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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

# COMMUNICATIONS LEGISLATION AMENDMENT (CONTENT SERVICES) BILL 2007

## SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

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

# COMMUNICATIONS LEGISLATION AMENDMENT BILL (CONTENT SERVICES) BILL 2007

## AMENDMENTS TO BE MOVED ON BEHALF OF THE GOVERNMENT

## OUTLINE

The proposed amendments implement additional measures to the Communications Legislation Amendment (Content Services) Bill 2007 (the Bill). These additional measures address several issues identified in public submissions to the inquiry into the bill by the Senate Environment, Communications, Information Technology and the Arts Committee, and through the Government's further discussions with key stakeholders . The committee published its report on 12 June 2007.

The proposed amendments will provide the following new measures:

- amendments to clause 3 to clarify that a links service has an 'Australian connection' if the links are hosted in Australia, and to provide that a live content service has an 'Australian connection' if the service is provided from Australia;

- amendments to clause 5 to clarify that a carriage service provider does not provide a content service merely because it provides a billing service, or a fee collection service, in relation to the provision of a content service;

- an amendment to the definition of 'prohibited content' to clarify that a service which delivers television programs on-demand to one or more subscribers as part of a licensed subscription broadcasting service is not subject to the MA 15+ restricted access requirement for commercial content services;

- a new anti-avoidance provision for live content services, which will take the form of a 'special service-cessation notice'; and

- a reasonableness test for action taken by content service providers to comply with special take-down and links-deletion notices, and the proposed service-cessation notice.

## FINANCIAL IMPACT STATEMENT

The proposed amendments are not expected to have any significant financial impact on Commonwealth expenditure or revenue.

## NOTES ON AMENDMENTS

### Amendments 1, 7, 8, 9 and 18 – Ancillary subscription television content service

The effect of amendments 1, 7, 8 and 9 is to amend the definition of 'prohibited content' (refer clause 20 of Schedule 7) to clarify that a content service which delivers television programs on-demand to one or more subscribers as part of a licensed subscription television broadcasting service is not subject to the restricted access requirement that applies to content classified (or likely to be classified) MA15+.

The purpose of these amendments is to ensure that certain television programs made available on-demand as part of a suite of content supplied by a licensed subscription television broadcasting service, would not be subject to Schedule 7's regulatory requirements regarding the provision of MA15+ content.

The amendments would allow such ancillary television programming to be offered consistent with the current broadcasting rules. The broadcasting rules allow a subscription television broadcasting service to make MA15+ programs available to the public (ie, its subscribers) without age-verification.

Schedule 7's regulatory requirements regarding the provision of content that is classified R18+, X18+, or RC would apply to an ancillary subscription television service. However these requirements are consistent with the rules that apply generally to programs provided by licensed broadcasting services.

Amendment 1 provides that the term 'ancillary subscription television content service' has the meaning given by new clause 9A.

Amendment 7 inserts new clause 9A. New clause 9A defines the term 'ancillary subscription television content service', which is a service that:

(a) delivers content by way of television programs to persons having equipment appropriate for receiving that content, where:

  (i) those television programs are stored on the equipment (whether temporarily or otherwise); and

  (ii) the equipment is also capable of receiving, whether in isolation or in conjunction with other equipment, one or more subscription television broadcasting services provided in accordance with a licence allocated by ACMA under the BSA; and

  (iii) those television programs are delivered to a subscriber to such a subscription television broadcasting service under a contract with the relevant subscription television broadcasting licensee; and

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

Amendments 8 and 9 provide for the insertion of a new subparagraph in the definition of prohibited MA15+ content (refer paragraph 20(1)(c)(vi)). The effect of this additional paragraph is to provide a limited exemption for an 'ancillary subscription television content service', such that MA 15+ content may be provided by such a service without a restricted access system (see clause 14). Content classified MA15+ (or likely to be so classified) will not be prohibited content or potential prohibited content where it is provided by an 'ancillary subscription television content service'. However, the requirements in relation to content classified RC, X 18+, or R 18+ will continue to apply to an 'ancillary subscription television content service' in accordance with clause 20.

Amendment 18 inserts new clause 117A, which makes it clear that new clause 9A and subparagraph 20(1)(c)(vi) are to be disregarded in determining the meaning of the expression 'broadcasting service', as defined in section 6 of the BSA. As a result, the term 'broadcasting service' is not affected by the treatment of an 'ancillary subscription television content service' in proposed Schedule 7. The special treatment enabled by proposed amendments 1, 7, 8 and 9 would be limited to Schedule 7 only.

**Amendments 2, 12, 13, 14 and 17 – Special service-cessation notices**

Amendments 2, 12, 13, 14 and 17 would provide the ACMA with the power to issue a 'special service-cessation notice' in relation to live content services. The power to issue such a notice is similar to those powers already provided in the Bill in relation to hosting services (clause 52 refers) and links services (clause 67 refers).

Amendment 2 inserts a reference to 'special service-cessation notice' in clause 2 of proposed Schedule 7. This amendment provides that a 'special service-cessation notice' means a notice under new clause 59A.

Amendment 12 inserts new clause 59A, which is an anti-avoidance provision for live content services.

As an anti-avoidance measure, clause 59A provides that if:

- a particular live content service provider is subject to an interim or final service-cessation notice relating to particular content; and
- the ACMA is satisfied that the live content service provider is providing, or is proposing to provide, another similar live content service that is substantially similar to the content identified in the interim or final service-cessation notice; and
- the ACMA is satisfied that the other similar live content service is prohibited content or potential prohibited content;

the ACMA will be able to give the live content service provider - if the interim or final service-cessation notice was given under paragraph 56(1)(c), (2)(d) or (4)(b)of this Schedule – a written notice (a *special 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 other similar live content service at any time when the interim or final service-cessation notice is in force.

For the purposes of clause 59A, a type A remedial situation exists in relation to the similar live content service if the provider does not provide that service (subclause 59A(2)). .

In any other case, the ACMA will be able to give the live content service provider a special 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 similar live content service at any time when the interim or final service-cessation notice is in force.

For the purposes of clause 59A, a type B remedial situation exists in relation to the similar live content service if:

- the similar live content service is not provided; or
- access to the similar live content service is subject to a restricted access system (subclause 59A(3)).

Amendments 13 and 14 would amend clause 60 of Schedule 7. Clause 60 establishes the actions that a live content service provider must take to comply with the rules relating to prohibited content and potential prohibited content. Furthermore, subclause 60(4) provides that these compliance actions constitute designated content/hosting provider rules (see clause 104). Failure to comply with the designated content/hosting provider rules set out in clause 60 will constitute an offence under clause 106.

Amendment 13 would insert new subclause (2A) in clause 60 of proposed Schedule 7. The new subclause 60(2A) would provide that live content service provider must comply with an applicable special service-cessation notice as soon as practicable, and in any event by 6pm on the next business day after ACMA has given notice to the provider.

Amendment 14 is consequential to amendment 13. This amendment to subclause 60(4) would provide that the compliance action required by new subclause 60(2A) in relation to a special service-cessation notice is a designated content/hosting service provider rule for the purposes of proposed Schedule 7.

As a result of Amendment 17, a new paragraph (ba) would be inserted after paragraph 113(3)(b), which would make a decision by the ACMA to issue a special service-cessation notice reviewable by the Administrative Appeals Tribunal (AAT).

**Amendments 3 and 4 – Australian connection**

For the purpose of proposed Schedule 7, a ‘content service’ and a ‘hosting service’ will only be subject to the regulatory scheme in Schedule 7 to the extent to which the services have an ‘Australian connection’. Clause 3 of proposed Schedule 7 currently provides that an Australian connection is established for a ‘content service’ 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; or

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

Amendment 3 would omit paragraphs 3(1)(b) and (c) and substitute a new paragraph (b). The effect of new paragraph (b) would be that, in the case of a live content service, an Australian connection will be established if the live content service is provided from Australia. This amendment clarifies that live content services will only be regulated under proposed Schedule 7 to the extent to which the live content service is provided from Australia. Consequently, Schedule 7 will have no extra-territorial application to live content services that are provided from outside Australia.

Amendment 3 omits paragraph 3(1)(c) because it is superseded by new paragraph (b). Content services, supplied by way of voice call or video call, are a subcategory of live content. Consequently, new paragraph (b) is redundant.

Amendment 4 adds a legislative note at the end of subclause 3(1). The purpose of this note is to clarify that a link is a type of 'content', as defined in clause 2. Therefore, in accordance with paragraph 3(1)(a), a links service will have an 'Australian connection' if, and only if, it provides a link that is hosted in Australia. To the extent that the link is hosted in Australia, the links service would be subject to any action that ACMA may take pursuant to Division 5 of Part 3 of Schedule 7. If the links service provides a link that is hosted outside Australia, the links service would not be subject to those provisions. The location of the content to which the link provides access is irrelevant to determining whether the links service has an Australian connection for the purpose of proposed Schedule 7.

**Amendments 5 and 6 – Content Service Provider**

Amendments 5 and 6 would amend clause 5 of proposed Schedule 7 to clarify when a person is to be regarded as a content service provider.

Clause 5 provides that a person does not provide a content service merely because the person supplies a carriage service that enables content to be delivered or accessed.

Amendment 6 would amend clause 5 of the Bill by adding new subclause (2), which clarifies that a person does not provide a content service merely because the person provides a billing service, or a fee collection service, in relation to a content service.

Amendment 5 is consequential to amendment 6.

**Amendments 10, 11, 15 and 16 – Special take-down notices and special link-deletion notices**

Amendments 10, 11, 15 and 16 would provide for the introduction of a reasonableness test for action required by content service providers in relation to their

compliance with special take-down and link deletion notices, and the proposed special service-cessation notice.

Amendments 10 and 11 would omit the words ‘such steps as are necessary’ and substitute the words ‘all reasonable steps’ in paragraphs 52(1)(d) and (e). These amendments will clarify that a hosting service provider subject to a special take-down notice (clause 52) will be required to take all reasonable steps to comply with that notice. The meaning of ‘all reasonable steps’ will be determined in accordance with the particular circumstances of the matter.

Amendments 15 and 16 would similarly require links service providers to take all reasonable steps to comply with special link-deletion notices issued by the ACMA under clause 67.

The requirement to take ‘all reasonable steps’ is also mirrored in new clause 59A (noted above) which deals with live content service providers.