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15 February 2024

Department of Infrastructure,  
Transport, Regional Development,  
Communications and the Arts

By submission: [Online Safety \(Basic Online Safety Expectations\) Amendment Determination 2023 | Department of Infrastructure, Transport, Regional Development, Communications and the Arts](#)

**RE: Online Safety (Basic Online Safety Expectations) Amendment Determination 2023**

The Internet Association of Australia Ltd (**IAA**) thanks the Department for the opportunity to respond to the consultation on the draft Online Safety (Basic Online Safety Expectations) Amendment Determination 2023 (**Draft BOSE Amendment Determination**).

IAA is a member-based association representing Australia's Internet community. Our membership is largely comprised of small to medium sized Internet Service Providers (**ISPs**). We understand that the Online Safety (Basic Online Safety Expectations) Determination 2022 (**BOSE Determination**) does not expressly apply to ISPs, which is a separate category of providers under the *Online Safety Act 2021* (**Online Safety Act**) and so the Draft BOSE Amendment Determination may not be directly relevant to all our members. However, due to the broad definition for 'designated internet services', ISPs, a great number of other providers are technically captured by the BOSE Determination and subsequently, the Draft BOSE Amendment Determination. As such, we offer our response in representation of those members who would be so affected, as well as the general public good of the Internet and Internet industry.

From the outset, IAA and our members recognise the importance of ensuring safety online, and the role that providers have to play in ensuring a safe online environment. However, in order for legislative frameworks to be effective and meaningful, we believe that it is important for such frameworks to be measured, appropriate and accurately target the intended entities. To that end, we offer our feedback in genuine hopes to work with the Department, eSafety Commissioner (**Commissioner**) and other stakeholders to develop such a framework.

**ISPs Exemption**

We are concerned that the general application of the BOSE Determination which is capable of capturing service providers such as ISPs under the umbrella of designated internet services will mean that the Draft BOSE Amendment Determination may also unnecessarily apply. We request that as part of the amendment of the BOSE Determination, there is also greater consideration about who should be captured by the Determination to expressly exclude ISPs unless they also provide specific services that are more relevant under the BOSE Determination (e.g. email services).

We believe that it is not the Minister for Communications, nor the Commissioner's intent to cover service providers like ISPs, given that this is a category that expressly exists under the Online Safety Act, and should the Minister and Commissioner wish to so capture ISPs, it should do so expressly. In which case, there should be further consultation and consideration about which of the expectations are actually appropriate and practicable as it pertains to ISPs.

Given our position that the BOSE Determination and therefore Draft BOSE Amendment Determination should not apply to ISPs (generally, and not where ISPs may provide other services that should be captured), we defer matters such as artificial intelligence and recommended systems to other organisations that are more suited to comment on the proposals regarding such matters. The remainder of this response will deal with matters we believe are relevant to the public good of the Internet more generally.

### **Resilience of Encryption**

In general, we support and appreciate the BOSE Determination and Draft BOSE Amendment Determination being expressed in flexible terms to ensure the expectations do not become technologically redundant, and to allow service providers to assess the appropriate and reasonable steps that each provider should take in respect of its own business. However, we are concerned that in some circumstances, the broad expectation without clear safeguards can result in threats to core Internet and online safety principles like privacy. In particular, we are concerned that the proposal to add a new expectation, subsection 14(1A) which establishes the expectation for providers to take proactive steps to detect breaches to its terms of use, may result in practices that may weaken or threaten encryption.

We recommend that similar to subsection 8(2) of the BOSE Determination, following a new subsection 14(1A), it is clearly stated that providers are not to take any steps that would introduce a weakness or otherwise threaten encryption.

### **'Reasonable' Test**

Although this does not expressly relate to the proposed Draft BOSE Amendment Determination, we believe this is a good opportunity to raise an issue with section 7, and in general what is considered "reasonable" as per the BOSE Determination. We reiterate our support for not being prescriptive and providing examples, rather than strict rules for steps that a service provider should take.

However, we consider that specifically as it relates to section 7(1), the expectation that each service provider should consult with the Commissioner to determine whether steps it has taken to ensure the safe use of its services is reasonable is impractical and unlikely to result in any real compliance.

Furthermore, we recommend that in general, in addition to the provision of examples, the BOSE Determination, should set out that in determining what is 'reasonable', the service provider should take into account a range of factors such as:

- risk of harm;
- nature and seriousness of harm;

- practicability and technical feasibility;
- costs; and
- likely benefits.

We appreciate that the Commissioner's guidance material and the Explanatory Statement to the BOSE Determination does acknowledge the risk-based approach. However, including this in the BOSE Determination itself is recommend to reduce confusion and assist in alleviating regulatory burdens for providers.

Once again, IAA reiterates our appreciation for the opportunity to commend on the Draft BOSE Amendment Determination. We acknowledge and appreciate the work of the Department and Commissioner in reviewing the BOSE Determination to ensure it is up to date, and meaningful. We sincerely hope that our feedback in this response will contribute meaningfully to the revised BOSE Determination, and look forward to continue working with the Department, Commissioner and other stakeholders to ensure a safe online environment.

## **ABOUT THE INTERNET ASSOCIATION OF AUSTRALIA**

The Internet Association of Australia (IAA) is a member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (WAIA), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations, and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IX-Australia is a service provided by the Internet Association of Australia to Corporate and Affiliate members. It is the longest running carrier neutral Internet Exchange in Australia. Spanning six states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.

IAA is also a licenced telecommunications carrier, and operates on a not-for-profit basis.

Yours faithfully,

Narelle Clark  
Chief Executive Officer  
Internet Association of Australia