared by Schedule 7 to be a designated provider rule, as well as any rule set out in a designated provider determination in force under clause 104.

The penalty for contravention of the offence created by subclause 106(1) is 100 penalty units; a penalty unit equals $110 (see section 4AA of the *Crimes Act 1914*).

Subclause 106(2) provides that the offence created by subclause (1) is a continuing offence, in that a separate offence is committed in respect of each day during which the contravention continues.

Clause 107 - Compliance with designated content/hosting service provider rules – civil penalty provision

Clause 107 creates liability to civil penalties in relation to the contravention of an applicable designated content/hosting service provider rule by a designated content/hosting service provider.

This requirement is a civil penalty provision, and a separate contravention is committed in respect of each day during which the contravention continues (subclauses 107(2) and (3)).

Clause 108 - Remedial directions – breach of designated content/hosting service provider rules

Clause 108 will apply if the ACMA is satisfied that a designated content/hosting service provider has contravened, or is contravening, an applicable designated content/hosting service provider rule. The clause provides for the ACMA to issue a written direction. It also creates an offence and sets out a civil penalty provision for contravention of such a direction.

Subclause 108(2) provides for the ACMA to give the designated provider a written direction requiring the provider to take specified action directed towards ensuring that the provider does not contravene the rule, or is unlikely to contravene the rule, in the future.

Subclause 108(3) gives two examples of the kinds of directions which the ACMA may give under subclause 108(2):

- a direction that the provider implement effective administrative systems for monitoring compliance with a designated content/hosting service provider rule; and

- a direction that the provider implement a system designed to inform its employees, agents and contractors of the requirements of a designated content/hosting service provider rule, insofar as those requirements affect them.

Subclause 108(4) provides that a person subject to a remedial direction who contravenes the direction will be guilty of an offence subject to a maximum penalty of 100 penalty units. A penalty unit equals $110 (see section 4AA of the *Crimes Act 1914*).

A contravention of a remedial direction will also be a separate offence in respect of each day during which the contravention continues (see subclause 108(5)).

Civil penalties also apply for persons contravening a direction under subclause (2) which applies to them: subclauses 108(6) and (7). The person commits a separate contravention for each day during which the contravention continues under subclause 108(8).

The ACMA's decision to give, vary or refuse to revoke a direction that is applicable to a designated content service provider will be reviewable by the AAT on the application of the designated content service provider concerned (paragraph 113(11)(b)).

Clause 109- Formal warnings – breach of designated content/hosting service provider rules

Clause 109 will allow the ACMA to issue a formal warning if the ACMA is satisfied that the person has contravened, or is contravening, an applicable designated content/hosting service provider rule.

Clause 110 – Federal Court may order a person to cease providing designated content/hosting services

If the ACMA is satisfied that a person is supplying a designated content/hosting service otherwise than in accordance with an applicable designated content/hosting service provider rule, the ACMA will be able to apply to the Federal Court for an order that the provider cease supplying that service (subclause 110(1)).

If the Federal Court is satisfied, on such an application, that the person is indeed supplying the service otherwise than in accordance with the applicable rule, the Court will be able to order the provider to cease supplying that service (subclause 110(2)).

Part 7 – Protection from civil and criminal proceedings

Clause 111 – Protection from civil proceedings – service providers

Clause 111 provides hosting service providers, live content service providers and links service providers with protection from civil proceedings in certain circumstances where the parties are required to do things in order to comply with designated content/hosting service provider rules relating to prohibited content.

Subclause 111(1) provides that civil proceedings do not lie against a hosting service provider in respect of anything done by the provider in compliance with clause 53. Clause 53 sets out a number of designated content/hosting service provider rules dealing with compliance with rules relating to prohibited content. Clause 53 requires hosting service providers to comply with interim, final and special take-down notices, as well as with undertakings given by the provider and accepted by ACMA under clause 48.

Subclause 111(2) provides that civil proceedings do not lie against a live content service provider in respect of anything done by the provider in compliance with clause 60. Clause 60 sets out a number of designated content/hosting service provider rules relating to compliance by live content service providers with prohibited content rules. Clause 60 requires live content service providers to comply with interim service-cessation notices, final service-cessation notices and undertakings given and accepted by ACMA under clause 57 or 58.

Subclause 111(3) provides that civil proceedings do not lie against a links service provider in respect of anything done by the provider in compliance with clause 68. Clause 68 sets out a number of designated content/hosting service provider rules relating to compliance by links service providers with prohibited content rules (including requirements that links service providers comply with interim, final and special link-deletion notices, and with undertakings accepted by ACMA under clause 63).

Clause 112 – Protection from criminal proceedings – ACMA, Classification Board and Classification Review Board

The purpose of clause 112 is to protect from criminal proceedings persons whose powers and functions require them to do things in relation to content or material which would otherwise be prohibited.

The persons protected are set out in subclause (1), and include the ACMA members, staff and consultants to the ACMA, members and staff of the Classification Board, consultants to the Classification Board, staff under the *Public Service Act 1999* who are transferred to the ACMA and the Classification Board, and members of the Classification Review Board.

Subclause (2) provides immunity from criminal proceedings against those persons, for acts done in relation to content or material, when the acts are done in connection with the exercise of a power or the performance of a function conferred on the ACMA, the Classification Board or the Classification Review Board by Schedule 5 or 7 to the BSA.

In effect, immunity will be granted with respect to a prosecution that may otherwise arise in relation to the collection, possession, distribution, delivery, copying, etc of offensive content or material (ie, material that has been classified RC or X 18+). This amendment is necessary to enable the various regulators to effectively perform their statutory functions under this Schedule.

Part 8—Review of decisions

Clause 113 – Review by the Administrative Appeals Tribunal

Clause 113 of this Schedule provides for the review by the AAT of certain decisions made by the ACMA.

Subclause 113(1) provides for AAT review of a decision by the ACMA to give a hosting service provider an interim take-down notice, final take-down notice or special take-down notice. It also provides for AAT review of a decision by the ACMA under subclause 47(2) or 47(3) to apply to the Classification Board for classification of content hosted by a hosting service provider.

Subclause 113(3) provides for AAT review of a decision by the ACMA to give a live content service provider an interim service-cessation notice or a final service cessation notice. It also provides for AAT review of a decision to apply under subclause 56(2) or 56(3) to the Classification Board for classification of content provided by a live content service.

Subclause 113(5) provides for AAT review of a decision by the ACMA to give a links service provider an interim link-deletion notice, final link-deletion notice or special link-deletion notice. It also provides for AAT review of a decision under subclause 62(2) or 62(3) to apply to the Classification Board for classification of content that can be accessed using a link provided by a links service.

An application for AAT review of a decision of a kind referred to above may only be made by the hosting service provider, live content service or links service provider concerned (see subclauses 113(2), (4) and (6), respectively).

An ACMA decision under clause 85 to refuse to register an industry code is also subject to AAT review on the application of the body or association that developed the code (subclauses 113(7) and (8)).

An ACMA decision to give, vary or refuse to revoke a direction under clause 89 (ie a direction to comply with an industry code) applicable to a designated content/hosting service provider will be reviewable by the AAT on the application of the designated content/hosting service provider concerned (subclause 113(9) and (10)).

If the ACMA makes a decision of an administrative character under a designated content/hosting service provider determination that relates to a designated content service provider (see subclause 104(5)), the AAT will be able to review the decision on the application of the designated content service provider concerned (see paragraph 113(11)(a)).

The ACMA decision to give, vary or refuse to revoke a remedial direction given under clause 108 that is applicable to a designated content/hosting service provider will be subject to review by the AAT on the application of the designated content/hosting service provider concerned (paragraph 113(11)(b)).

Part 9—Miscellaneous

Clause 114 – Additional ACMA functions

Clause 114 sets out the ACMA's functions for the purposes of this Schedule. These functions are additional functions of the ACMA for the purposes of subparagraph 11 (1)(d)(ii) of the ACMA Act.

The ACMA's additional functions under clause 114 are:

- to monitor compliance with industry codes and standards registered under Part 4 of this Schedule;
- to advise and assist parents and responsible adults in relation to the supervision and control of children's access to content services;
- to conduct and/or co-ordinate community education programs about content services, in consultation with relevant industry and consumer groups and government agencies;
- to conduct and/or commission research into issues relating to content services;
- to liaise with regulatory and other relevant bodies overseas about co-operative arrangements for the regulation of the commercial content services industry, including (but not limited to) collaborative arrangements to develop multilateral codes of practice and content labeling technologies;
- to inform itself and advise the Minister on technological developments and service trends in the commercial content services industry.

Clause 115 – Recordings of content etc

Clause 115 provides for the ACMA to make recordings of live content (or segments of live content) and to make copies of such recordings, for certain purposes. The clause also provides for the ACMA to make copies of stored content. The term 'stored content' is defined in clause 2 of this Schedule to mean content stored on a data storage device, except content stored on a highly transitory basis as an integral function of the technology used in its transmission (for example momentary buffeting).

Clause 115 only empowers the ACMA to make such recordings and copies for two specified purposes: for the purpose of an ACMA investigation of prohibited or potential prohibited content under Division 2 of Part 3, or for the purpose of an application to the Classification Board for the classification of content under clause 22.

Subclause 115(3) provides ACMA with protection against potential liability for copyright infringement that might otherwise arise from ACMA's recording or copying of content.

Clause 116 – Samples of content to be submitted for classification

Clause 116 requires the ACMA, from time to time, to select samples of content that have been the subject of complaints under clause 37 (about prohibited content or potential prohibited content) to apply to the Classification Board under clause 22 for classification of that content.

Clause 117 – Service of summons, process or notice on corporations incorporated outside Australia

Clause 117 is a deeming provision setting out the circumstances in which certain summons, processes or notices under or connected with Schedule 7 will be taken to have been served on, or given to, an overseas body corporate. Clause 117 provides that where the body corporate does not have a registered or principal office in Australia then a summons, process or notice will be deemed to have been served or given where it is served on or given to the body corporate's agent in Australia.

Clause 117 provides more scope for the ACMA to take action in relation to the provision of prohibited content, or potential prohibited content, where the responsible body corporate is incorporated outside of Australia.

Clause 118 – Review

The Minister will be required, within 3 years after the commencement of Schedule 7, to arrange for a review of the operation of Schedule 7 and whether the Schedule should be amended or repealed (subclause 118(1)).

The Minister will also be required to arrange for a report of the review to be prepared (subclause 118(2)) and for the report to be tabled in each House of Parliament within 15 sitting days after the completion of the report (subclause 118(3)).

Clause 119 – This Schedule does not limit Schedule 5

Clause 119 provides that this Schedule does not limit the operation of Schedule 5 to the BSA, which deals with the regulation of Internet service providers.

Clause 120 – This Schedule does not limit the *Telecommunications Act 1997*

Clause 120 provides that this Schedule does not limit the operation of the *Telecommunications Act 1997*.

Clause 121 Implied freedom of political communication

Clause 121 is a constitutional safeguard. It provides that this Schedule does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication (subclause 121(1)).

Subclause 121(1) does not, however, limit the application of section 15A of the *Acts Interpretation Act 1901* to the BSA. Section 15A provides that every Act shall be read and construed subject to the Constitution (subclause 121(2)).

Clause 122 – Concurrent operation of State and Territory laws

In accordance with clause 122, it is the intention of Parliament that this Schedule does not apply to the exclusion of a law of a State or Territory to the extent to which that law is capable of operating concurrently with this Schedule.

Clause 123 – Schedule not to affect performance of State or Territory functions

Clause 123 is also a constitutional safeguard. It provides that a power conferred by this Schedule must not be exercised in such a way as to prevent the exercise of the powers, or the performance of the functions, of government of a State, the Northern Territory, the Australian Capital Territory or Norfolk Island.

Criminal Code Act 1995

Items 78, 79, 80 and 81 - Amendment of subsections 474.21(4) and 474.24(4) of the *Criminal Code*

Items 78, 79, 80 and 81 of the Bill would amend Division 474 of the *Criminal Code Act 1995* which provides for telecommunications offences.

Subsection 474.21(4) of the *Criminal Code* provides that a person is not criminally responsible for an offence against section 474.19 (using a carriage service for child pornography material) or 474.20 (possessing etc. child pornography material for use through a carriage service) if the person engages in the conduct in good faith for the sole purpose of, inter alia, assisting the ACMA to detect prohibited content (within the meaning of Schedule 5 to the BSA) or potential prohibited content (within the meaning of that Schedule).

Subsection 474.24(4) is a similar provision that provides that a person is not criminally responsible for an offence against section 474.22 (using a carriage service for child abuse material) or 474.23 (possessing etc. child abuse material for use through a carriage service) if the person engages in the conduct in good faith for the sole purpose of, inter alia, assisting the ACMA to detect prohibited content (within the meaning of Schedule 5 to the *Broadcasting Services Act 1992*) or potential prohibited content (within the meaning of that Schedule).

The proposed amendments to the Division 474 of the *Criminal Code* are of a minor consequential nature. They will amend the *Criminal Code* to take account of the introduction of new Schedule 7 to the BSA.

Export Market Development Grants Act 1997

Item 82 – Amendment to section 40 of the *Export Market Development Grants Act 1997*

Section 40 of the *Export Market Development Grants Act 1997* lists the type of excluded expenses that are not claimable expenses in respect of eligible promotional activities for the purposes of that Act.

Item 82 will amend the list of excluded expenses in section 40, to replace expenses associated with prohibited or potential prohibited Internet content with expenses associated with commercial content services that specialise in prohibited content.

Items 83 and 84– Amendment to section 57A of the *Export Market Development Grants Act 1997*

Item 83 will amend section 57A of the *Export Market Development Grants Act 1997* to replace the phrase "Internet content that is" with "a commercial content service that specialises in" and to amend the section heading accordingly. Item 84 makes a corresponding amendment to the note to section 57A.

Item 85, 86, 87 and 88 – Amendments to section 107 of the *Export Market Development Grants Act 1997*

Item 85 will insert the term *commercial content service* into the definitions listed in section 107. This term will have the same meaning under the *Export Market Development Grants Act 1997* as it does under this Schedule.

Item 86 will repeal the definition of *internet content* in section 107. Items 87 and 88 will make minor consequential amendments to the definitions of *potential prohibited content* and *prohibited content*, respectively, so that they refer to Schedule 7 rather than Schedule 5 to the BSA.

Freedom of Information Act 1982

Items 89, 90 and 91 – Amendments to subsection 4(1) of the *Freedom of Information Act 1982*

Items 89 and 90 insert the terms *exempt content-service document* and *offensive content-service content* into the definitions listed in subsection 4(1) of the *Freedom of Information Act 1982*.

Exempt content-service document means a document containing content, or a record of content (within the meaning of this Schedule) that has been delivered by, or accessed using, a content service and was offensive content-service content when it was delivered by, or accessed using, that content service. The term also refers to a document that sets out how to access, or that is likely to facilitate access to, offensive

content-service content. This may include, for example, a document that sets out the name of an Internet site, an IP address, a URL or a password which would allow a person to access offensive content-service content.

Offensive content-service content means content (within the meaning of this Schedule) that is delivered by, or accessed using, a content service and is either prohibited content or potential prohibited content for the purposes of this Schedule.

Item 91 amends the definition of *offensive internet content* to substitute a reference to "that Schedule" with a reference to "Schedule 5 to that Act as in force before the commencement of Schedule 7 to that Act".

Items 92, 93 and 94 – Amendments to Division 1 of Part II of Schedule 2 to the *Freedom of Information Act 1982*

Division 1 of Part II of Schedule 2 to the *Freedom of Information Act 1982* sets out the agencies that are exempt from the application of the Act in respect of particular documents.

Item 92 repeals the reference to the Attorney-General's Department under Division 1 of Part II of Schedule 2 and substitutes a new reference. The new reference will add two classes of documents to those already listed, in respect of which the Attorney-General's Department will be exempt from the application of the Act. The additional classes of documents are:

- exempt Internet-content documents concerning the performance of a function, or the exercise of a power, under Schedule 5 to the BSA; and

- exempt content-service documents concerning the performance of a function, or the exercise of a power, under Schedule 7 to the BSA.

Similarly, Item 93 repeals the reference to the ACMA and substitutes a new reference. The new reference adds another class of document in respect of which the ACMA will be exempt from the application of the Act. The new class of document is exempt content-service documents concerning the performance of a function, or the exercise of a power, under this Schedule.

Item 94 will repeal the references to the Classification Board and Classification Review Board in Division 1 of Part II of Schedule 2 to the *Freedom of Information Act 1982* and substitute a new reference. The new reference will include an additional class of document, being exempt content-service documents concerning the performance of a function, or the exercise of a power, under Schedule 7 to the BSA.

The effect of these provisions is that the exceptions to FOI access that apply in relation to certain information about prohibited or potential prohibited Internet content under Schedule 5 to the BSA are extended to corresponding information about prohibited or potential prohibited content under Schedule 7.

Interactive Gambling Act 2001

Item 95 – Amendment to subsections 36(2) and (3) of the *Interactive Gambling Act 2001*

Section 36 of the *Interactive Gambling Act 2001* is a statement of regulatory policy which provides for the development of a single industry code that applies to Internet service providers and deals exclusively with the designated Internet gambling matters by a body or association that the ACMA is satisfied represents Internet service providers.

Item 95 will insert references to this Schedule into subsections 36(2) and (3) of the *Interactive Gambling Act 2001* (so that that Act refers to both Schedule 5 and Schedule 7). The effect of this insertion will be that:

- an industry code, or industry standard developed under section 36 is to be in addition to any industry codes, or standards determined, under Schedule 5 and this Schedule (subsection 36(2)); and
- Part 4 of the Act, does not by implication limit the matters that may be dealt with by any industry codes developed, or standards determined, under Schedule 5 and this Schedule (subsection 36(3)).

Telecommunications Act 1997

Item 96 – Amendment to Division 1 of Part 13 of the *Telecommunications Act 1997*

Part 13 of the *Telecommunications Act 1997* obliges carriers, carriage service providers, number-database operators, emergency call persons and their respective associates to protect the confidentiality of certain information.

Item 96 adds new section 275A to Division 1 of Part 13 as an avoidance of doubt provision (subsection 275A(3)).

New clause 275A(1) provides that, for the purposes of Part 13, information about the location of a mobile telephone handset or any other mobile communications device is taken to be information that relates to the affairs of the customer responsible for the handset or device.

A mobile communications device may, for example, include a Blackberry, laptop or any other mobile communications device.

New clause 275A(2) also provides that, for the purposes of Part 13, a document about the location of a mobile telephone handset or any other mobile communications device is taken to be a document that relates to the affairs of the customer responsible for the handset or device.

Items 97, 98 and 99– Amendment to subsection 291 of the *Telecommunications Act 1997*

Subsection 291 of the *Telecommunications Act 1997* provides certain 'business needs' exceptions to the section 276 prohibition against the use and/or disclosure of any information or document relating to certain prescribed subject matter.

Items 97, 98 and 99 add new paragraph (e) to subsections 291(1), (2) and (3) to include an additional requirement to these exceptions in relation to the location of a mobile telephone handset or any other mobile communications device. The additional requirement is that the customer has consented to the disclosure, or use, in the circumstances concerned.

Part 2 – General application and transitional provisions

Item 100 - Transitional—content provisions of Schedule 5 to the *Broadcasting Services Act 1992*

Item 100 lists a number of provisions and definitions in Schedule 5 to the BSA that are to be repealed or amended by Schedule 1 to the Bill. It provides that, despite such repeals and amendments, the provisions listed (and definitions listed to the extent to which they relate to listed provisions) continue to apply after the commencement of item 100 as if the repeals had not been effected and the amendments had not been made. However, such continued application is subject to the modifications set out in subitem 100(2), being that the ACMA must not take any action under clause 30 or 36 of Schedule 5 to the BSA.

Clause 30 of Schedule 5 to the BSA currently deals with action to be taken by the ACMA in relation to complaints about prohibited content hosted in Australia. Clause 36 of Schedule 5 is an anti-avoidance measure which provides for the ACMA to issue internet content hosts with special take-down notices in certain circumstances.

Item 101 - Industry codes and standards under Part 5 of Schedule 5 to the *Broadcasting Services Act 1992*—Internet service providers

Item 101 applies to an industry standard under Part 5 of Schedule 5 to the BSA, or to an industry code registered under that Part, if the code or standard relates, in whole or in part, to the Internet service provider section of the Internet industry and was in force immediately before the commencement of item 101.

In such circumstances, item 101 provides that the amendments to clause 60 of Schedule 5 to the BSA made by Schedule 1 to the Bill (see items 50 to 59 inclusive of Schedule 1 to the Bill) do not affect the continuity of the code or standard to the extent to which it relates to the Internet service provider section of the Internet industry. Clause 60 to the BSA sets out matters to be dealt with by industry codes and standards.

However, subitem 101(3) makes it clear that the ACMA should take action under Schedule 5 to the BSA, within 90 days after the commencement of the item, directed

towards ensuring compliance with clause 60 of that Schedule as amended by Schedule 1 to the Bill.

Item 102 - Industry codes and standards under Part 5 of Schedule 5 to the *Broadcasting Services Act 1992*—Internet content hosts

Item 102 applies to an industry standard under Part 5 of Schedule 5 to the BSA, or to an industry code registered under that Part, if the code or standard relates, in whole or in part, to the Internet content host section of the Internet industry and was in force immediately before the commencement of item 102.

Such a code or standard, to the extent to which it relates to the Internet content host section of the Internet industry, is revoked, and ceases to be registered under Part 5, upon the commencement of item 102.

Item 103 - Transfer of complaints made under repealed subclauses 22(1) and (2) of Schedule 5 to the *Broadcasting Services Act 1992*

Item 103 applies to complaints under clause 22 of Schedule 5 to the BSA (which provides a mechanism for people to complain to ACMA about prohibited content or potential prohibited content, but which is repealed by item 36 of Schedule 1 to the Bill) where the complaint was made before the commencement of item 103, and where an investigation of the complaint by ACMA was pending.

In such a case, proposed new Schedule 7 to the BSA will have effect as if:

- new clause 37 included a provision that entitled the complainant to make the complaint under that clause;
- the complaint had been made under that provision immediately after the commencement of item 103; and
- subclause 37(8) of Schedule 7 (which provides that a person is not entitled to make a complaint that occurred before the commencement of clause 37 of Schedule 7) did not apply to the complaint.

The purpose of item 103 is to ensure that complaints that have already been made to ACMA can be effectively dealt with under the new legislative regime.

Item 104 - Transfer of certain investigations under repealed clause 27 of Schedule 5 to the *Broadcasting Services Act 1992*

Item 104 applies to an investigation by the ACMA relating to a matter mentioned in clause 27 of Schedule 5 to the BSA (which provides for ACMA to investigate certain matters on its own initiative, but which is repealed and substituted by item 39 of the Bill) in certain circumstances. It will apply where the investigation has started, but has not concluded, immediately before the commencement of item 104, and where the investigation relates to a matter covered by paragraph (1)(a) or (b) of that clause.

Paragraph 1(a) of repealed clause 27 relates to "whether an internet service provider is supplying an Internet carriage service that enables end users to access prohibited content or potential prohibited content" and paragraph 1(b) relates to "whether an internet content host is hosting prohibited content, or potential prohibited content, in Australia".

In the circumstance outlined above, the effect of subitem 104(2) will be that new Schedule 7 to the BSA has effect as if clause 44 of that Schedule included a provision authorising the ACMA to investigate the matter under that clause.

The purpose of item 104 is to ensure that certain investigations commenced by ACMA can continue under the new legislative regime.

Item 105 - Application of amendments—*Export Market Development Grants Act 1997*

Item 105 clarifies that the amendments to the *Export Market Development Grants Act 1997* made by Schedule 1 to the Bill apply to expenses incurred after the commencement of item 105.

Part 3 – Special transitional provisions

Item 106 – Transitional – pre-commencement training of content assessors

Item 106 provides that the Director of the Classification Board may exercise a power under clause 18 before Schedule 7 comes into operation. Item 106 refers to the Director's power to approved specified training for the purposes of paragraph 18(1)(b).

Item 106 also clarifies that the 12 month period referred to in paragraph 18(1)(a) may begin before Schedule 7 comes into operation.

The purpose of item 106 is to ensure that the training referred to in clause 18 can be developed and approved by the Director of the Classification Board in preparation for the commencement of Schedule 7.

Subitem 106(3) clarifies that the item does not limit section 4 of the *Acts Interpretation Act 1901*, which relates to the exercise of certain powers between the passage and commencement of Acts.

Item 107 - Transitional—pre-commencement development of industry codes under Part 4 of Schedule 7 to the *Broadcasting Services Act 1992*

Item 107 provides for certain things to be done, and powers to be exercised, under new Schedule 7 to the BSA prior to the commencement of that Schedule. The things that may be done (as if the Schedule had come into operation) are that:

- an industry code may be developed under Part 4 of Schedule 7 (whether or not in response to a request under that Part);
- the ACMA or any other person, body or association may exercise a power conferred by; or do anything under Division 4 of Part 4 of Schedule 7 (other than clause 89 or 90 of that Schedule)
- the ACMA may register an industry code and maintain a Register of industry codes and standards under clause 101 of Schedule 7 (although an industry code registered under clause 101 will take effect only when Schedule 7 comes into operation); and
- the Minister may exercise a power conferred by clause 79 of Schedule 7. Clause 79 provides for the Minister to declare a specified person or body to be a "designated body" for the purposes of Part 4 of Schedule 7.

The purpose of this arrangement is to facilitate a smooth transition to the new legislative regime, by allowing interested parties to undertake certain preparatory steps.

Subitem 107(6) clarifies that the item does not limit section 4 of the *Acts Interpretation Act 1901*, which relates to the exercise of certain powers between the passage and commencement of Acts.

Schedule 2 – Other content amendments

Part 1 - Amendments

Broadcasting Services Act 1992

Item 1 – Amendment to clause 2 of Schedule 7 (paragraph (w) of the definition of *content service*)

Upon commencement of Schedule 2 to the Bill, on a day to be fixed by Proclamation (see clause 2), Item 1 of Schedule 2 will repeal paragraph (w) of the definition of *content service* in clause 2 of this Schedule.

Paragraph (w) excludes telephone sex services from the definition of *content service* for the purposes of Schedule 7. The effect of this amendment will be that, upon commencement of the amendments to the Consumer Protection Act set out in Schedule 2 to the Bill, the definition of *content service* will not exclude telephone sex services.

Telecommunications Act 1997

Item 2 – Amendment to section 7 (paragraph (p) of the definition of *civil penalty provision*)

Paragraph (p) of section 7 of the *Telecommunications Act 1997* defines *civil penalty provision* to mean subsection 158D(3) of the Consumer Protection Act.

However, upon commencement of the amendments in Schedule 2 to the Bill, section 158D of the Consumer Protection Act will be repealed by Item 6. For this reason, Item 2 repeals paragraph (p) in section 7 of the *Telecommunications Act 1997*.

Telecommunications (Consumer Protection and Service Standards) Act 1999

Item 3 – Amendment of section 158A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Item 3 repeals the simplified outline in section 158A of the Consumer Protection Act and substitutes a new simplified outline. The new simplified outline provides that Part 9A (which deals with telephone sex services) regulates the prefixes of numbers used by telephone sex services and that the supply of other goods and services must not be tied to the supply of a telephone sex service. Other matters formerly regulated under Part 9A will be regulated under Schedule 7 to the BSA.

Item 4 – Amendment of subsection 158B(2) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Section 158B of the Consumer Protection Act prohibits telephone sex service providers or a carriage service provider from engaging in unacceptable conduct in relation to a

telephone sex service. Subsection 158B(2) sets out what *unacceptable conduct* for the purposes of the section.

Item 4 amends subsection 158B(2) so that the telephone sex service provider and the carriage service provider are taken to have engaged in unacceptable conduct in relation to the telephone sex service (as described in subsection 158B(2)) unless the voice call is made to a number with an approved prefix.

Item 5 – Amendment to subsection 158B(6) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Subsection 158B(6) of the Consumer Protection Act concerns the agreements referred to in paragraph 158B(2)(e). However, paragraph 158B(2)(e) has been omitted as a result of the amendment to subsection 158B(2) in Item 4. As a result, subsection (6) is no longer required and is repealed by this Item 5.

Item 6 – Amendment to section 158D of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Section 158D of the Consumer Protection Act provides that regulations may prohibit or regulate certain telephone sex services. Item 6 repeals section 158D.

Item 7 – Amendments to paragraphs 158E(1)(a), (b), (c) and (d) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Item 7 amends paragraphs 158E(1) (a), (b), (c) and (d) of the Consumer Protection Act by removing references to subsection 158D(3). Subsection 158D(3) is repealed by Item 6.

Item 8 – Amendment to section 158G of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Item 8 repeals section 158G of the Consumer Protection Act because it is redundant as a result of the amendment made to subsection 158B(2) by Item 4.

Items 9 and 10– Amendments to section 158N of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Item 10 repeals subsection 158N(2) of the Consumer Protection Act because it is redundant as a result of the amendments made to subsection 158B(2) by Item 4.

Item 9 omits ‘(1)’ from subsection 158N(1) because of the repeal of subsection (2).

Part 2 – Transitional provision

Item 11 - Transitional – section 158G of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Despite the repeal of section 158G of the Consumer Protection Act by item 8 of Schedule 2 to the Bill, section 158G will continue to apply, as if the repeal had not happened, in relation to proceedings that:

- are instituted under the *Telecommunications Act 1997* before or after the commencement of Item 11; and
- relate to a contravention of Part 9A of the Consumer Protection Act; and where the contravention occurred before the commencement of Item 11.

Schedule 3—Miscellaneous amendments

Telecommunications (Consumer Protection and Service Standards) Act 1999

Item 1 – Subsection 158P(10) (definition of *Australia*)

Section 158P of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Consumer Protection Act) provides that the proposed Regional Telecommunications Independent Review Committee (RTIRC) will be required to review the adequacy of telecommunications services in regional, rural and remote parts of Australia.

The term 'Australia', when used in a geographical sense, is defined in section 7 of the *Telecommunications Act 1997* to include, unless the contrary intention appears, the eligible Territories. The eligible Territories are defined in section 7 of the Telecommunications Act to mean the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and any other external Territory prescribed for the purposes of section 10 of that Act. No external Territory has been prescribed for the purposes of section 10. As a result of subsection 5(1) of the Consumer Protection Act, unless the contrary intention appears, the term 'Australia' will have the same meaning in that Act as it has in the Telecommunications Act.

A contrary intention appears in subsection 158P(10) of the Consumer Protection Act. The effect of this provision is that references to 'Australia' in section 158P do not currently include the eligible Territories as defined in section 7 of the *Telecommunications Act 1997*. This means that references to 'Australia' in section 158P do not currently include the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands or on any other external Territory prescribed for the purposes of section 10 of the Telecommunications Act. (As indicated above, no other external Territory has been prescribed for the purposes of section 10.)

Item 1 would amend the definition of 'Australia' in subsection 158P(10) to ensure that it includes the Territory of Christmas Island and the Territory of Cocos (Keeling)

Islands but not any other external Territory that may in the future be prescribed for the purposes of section 10 of the Telecommunications Act.

This will ensure that the RTIRC is required to assess the adequacy of telecommunications services in the Indian Ocean Territories and will be consistent with the Commonwealth Government's commitment to align the legislation and programmes in these Territories with those of comparable mainland communities.

Item 2 – Subsection 158T(7) (definition of *Australia*)

Section 158T of the Consumer Protection Act deals with the membership of the RTIRC. Subsection 158T(2) requires the RTIRC Chair and members to have knowledge of, or experience in, matters affecting regional, rural and remote parts of Australia or telecommunications. Subsection 158T(4A) requires the Minister to ensure that at least one RTIRC member is nominated by an organisation that represents the interests of people, or bodies, in regional, rural or remote parts of Australia.

The term 'Australia', when used in a geographical sense, is defined in section 7 of the *Telecommunications Act 1997* to include, unless the contrary intention appears, the eligible Territories. The eligible Territories are defined in section 7 of the Telecommunications Act to mean the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and any other external Territory prescribed for the purposes of section 10 of that Act. No external Territory has been prescribed for the purposes of section 10. As a result of subsection 5(1) of the Consumer Protection Act, unless the contrary intention appears, the term 'Australia' will have the same meaning in that Act as it has in the Telecommunications Act.

A contrary intention appears in subsection 158T(7) of the Consumer Protection Act. The effect of this provision is that the references to 'Australia' in subsections 158T(2) and (4A) do not currently include the eligible Territories as defined in section 7 of the *Telecommunications Act 1997*. This means that references to 'Australia' in these provisions do not currently include the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands or on any other external Territory prescribed for the purposes of section 10 of the Telecommunications Act. (No other external Territory has been prescribed for the purposes of section 10.)

Item 2 would amend the definition of 'Australia' in subsection 158T(7) to ensure that it includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands but not any other external Territory that may in the future be prescribed for the purposes of section 10 of the Telecommunications Act.