Submission to Online Safety Act 2021, Review

21 June 2024

australia new zealand screen association

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ABOUT ANZSA

This submission is made on behalf of the Australia New Zealand Screen Association (ANZSA). The ANZSA represents the film and television content and distribution industry in Australia and New Zealand.[1] Its core mission is to advance the business and art of filmmaking, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all services.

Our member companies produce and distribute a wide range of film and television content in Australia and either have, or are making plans to have, direct-to-consumer online-curated-content / video-on-demand ("OCC" / "VOD") services operating in Australia.

Introduction

We thank the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) for the opportunity to provide comments on the ongoing review of the *Online Safety Act 2021* ("the OSA"). ANZSA and its members are committed to providing a safe, age-appropriate environment for consumers and their families. We also note the recent amendments made on May 30 to the *Basic Online Safety Expectations (BOSE) Determination* to encourage further enhanced protections for Australians from unlawful and harmful material.[2]

VOD services in Australia (including those owned by ANZSA member companies) adhere to the required classification requirements under the *Classification (Publications, Films and Computer Games) Act 1995* ("the Classification Act"), and already provide local classification rating and consumer advice for their titles in accordance with the Act. This rating and consumer advice may be obtained by applying directly to the Board, or through self-classification using an approved classification tool or an accredited classifier.[3]

Our comments on the OSA are made in the context of working towards achieving online safety in a manner that avoids imposing unnecessary regulatory burdens and improving the ease of doing business. We focus on responding to Part 2 of the Issues Paper (around Australia's regulatory approach to online services, systems and processes).

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[1] The ANZSA-represented companies are: Motion Picture Association; Walt Disney Studios Motion Pictures; Netflix Inc.; Paramount Pictures; Sony Pictures Releasing International Corporation; Universal International Films, Inc.; Warner Bros. Pictures International, a division of Warner Bros. Entertainment Inc., Village Roadshow Limited and Fetch TV.

[2] https://minister.infrastructure.gov.au/rowland/media-release/online-safety-expectations-boost-transparency-and-accountability-digital-platforms

[3] https://www.classification.gov.au/classification-ratings/industry-classifications

As such we are responding to the following Questions outlined in the Issues Paper:

- Question 2: Does the Act capture and define the right sections of the online industry?
- Question 3: Does the Act regulate things (such as tools or services) that do not need to be regulated, or fail to regulate things that should be regulated?

Definitions of "Designated Internet Service"

The OSA has a very broad definition of "designated internet service". The Issues Paper itself notes that "[d]esignated internet services are broadly defined… [and] present very different levels of risks to users" (page 16).

This broad definition appears to inadvertently capture video-on-demand ("VOD") services, including subscription video-on-demand ("SVOD"). As stated in the Issues Paper, the OSA excludes "on-demand program service[s]" as defined in the *Broadcasting Services Act 1992 ("the BSA").* However, the BSA defines "on-demand services" as those provided by commercial, subscription and national "broadcasters", limiting this to catch-up TV, i.e. broadcasting video-on-demand ("BVOD") services.[4] This narrow, limited exception for BVOD means that other VOD services which provide curated libraries of professionally-produced and classified content, including ANZSA member services, are currently captured in the OSA as "designated internet services".

VOD services, including both SVOD and BVOD services, offer professionally-curated content, where each piece of content is owned or licensed by the service. This content has also been reviewed by in-house experts experienced in implementing standards and practices; and already adhere to the relevant classification requirements under the Classification Act. There is no policy reason for treating these services differently, and we argue they should be treated alike, equally within the BSA's definition of "on-demand program services", and out of scope of the OSA.

Reducing Undue Regulatory Burdens on VOD Services

VOD services currently must comply with a range of regulatory requirements which are not relevant to them because of their inclusion in the OSA.

As a "designated internet service", VOD services must comply with the requirements under the (soon to be finalised) Class 1 Standards, which were drafted to ensure "that providers of designated internet services establish and implement systems, processes and technologies to manage effectively risks that Australians will solicit, generate, distribute, get access to or be exposed to class 1A material or class 1B material through the service".[5]

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[4] See part 18 of the Broadcasting Services Act 1992, definition of 'on-demand program service'.

[5] Section 4 of the Draft Online Safety (Designated Internet Services - Class 1A and Class 1B Material) Industry Standard 2024.

However, the display or distribution of Class 1 material by VOD services is already prohibited under the obligations of the Classification Act. In spite of this, VOD services have dedicated significant resources to supporting the development of the Class 1 Designated Internet Services Code. One of our members estimates they have already devoted approximately 15 days (or over 110 hours) to the process of assisting with drafting and reviewing the Class 1 Codes and Standards.

Further, VOD services will be required to dedicate further resources to ensure they comply with the Class 1 Standard's regulatory requirements, even though they cannot host or facilitate access to Class 1 content. These requirements include but are not limited to: providing reports to the Office of the eSafety Commissioner about their risk profile and assessment, when requested (Section 34); offering complaint handling services, and notifying the complainant of the outcome of the investigation (Section 40); and keeping records that set out the actions the provider has taken to comply with the industry standard, for 2 years (Section 41). There is no reason why VOD services should have to comply with regulatory burdens aimed at preventing access to content which they are legally prevented from carrying.

VOD services will also be required to comply with the (soon to be drafted) Class 2 Codes, which outline regulatory requirements for online pornography and "other high impact content".[6] However, VOD services do not provide access to online pornography and already are subject to a number of obligations for R18+ content under the Classification Scheme.

We therefore argue that the definition of "designated internet service" should be amended to reduce the undue regulatory and administrative burden on VOD services related to content which they do not provide access to.

Taking A Risk-Based Approach

Currently, the OSA does not apportion obligations on services based on their purpose or functionality or the extent to which the service interfaces with the public. This is out of step with approaches in other jurisdictions, such as the United Kingdom's Online Safety Bill, which assesses potential for risk (through a risk threshold, size or reach assessments) and subjects relevant services to proportionate regulatory requirements.

We would therefore encourage the Department to consider amending the OSA to take a risk-based approach to regulation in order to avoid undue regulatory burdens. The OSA should focus regulatory efforts on services which present the greatest risk of harm, while taking a light-touch approach towards services which are already taking reasonable steps to implement the necessary systems, processes and service features to mitigate the potential risk of harm.

We would further add that VOD services are inherently low-risk, due to a number of factors:

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[6] September 2021, Position Paper: Development of Online Safety Codes, page 23. See here.

- VOD services are distinct from User Generated Content (UGC) services, as they provide curated libraries of professionally-produced content and do not have chat functions or provide the ability to upload content;
- Subscribers to VOD services choose what they wish to view, at a time they wish to view it, on a device of their choice;
- VOD services are already subject to the Classification Act, and required to provide local classifications and advisories, as described above;
- VOD services provide a range of controls to prevent access to age-inappropriate content, such as requiring a credit card for sign-ups and offering parental controls.

While we argue that VOD services should be out of scope of the OSA, we also recognise that some VOD services may provide additional services, such as gaming, which will continue to be regulated under the OSA. This is appropriate.

Reassessing Duplicative Regulation between the Classification Act and Online Safety Act

We also note that the OSA and the Classification Act are currently linked, and there is unneeded duplication in the types of material the two Acts seek to regulate. The Classification Scheme is designed to regulate content which is legal but may be objectionable,[7] while the OSA regulates harmful online content.

However, the OSA relies on the Classification Act's definitions of Class 1 and 2 material; these references do not always appropriately capture material that may or may not be harmful. For example, Class 2 material is defined broadly to include legal material such as R18+ films that adults can watch on streaming services, R18+ games, and X18+ material that includes pornography. We are concerned that this provides the eSafety Commissioner with the power to request removal of R18+ content on a video on demand service, or an R18+ game which is (1) legal, (2) professionally produced and that has been appropriately classified under the Classification Act, and (3) produced for literary, artistic, or educational purposes.[8]

The Government should seek to address such duplicative regimes and lack of clarity by limiting the eSafety Commissioner's powers to Class 1 content, or Class 2 content that has not be classified in accordance with the Classification Act. This would refocus the Online Safety Act more clearly on online content which is, or may be, harmful.

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[7] See the recent Consultation Paper on classification reform, which states that the Classification Scheme is designed so that "adults should be able to read, hear, see and play what they want; children should be protected from material likely to harm or disturb them; and everyone should be protected from exposure to unsolicited material that they find offensive." Public Consultation: Modernising Australia's Classification Scheme - Stage 2 Reforms, Page 8, April 2024.

[8] Section 11, Classification (Publications, Films and Computer Games) Act 1995.

We hope the comments above are helpful. ANZSA is grateful for the opportunity to participate in this consultation and we are happy to meet the Department to answer any questions.

Paul Muller

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