



interactive games & entertainment association

**Submission to the Department of Infrastructure,
Transport, Regional Development, Communications and
the Arts**

Response to Online Safety (Basic Online Safety Expectations) Amendment Determination 2023

February 2024

IGEA acknowledges and pays respect to the past and present Traditional Custodians and Elders of this land and the continuation of cultural, spiritual, and educational practices of Aboriginal and Torres Strait Islander peoples. We would like to extend our acknowledgments to the indigenous people from countries overseas and recognise their strength, wisdom, and creativity.

1. Introduction & Overview

The Interactive Games & Entertainment Association (IGEA) welcomes the opportunity to provide a submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Department), on its consultation of the Online Safety (Basic Online Safety Expectations) Amendment Determination 2023 (amendments to the BOSE Determination).

This consultation follows the commencement of the BOSE Determination in January 2022. According to the Department, the premise behind these latest proposed amendments to the BOSE Determination is that the online environment continues to rapidly evolve which presents new challenges, including developments related to generative artificial intelligence (AI) and recommender systems, and the amendments would better provide for the safety of end-users.¹

The scope of the BOSE Determination covers a wide range of services that enable end-users to communicate with each other online, particularly Social Media Services, Relevant Electronic Services (RES), and Designated Internet Services (DIS). Our submission focuses on those services that enable end-users to play online games with each other, which we consider fall under the category of RES.²

Among other reasons raised in our submission, with the BOSE Determination still in its infancy, we do not believe there has been sufficient changes within this short two-year period after its adoption to warrant such extensive additions to the Determination. Moreover, there should be sufficient time allocated for industry codes and standards to be properly implemented and reviewed before any further assessment of the Determination.

1.1 About IGEA

IGEA is the industry association representing and advocating for the video games industry in Australia, including the developers, publishers, and distributors of video games, as well as the makers of the most popular gaming platforms, consoles and devices.

IGEA also organises the annual Games Connect Asia Pacific (GCAP) conference for Australian game developers and the Australian Game Developer Awards (AGDAs) that celebrate the best Australian-made games each year. IGEA has over a hundred members, from emerging independent studios to some of the largest technology companies in the world.

¹ Amending the Online Safety (Basic Online Safety Expectations) Determination 2022 – Consultation paper, p. 4.

² In our recent submission to the eSafety Commissioner on its Draft RES and DIS Standards, we stated that we only consider the Draft RES Standard to be more relevant to the video games sector (as opposed to the Draft DIS Standard). This is on the basis that gaming services have been explicitly defined in the Standard and where the predominant functionality of the service appears to be more closely aligned with the Draft RES Standard than with the Draft DIS Standard. Should eSafety consider the DIS Standard also to be applicable to the video games sector, we would welcome eSafety's guidance.

Video games are a beloved Australian activity and significantly benefit Australian game players, the wider community, and the economy. Video game developers and publishers are the innovators, creators and business leaders reimagining entertainment and transforming how we learn and play. Two in three Australians play games, mainly for enjoyment and relaxation, and games are increasingly being used for serious and educational purposes, including by governments. Video games provide a digital outlet for Australian art, culture, stories and voices, and Australian-made video games are among Australia's most successful and valuable cultural exports. Our medium also brings kids into STEM and helps them build technology skills that will feed Australia's workforce needs.

In supporting local content, the video game industry is a major contributor to the Australian digital economy. According to our data, video games are worth around \$4.21 billion annually in Australia,³ while Australian-made games brought in \$345.5 million in largely export revenue last year.⁴ Moreover, because the video game sector uniquely sits at the intersection of entertainment, the arts and technology, video game companies hire a wide range of artistic, technical and professional roles and are thus a wellspring of high-quality sustainable careers, and are an engine for growth in the Australian national economy. Indeed, Australian game developers are internationally renowned, and ours has the potential to be one of Australia's most important future growth industries and an integral component of the Government's vision for Australia to be a top 20 digital economy and society by 2030.

1.2 Overview

Overall, we support the intention behind the BOSE Determination for setting a benchmark for industry to take responsibility for online safety, and the Department's rationale for proposed amendments to the BOSE Determination to better provide for the safety of end-users in response to a rapidly evolving online environment.⁵ It is important to keep in mind, however, that the BOSE is intended to be broad and high level. It is purposefully drafted to avoid being overly prescriptive and specific.⁶

Over the last several years, IGEA and its members have been heavily engaged in and contributed to the development of the various industry online safety codes that were registered by eSafety (including for app distribution services and equipment), as well as the Draft RES Code that was declined for registration by eSafety (and subsequent Draft RES Standard that is currently under consultation by eSafety).

³ ['Australians subscribe to video game growth' \(IGEA Media Release, 8 June 2023\)](#).

⁴ ['Aussie game developers pull in \\$345.5 million for the local economy' \(IGEA Media Release, 18 December 2023\)](#).

⁵ Amending the Online Safety (Basic Online Safety Expectations) Determination 2022 – Consultation paper, pp. 1 and 4.

⁶ Australian Government, Frequently Asked Questions – Basic Online Safety Expectations (October 2021), p. 2.

The video games industry takes consumer protection extremely seriously, offering high levels of safeguards so players and parents can enjoy video games and have positive experiences. The industry adheres to strict domestic and international data and consumer protection laws, supplemented with an age-appropriate video game content labelling scheme, along with other measures. The industry also leads in empowering players and parents with easy-to-use tools, including for managing playtime, spending, online privacy, online gameplay, and access to age-appropriate games. The industry's serious commitment and responsibility to these protections are built around global industry best practices.

As a matter of good regulatory practice and policy design, any regulatory measure (including the BOSE Determination) should be well-defined, reasonable and clearly scoped, provide sufficient flexibility that is future-proofed for evolving technologies, and be supplemented by relevant industry guidance to enable sufficient regulatory clarity and certainty.

It is also important to ensure that the Determination avoids unnecessary regulatory duplication and conflict with both existing and future regulations, including the online safety standards and codes, the other provisions under the Online Safety Act, and development of industry codes for Class 2 material. Minimising such duplication not only ensures administrative efficiency, such as reducing associated regulatory costs, regulatory burden and complexity, but also mitigates inadvertent inconsistencies between the regulatory instruments.

In our recent submission to eSafety on its online safety standards, especially the Draft RES Standard, we recommended the significant benefit of providing further clarity through relevant guidance and other explanatory material to support the Draft RES Standard (eSafety intentionally omitted such guidance from its consultation stage). There would be value in providing guidance on how the Determination, codes and standards could work together in practice, especially when each instrument is arguably intended to set the industry benchmark for ultimately promoting online safety, and there appears to be significant duplication in the provisions of the industry codes and standards and the BOSE Determination, such as in relation to reporting requirements.

In the absence of adequate clarification on how these regulatory instruments work together, there is a risk of creating suboptimal or unintended outcomes. It should be in everyone's interest that this does not occur, and the Government has a leading role in ensuring that as much regulatory clarity is provided to help service providers meet their online safety regulatory obligations properly, rather than automatically resorting to the threat of regulatory "sticks" for inadequate compliance in the first instance.

Further, given the draft online safety standards for Class 1A and 1B material are still under consultation by eSafety, and the pending Online Safety Act review will necessarily include a review of the BOSE regime, there may be a range of proposed amendments to the Determination that might be better served to be deferred for consideration as part of the

wider Online Safety Act review.⁷ This would enable a more holistic and coordinated approach to the proposed introduction of new online safety requirements, compared to the currently overlapping consultations that could inadvertently lead to a fragmented approach towards online safety in practice, despite operating under the same overarching online safety framework.

In addition, with the BOSE Determination still in its infancy, we do not believe there has been sufficient changes within this short two-year period after its adoption to warrant such extensive additions to the Determination. Moreover, there should be sufficient time allocated for industry codes and standards to be properly implemented and reviewed before any further assessment of the Determination.

Below is a summary of our recommendations to this consultation.

Topic	Recommendations
General	<p><u>Avoid duplicating and conflicting requirements, and over-prescriptiveness and regulatory overreach:</u> Consideration be given to rejecting certain proposed amendments to the BOSE Determination, where the requirements could lead to: duplication or conflict with requirements under the relevant online safety codes or standards (i.e. existing, under development or planned); over-prescriptiveness and inflexibility; or regulatory overreach.</p> <p><u>Defer to Online Safety Act Review:</u> Consideration be given to deferring certain proposed amendments to the BOSE Determination, where new requirements would: not be covered under any online safety codes or standards; have a material impact on service providers (i.e. existing, under development or planned); and be better served as part of the forthcoming Online Safety Act review.</p> <p><u>Guidance material:</u> Guidance material be produced to explain the scope and interoperability between the online safety regulatory requirements in practice for service providers i.e. how the online safety codes and standards, and BOSE Determination will operate together.</p> <p><u>Further consultation:</u> We would welcome the opportunity to discuss further with the Department to understand the intent underlying the application of the BOSE Determination, alongside the online safety codes and standards that apply to online video games services.</p>

⁷ The Online Safety Act review will be broad ranging, according to the Australian Government’s recently released Terms of Reference for this review. See Australian Government Terms of Reference - Statutory Review of the Online Safety Act 2021 (February 2024), pp. 3-4, <https://www.infrastructure.gov.au/department/media/publications/terms-reference-statutory-review-online-safety-act-2021>.

Topic	Recommendations
Generative AI capabilities	The proposed express inclusion of generative AI in the BOSE Determination runs counter to the overall technology-neutral approach of the BOSE. To enable a more holistic and coordinated approach to generative AI, we would recommend this be deferred to the broader Australian Government safe and responsible AI consultation.
Unlawful or harmful material	<p>Further clarification is required on the scope of “harmful material” throughout the BOSE Determination - in its current form, the term is extremely broad and ambiguous to interpret and comply in practice.</p> <p>Alternatively, consideration could be given to replacing references to “unlawful or harmful material” with “Class 1A and 1B material”, which would be more aligned with the online safety codes and standards.</p>
User management and control	Where a service provider relies on an established user management and control system via a third party service provider that is already subject to the BOSE Determination or relevant online safety standard or code, this should be considered a reasonable step.
Best interests of the child	<p>With respect to the proposal for service providers to take reasonable steps to ensure the best interests of the child, this should be referring to the design and operation of any service that is “targeted at children” (as opposed to “used by, or accessible to, children”).</p> <p>The proposed introduction of a “reasonable step” example “to ensure that technological and other measures are in effect to prevent access by children to Class 2 material” by “implementing appropriate age assurance mechanisms”, is out of scope and should not be included in the BOSE Determination consultation.</p> <p>For similar reasons, the proposed introduction of a “reasonable step” example “to ensure that technological and other measures are in effect to prevent access by children to Class 2 material” by “continually seeking to develop, support or source, and implement improved technologies and processes for preventing access by children to class 2 material”, is also out of scope and should not be included in the BOSE Determination consultation.</p>
Safety impacts of business and resourcing decisions	Any proposed obligations on service providers to share information with eSafety should ensure the regulator implements appropriate safeguards in managing such

Topic	Recommendations
	<p>information in accordance with due process, transparency, confidentiality, and privacy.</p> <p>With respect to the safety impacts of business and resourcing decisions, we strongly caution against including a provision for this in the BOSE Determination. It sets a dangerous precedent for the regulator to seek information about sensitive commercial business decisions (including staff resourcing and investments) and the potential subsequent misuse or misrepresentation of that information to draw a causal link to online safety issues.</p> <p>Regarding the proposed inclusion of a reasonable step example relating to service providers “investing in systems, tools, and processes to improve the prevention and detection of material or activity on the service that is unlawful or harmful”, the Determination should either directly refer to the RES Standard or remove this requirement as it is already being considered as part of the RES Standard.</p>
Hate speech	<p>The proposed inclusion of a reasonable step that requires the implementation of processes for detecting and addressing hate speech has its practical limitations if it relates to managing hate speech delivered orally (as opposed to in written form), due to limitations in technology. Therefore, inclusion of this reasonable step needs to be reviewed to ensure technical feasibility or otherwise be deferred for further consideration as part of the Online Safety Act review.</p>
Additional transparency reporting	<p>Transparency reporting is a subject currently under consideration as part of the RES Standard consultation by eSafety, including issues relating to duplicated reporting requirements, and therefore not appropriate for additional consideration as part of the BOSE Determination.</p>
Enforcement of terms of use	<p>Terms of use, and end-user complaints and reporting mechanisms are currently under consideration as part of the RES Standard consultation by eSafety, and therefore not appropriate for additional consideration as part of the BOSE Determination.</p>

2. General comments

IGEA acknowledges that the BOSE Determination, as well as online safety codes and standards, are regulatory instruments that fall under the overarching Online Safety Act 2021 (Cth). The eSafety Commissioner and industry also have roles to play to ultimately support the objectives of the Online Safety Act to protect the safety of Australian users online.

To this end, IGEA and its members have been engaged with industry and eSafety over the last several years, especially in developing industry codes and standards, such as for Equipment Services and App Distribution Services that were accepted by eSafety last year, and for Relevant Electronic Services currently under review by eSafety.

We appreciate the intention behind the proposed amendments to the BOSE Determination. However, the timing of this consultation, alongside the ongoing proceeding to finalise the RES Standard, forthcoming Online Safety Act review and development of industry codes for Class 2 material, makes it difficult to navigate and provide feedback. This is especially true where there are new requirements being proposed under either the RES Standard or the BOSE Determination, and understanding how the Determination, and online safety standards and codes interact with each other, and for service providers to meet those obligations properly.

In addition, with the BOSE Determination still in its infancy, we do not believe there has been sufficient changes within this short two-year period after its adoption to warrant such extensive additions to the Determination. Moreover, there should be sufficient time allocated for industry codes and standards to be properly implemented and reviewed before any further assessment of the Determination. This will enable a future review of the Determination to be based on substantiated evidence, leading to a more robust assessment as to its effectiveness, including fit-for-purpose, in practice.

This will also help to address our wider concerns about the confusion of meeting two separate sets of minimum obligations. On the one hand, there are minimum obligations proposed for online video game services under the RES Standard, as well as for service providers captured under other online safety codes and standards. There are also new minimum obligations proposed in the BOSE Determination.

Further, as some of these matters remain unresolved (as they are currently, or planned to be, subject to review), introducing similar or new obligations in the BOSE Determination at this stage will likely risk the introduction of regulatory complexity, uncertainty, duplication and conflict. While the regulatory instruments are intended to complement each other in accordance with the overarching Online Safety Act, the concurrent consultations will inadvertently lead to suboptimal outcomes.

Therefore, as a general comment, we recommend that this consultation avoid duplicating requirements between the BOSE Determination, RES Standard, and other online safety standards and codes. It should refer to the Online Safety Act Review for new requirements that would have a material impact on service providers. Additional guidance should also be provided to clarify any regulatory uncertainty that might arise in the application of the BOSE Determination, alongside the online safety codes and standards.

Recommendations:

- **Avoid duplicating and conflicting requirements, and over-prescriptiveness and regulatory overreach: Consideration be given to rejecting certain proposed amendments to the BOSE Determination, where the requirements could lead to:**

duplication or conflict with requirements under the relevant online safety codes or standards (i.e. existing, under development or planned); over-prescriptiveness and inflexibility; or regulatory overreach.

- **Defer to Online Safety Act Review: Consideration be given to deferring certain proposed amendments to the BOSE Determination, where new requirements would: not be covered under any online safety codes or standards; have a material impact on service providers (i.e. existing, under development or planned); would be better served as part of the forthcoming Online Safety Act review.**
- **Guidance material: Guidance material be produced to explain the scope and interoperability between the online safety regulatory requirements in practice for service providers i.e. how the online safety codes and standards, and BOSE Determination will operate together.**
- **Further consultation: We would welcome the opportunity to discuss further with the Department to understand the intent underlying the application of the BOSE Determination, alongside the online safety codes and standards that apply to online video games services.**

3. Generative AI capabilities

The Department proposes a new section 8A in the BOSE Determination, which will create new additional expectations for service providers to take reasonable steps regarding generative AI capabilities. The Department considers that the Determination already captures generative AI capabilities, but “the accessibility and usability of generative AI capabilities creates potential for the production of harmful material and activity on a scale and speed not previously possible”.⁸ It therefore suggests “new additional expectations will emphasise and clearly signal the Australian public’s interest in how service providers are designing and deploying these capabilities”.

We acknowledge that generative AI is a currently a hot topic, touching upon different areas of policy and regulatory reform, and not limited to Australia. However, it is important that we treat generative AI in a similar fashion to any other technology i.e. technology agnostic. This approach will ensure that any regulatory or non-regulatory response is sufficiently flexible to respond to technological changes and therefore technology neutral.

In the context of video games, AI has been used over the last several decades. Unlike in other context and use-cases, we consider it a low-risk application for video games, where

⁸ Amending the Online Safety (Basic Online Safety Expectations) Determination 2022 – Consultation paper, p. 6.

AI is focused on entertainment, safety or innovation purposes. The intention of AI in the video game industry is to ultimately enhance player enjoyability, accessibility and safety.⁹

We therefore believe regulation of AI in video games is unnecessary. We believe it would be beneficial to implement further analysis and research on specific uses of AI in video games, should the Government decide to embark on any regulation.

As discussed above, we recommend that the inclusion of new requirements in the BOSE Determination would be better served by deferring these for consideration as part of the wider Online Safety Act review, enabling a more holistic and coordinated approach. However, we also note that the Australian Government has recently published its interim response to the safe and responsible AI consultation, led by the Department of Industry, Science and Resources.¹⁰ It would therefore be more appropriate to coordinate consideration of online safety with respect to generative AI, as part of that wider review.

Recommendation: The proposed express inclusion of generative AI in the BOSE Determination runs counter to the overall technology-neutral approach of the BOSE. To enable a more holistic and coordinated approach to generative AI, we would recommend this be deferred to the broader Australian Government safe and responsible AI consultation.

Further, the proposed introduction of section 8A includes the term “harmful material” (and also expressed in alternative ways in other sections of the BOSE Determination e.g. “material ... that is ... harmful”). The term “harmful material” is broad and includes not only materials within the scope of the Online Safety Act but also *should* fall under a provider’s terms of use, policies, or standards of conduct. The scope of “harmful material” is potentially extremely broad and creates significant ambiguity for providers in interpreting the requirements of the BOSE Determination.

Recommendations:

- **Further clarification is required on the scope of “harmful material” throughout the BOSE Determination - in its current form, the term is extremely broad and ambiguous to interpret and comply in practice.**

⁹ IGEA discusses further about video games and AI in our submission to the Department of Industry, Science and Resources’ Safe and Responsible AI in Australia consultation: <https://igea.net/wp-content/uploads/2023/08/IGEA-Submission-to-Supporting-responsible-AI-discussion-paper.pdf>.

¹⁰ Australian Government’s interim response, “Safe and responsible AI in Australia consultation” (January 2024), <https://consult.industry.gov.au/supporting-responsible-ai>.

- **Alternatively, consideration could be given to replacing references to “unlawful or harmful material” with “Class 1A and 1B material”, which would be more aligned with the online safety codes and standards.**

4. Recommender systems

For similar reasons as generative AI (and despite acknowledging that the BOSE Determination already provides that services develop and deploy new technologies in a manner that promotes user safety), the Department proposes for the introduction of a new section 8B in the Determination, which will create new additional expectations for service providers to take reasonable steps regarding recommender systems.¹¹

The example used in the consultation paper, as the basis for introducing this requirement, relates to social media platforms, where eSafety considers “there is the potential for recommender systems to amplify harmful and extreme content”.¹² In relation to online video games services, it is not clear if a case has been made as to how that scenario would arise. In other words, it is important that the risks and issues associated with social media services are not conflated with other online services such as online video games services, without any evidence.

As a general comment, for similar reasons as with generative AI, we suggest that the subject of recommended systems should be referred to the Online Safety Act review for a more holistic assessment.

If the Government decides to proceed with a new recommender system requirement in the BOSE Determination, the new requirement should enable sufficient flexibility for the service provider to demonstrate reasonable steps have been undertaken.

Recommendations:

- **To enable a more holistic and coordinated approach to recommender systems, we would suggest this be deferred to the broader Online Safety Act review.**
- **Should the Department wish to proceed with inclusion of recommender systems requirements in the BOSE Determination, the new requirement should enable sufficient flexibility for the service provider to demonstrate reasonable steps have been undertaken.**

¹¹ Amending the Online Safety (Basic Online Safety Expectations) Determination 2022 – Consultation paper, p. 8.

¹² Ibid.

5. User management and control

The Department proposes a new subsection 6(5) in the BOSE Determination to create an additional expectation, where the service provider “will take reasonable steps to make available controls that give end-users the choice and autonomy to support safe online interactions”.¹³ Subsection 6(6) also introduces some examples of user empowerment controls that service providers should be employing on their service.¹⁴ The rationale for this proposal is that this “will set the standard that service providers are expected to make user empowerment controls available to their end-users to support safe online interactions and experiences”.¹⁵

As stated in our submission to eSafety on the RES Standard regarding examples of industry practices, the video game industry (as a whole and globally) takes consumer protection extremely seriously, offering high levels of safeguards so players and parents can enjoy video games and have positive experiences. The industry adheres to strict domestic and international data and consumer protection laws, supplemented with an age-appropriate video game content labelling scheme, along with other measures. The industry also leads in empowering players and parents with easy-to-use tools, including for managing playtime, spending, online privacy, and access to age-appropriate games.

The industry’s serious commitment and responsibility to these protections are built around global industry best practices, according to the following pillars: age-appropriate pre-contractual information; safety by design in online environments; tools to enable players, parents, and caregivers to set the permissions that are appropriate for them or their children; and enabling consumer redress and efficient and proportionate enforcement.

Therefore, as a general comment, the proposed introduction of user empowerment controls in the BOSE Determination is reflected in global best practices of the video games industry. In practice, it is not unusual for video games publishers to rely on consoles and platforms to utilise and leverage on well-established user management and control systems and tools for enabling effective online safety. In those instances, it would be a redundant requirement to expect that all service providers within the video games ecosystem to implement similar controls. As this approach would achieve the objectives of the proposal, it should be recognised in the BOSE Determination as a reasonable step.

Recommendation: Where a service provider relies on an established user management and control system via a third party service provider that is already subject to the BOSE Determination or relevant online safety standard or code, this should be considered a reasonable step.

¹³ Ibid, p. 9.

¹⁴ Ibid, pp. 9-10.

¹⁵ Ibid.

6. Best interests of the child

The Department considers that the BOSE Determination already contains certain protections for children.¹⁶ However, it suggests that the Determination does not currently encourage services to: “consider the best interests of the child throughout the development and implementation phases of an online service”; and “focus on continually improving technologies to better prevent children from accessing class 2 material or to ensure that age assurance mechanisms are appropriate to the level of risk”.

The Department therefore proposes:¹⁷

- Best interests of the child: A new subsection 6(2A) to create a new additional expectation for service providers to take reasonable steps to ensure that the best interests of the child are a primary consideration in the design and operation of any service that is used by, or accessible to, children.
- Age assurance: Amendment of paragraph 12(2)(a) to provide an example of a reasonable step to ensure that technological and other measures are in effect to prevent access by children to Class 2 material is implementing appropriate age assurance mechanisms.
- Updating approaches: A new paragraph 12(2)(c) to provide a new example of a reasonable step to ensure that technological and other measures are in effect to prevent access by children to Class 2 material, namely: continually seeking to develop, support or source, and implement improved technologies and processes for preventing access by children to Class 2 material.

6.1 Best interests of the child

Regarding the best interests of the child, it is important to note that these have already been taken into account by the Australian Government when the Online Safety Bill was tabled and passed as legislation, in accordance with the United Nations *Convention on the Rights of the Child (CROC)*:

- *Article 3(1) of the CROC provides that in all actions concerning children, the best interests of the child shall be a primary consideration. The principle requires legislative, administrative and judicial bodies to take active measures to protect children’s rights, promote their wellbeing and consider how children’s rights and interests are or will be affected by their decisions and actions. The Bill supports the best interests of the child by providing mechanisms so that children are protected from seriously harmful content, as well as cyber-bullying material and the non-consensual sharing of intimate images.*¹⁸

¹⁶ Ibid, pp. 10-12.

¹⁷ Ibid, p. 11.

¹⁸ [Explanatory Memorandum to the Online Safety Bill 2021](#), p. 64.

- *The CROC also recognises the right of a child not to be subjected to unlawful attacks on their honour and reputation. By providing remedies for a child who is the target of such material, the Bill advances these rights.*¹⁹

Further, the Australian Government has recently released Terms of Reference for the Online Safety Act Review, which will have regard to “ensuring industry acts in the best interests of the child”.²⁰

For the purposes of the BOSE Determination, it is therefore questionable whether these need to be repurposed in subordinate legislation, as they are already reflected in the Online Safety Act and subject to the forthcoming review of the Act.

Setting aside this technicality, we support service providers taking reasonable steps to protect children online, especially in the realm of video games, where this is catered for as part of their range of currently available tools. As a matter of global industry best practice, service providers should be implementing these for services *targeted at or exposed to* children.

However, we caution against the scenario where services are merely *used by, or accessible to*, children. There are never fool-proof mechanisms that can prevent minors from intentionally circumventing systems in order to *use or access* content where they choose to do so. It would be technically infeasible and unrealistic to set that expectation on service providers.

6.2 Age assurance and Class 2 material

With respect to the proposed requirement for service providers to implement age assurance mechanisms, we note that the Australian Government has already stated its position regarding age verification.²¹ In particular, eSafety’s Roadmap for Age Verification found that age assurance technologies were immature and presented their own privacy, security, effectiveness and implementation issues; hence the Government was unable to mandate age assurance.²²

The Government did note that the BOSE Determination enables eSafety to require online services to report on how they are meeting the BOSE, including examples of reasonable steps for industry that could include implementing age assurance mechanisms for preventing access by children to Class 2 material.²³ However, the Government also

¹⁹ [Addendum to the Explanatory Memorandum to Online Safety Bill 2021](#), p. 6.

²⁰ Australian Government Terms of Reference – Statutory Review of the Online Safety Act 2021 (February 2024), p. 4, <https://www.infrastructure.gov.au/departments/media/publications/terms-reference-statutory-review-online-safety-act-2021>.

²¹ Australian Government response to the Roadmap for Age Verification, (August 2023), <https://www.infrastructure.gov.au/sites/default/files/documents/government-response-to-the-roadmap-for-age-verification-august2023.pdf>.

²² *Ibid*, p. 2.

²³ *Ibid*, p. 5.

indicated that it would wait for the outcomes of the Class 2 Codes process before even deciding on a potential trial of age assurance technologies.²⁴

Therefore, it would be inappropriate to inadvertently reopen this discussion as part of the BOSE Determination consultation, while the Class 2 Codes process have not even commenced and been completed.

Finally, Class 2 material will be subject to the industry codes development process, managed by eSafety. Therefore, it would be inappropriate to introduce new requirements relating to Class 2 material at this stage of the BOSE Determination.

Recommendations:

- **With respect to the proposal for service providers to take reasonable steps to ensure the best interests of the child, this should be referring to the design and operation of any service that is “targeted at children” (as opposed to “used by, or accessible to, children”).**
- **The proposed introduction of a “reasonable step” example “to ensure that technological and other measures are in effect to prevent access by children to Class 2 material” by “implementing appropriate age assurance mechanisms”, is out of scope and should not be included in the BOSE Determination consultation.**
- **For similar reasons, the proposed introduction of a “reasonable step” example “to ensure that technological and other measures are in effect to prevent access by children to Class 2 material” by “continually seeking to develop, support or source, and implement improved technologies and processes for preventing access by children to class 2 material”, is also out of scope and should not be included in the BOSE Determination consultation.**

7. Safety impacts of business and resourcing decisions

The Department considers that services providers “not only need to consider safety impacts on end-users in Australia in the development and implementation of their products and services, but also when they make business decisions that are likely to have a significant adverse impact on the ability of end-users to use their service in a safe manner”.²⁵ Similar reasons are also provided for when businesses make resourcing and investment decisions.

²⁴ Ibid.

²⁵ Amending the Online Safety (Basic Online Safety Expectations) Determination 2022 – Consultation paper, pp. 12-13.

The Department therefore proposes new examples relating to the safety impacts of business and resourcing decisions in the BOSE Determination:²⁶

- Business decisions: New paragraph 6(3)(f) provides a new example of a reasonable step to ensure that end-users are able to use the service in a safe manner, namely: assessing whether business decisions will have a significant adverse impact on the ability of end-users to use the service in a safe manner and in such circumstances, appropriately mitigating the impact.
- Staff and resources: New paragraph 6(3)(g) provides a new example of a reasonable step to support services to respond to reports and complaints within a reasonable time (as required by new subsection 14(3)), namely: having staff, systems, tools and processes to action reports and complaints within a reasonable time in accordance with subsection 14(3).
- Investment: New paragraph 6(3)(h) provides a new example of a reasonable step to ensure that end-users are able to use the service in a safe manner, namely: investing in systems, tools and processes to improve the prevention and detection of material or activity on the service that is unlawful or harmful.
- Point of contact: For the avoidance of doubt, a new explanatory note will be included at the end of subsection 21(1) stating that the service provider is expected to have a designated contact point regardless of whether the service has staff physically located in Australia.

While it may be well-intentioned, we are concerned with the over-prescriptiveness of these proposed new examples of reasonable steps. It sets a dangerous precedent that could lead to unintended consequences.

Several issues with these proposals include:

- Confidentiality: Business decisions that include staff resourcing can be commercially sensitive and it would be inappropriately intrusive for eSafety to provide public commentary on, amounting to naming and shaming. Further, such information could be misused or mishandled without appreciating their commercial sensitivity or privacy.
- Requisite business expertise and knowledge: There is a presumption that eSafety would have the relevant business expertise to “walk in the business’ shoes” or the requisite knowledge to comment on business operations. This would be overstepping eSafety’s capabilities, amounting to regulatory overreach.
- Causation: There is a logical fallacy to assume a causal link can be drawn between a service provider’s business, resourcing and investment decisions and the maturity of a service provider’s online safety posture and its impact on end users.
- Representation of information: Public commentary made by eSafety, based on information provided by service providers through these proposals, could be

²⁶ Ibid.

misinformed without properly understanding the context of the shared information and providing service providers with a fair right to be heard and respond.

Therefore, the proposals regarding the safety impacts of business and resourcing decisions need to be seriously reviewed or otherwise removed from the scope of the BOSE Determination consultation.

Finally, the proposed inclusion of a reasonable step example relating to service providers “investing in systems, tools, and processes to improve the prevention and detection of material or activity on the service that is unlawful or harmful” is currently under consideration as a part of the RES Standard. For this reason, it should be omitted from this consultation.

Recommendations:

- **Any proposed obligations on service providers to share information with eSafety should ensure the regulator implements appropriate safeguards in managing such information in accordance with due process, transparency, confidentiality, and privacy.**
- **With respect to the safety impacts of business and resourcing decisions, we strongly caution against including a provision for this in the BOSE Determination. It sets a dangerous precedent for the regulator to seek information about sensitive commercial business decisions (including staff resourcing and investments) and the potential subsequent misuse or misrepresentation of that information to draw a causal link to online safety issues.**
- **Regarding the proposed inclusion of a reasonable step example relating to service providers “investing in systems, tools, and processes to improve the prevention and detection of material or activity on the service that is unlawful or harmful”, the Determination should either directly refer to the RES Standard or remove this requirement as it is already being considered as part of the RES Standard.**

8. Hate speech

The Department considers that online hate speech is not currently covered in the BOSE Determination, although sections 6 and 14 include requirements for service providers regarding: reasonable steps to minimise the provision of unlawful and harmful material on a service; and having terms of use, policies, and procedures in relation to user safety, and policies and procedures for dealing with reports and complaints.²⁷ In addition, there are

²⁷ Ibid, pp. 14-15.

laws in all Australian jurisdictions addressing hate speech through concepts including anti-discrimination, vilification, and incitement.

The Department therefore proposes a new paragraph 6(3)(i) to provide for a reasonable step “in ensuring end-users are able to use a service in a safe manner” by “having processes for detecting and addressing hate speech that breaches a service’s terms of use and, where applicable, breaches a service’s policies and procedures and standards of conduct mentioned in section 14”.²⁸ It also proposes a non-exhaustive definition for hate speech under new subsection 6(4).

In general, we support providing appropriate mechanisms to protect users against hate speech. Regarding video games, as a matter of global industry best practice, service providers should be implementing mechanisms to protect against this where it is technically feasible.

For instance, we understand in practice that video game services have systems to manage hate speech in written form. However, there is limited or no technology capable of handling hate speech in oral form.

Recommendation: The proposed inclusion of a reasonable step that requires the implementation of processes for detecting and addressing hate speech has its practical limitations if it relates to managing hate speech delivered orally (as opposed to in written form), due to limitations in technology. Therefore, inclusion of this reasonable step needs to be reviewed to ensure technical feasibility or otherwise be deferred for further consideration as part of the Online Safety Act review.

9. Additional transparency reporting

The Department proposes a new section 18A in the BOSE Determination to create an additional expectation for service providers to publish regular transparency reports.²⁹ It suggests that the “BOSE Determination does not currently contain any expectations for service providers to publish information about the safety measures deployed on their service, the effectiveness of those measures, or how their service is enforcing its own terms of use, policies and procedures and standards of conduct”. It concludes that “transparency reporting would provide users with relevant information so that they can make informed choices about the services on offer and the safety measures available”.

New reporting obligations have already been proposed as part of the RES Standard, which is currently under consultation by eSafety. In those discussions, we raise issues concerning

²⁸ Ibid.

²⁹ Ibid, pp. 15-16.

duplicated reporting requirements, the purpose of reporting requirements, and safeguards around reporting as a sound regulatory practice.

Given that reporting obligations are being proposed for the RES Standard, we consider adding additional transparency reporting under the BOSE Determination redundant and superfluous. Should the Department proceed with additional transparency reporting requirements, it should be subject to appropriate safeguards that promote due process, transparency, confidentiality, and privacy.

Recommendations:

- **Transparency reporting is a subject currently under consideration as part of the RES Standard consultation by eSafety, including issues relating to duplicated reporting requirements, and therefore not appropriate for additional consideration as part of the BOSE Determination.**
- **Should the Department wish to proceed with additional transparency reporting in the BOSE Determination, these should be built upon appropriate safeguards that promote due process, transparency, confidentiality and privacy.**

10. Enforcement of terms of use

The Department considers that the “BOSE Determination does not currently contain any expectations about the speed with which service providers should review and respond to reports and complaints about unlawful and harmful material or activity, or the need to keep those who make reports and complaints informed of what action has been taken in response”.³⁰ Therefore, its proposed new subsections 14(3), 14(4) and 14(5) are aimed to address these gaps.

Concerning anonymous accounts, the Department considers that “paragraph 9(2)(a) provides one example of a reasonable step to prevent anonymous accounts from being used to deal with unlawful or harmful material, is having processes that prevent the same person from repeatedly using anonymous accounts to engage in such conduct. However, this example of a reasonable step does not provide that services should take proactive measures to prevent anonymous accounts being used to engage in this conduct”.³¹ It therefore considers that its proposed “amendment emphasises that services should take proactive steps to prevent individuals from using anonymous accounts to circumvent enforcement action (e.g. bans or suspensions) taken by a service against them”.

³⁰ Ibid, pp. 16-19.

³¹ Ibid, pp. 19-20.

The Department proposes several amendments to the BOSE Determination around addressing terms of use, namely:³²

- Detecting breaches of terms of use, policies and procedures and standards of conduct: Proposed subsection 14(1A) is a new additional expectation, where the service provider will take reasonable steps (including proactive steps) to detect breaches of its terms of use and, where applicable, breaches of policies and procedures in relation to the safety of end-users, and standards of conduct for end-users.
- Enforcement of policies and procedures and standards of conduct, and readily identifiable reporting mechanisms:
 - Amend subsection 14(2), where the service provider will take reasonable steps (including proactive steps) to ensure that any penalties specified for breaches of its terms of use, policies and procedures in relation to the safety of end-users, and standards of conduct for end-users, are enforced against all accounts held or created by the end-user who breached the terms of use and, where applicable, breached the policies and procedures, and standards of conduct, of the service.
 - Amend subsection 15(2), where the service provider will ensure that the service has clear and readily identifiable mechanisms that enable any person ordinarily resident in Australia to report, and make complaints about, breaches of the service's terms of use and, where applicable, breaches of the service's policies and procedures and standards of conduct mentioned in section 14.
- Additional expectation on timely resolution of complaints and reports: Proposed subsection 14(3) (accompanied by new subsections 14(4) and 14(5)) will create a new additional expectation, where the service provider will, within a reasonable period of time, review and respond to reports and complaints mentioned in sections 13 and 15, and provide feedback on the action taken.
- Proactive prevention of recidivism through the use of anonymous accounts: Amended paragraph 9(2)(a) provides that a reasonable step to prevent anonymous accounts from being used to deal with material or activity that is unlawful or harmful, namely having processes, including proactive processes, that prevent the same person from repeatedly using anonymous accounts to post material, or to engage in activity, that is unlawful or harmful.

We note that the subject relating to terms of use and end-user and account holder complaints and reporting mechanisms are currently under consideration in the RES Standard. As such, we recommend that it is premature also to consider this as part of the BOSE Determination. Otherwise, it could lead to duplicated and conflicting requirements between the RES Standard and BOSE Determination.

Further, as a general comment, the service provider should be given the flexibility in how it enforces breaches of terms of use, especially if it relates to low impact issues compared to

³² Ibid, pp. 16-20.

high impact issues on the other end of the spectrum. Also, implementing processes for service providers to respond to individual end-user reports, with feedback on actions taken, will be difficult to implement in practice; this should not be included as a requirement as it may not be technically feasible and, depending on the circumstances, may not be necessary or reasonable.

Recommendation: Terms of use, and end-user complaints and reporting mechanisms are currently under consideration as part of the RES Standard consultation by eSafety, and therefore not appropriate for additional consideration as part of the BOSE Determination.

Thank you for allowing IGEA to contribute to the Department's consultation on its proposed amendments to the BOSE Determination. For more information on any issues raised in this submission, please contact IGEA's Director of Public Policy & Government Relations, Charles Hoang, at [REDACTED] or [REDACTED]