

9 February 2023

John Stanton
Chief Executive Officer
Communications Alliance

Sunita Bose
Managing Director
Digital Industry Group Inc

Ron Curry
Chief Executive Officer
Interactive Games & Entertainment Association

By email: [REDACTED], [REDACTED] and [REDACTED]

Invitation to respond and/or submit amended draft code – App Distribution Services Code

Dear John, Sunita and Ron,

On 18 November 2022, I received a request from the six industry associations making up the Steering Group (**Steering Group**) to register the Consolidated Industry Codes of Practice for the Online Safety Industry (Class 1A and Class 1B Material) pursuant to section 140 of the *Online Safety Act 2021 (Cth)* (**the Act**).

As presented, the Consolidated Industry Codes comprise a set of head terms, and eight separate industry codes that apply to different sections of the online industry. In the request for registration, Communications Alliance, Digital Industry Group Inc and Interactive Games and Entertainment Association (collectively, the **Industry Bodies**) indicated that together they represent providers of app distribution services and were responsible for developing the App Distribution Services Online Safety Code (Class 1A and Class 1B Material) (**draft App Distribution Code**).

Section 140 of the Act gives me, as the eSafety Commissioner, power to register an industry code. I have considered the relevant requirements under the Act, taking into account the Steering Group's submission and accompanying documents.

I have not yet made a decision whether to register the draft App Distribution Code, but have formed a preliminary view. The **attached** statement sets out my preliminary view on the draft App Distribution Code and provides you with an opportunity to respond and/or submit an amended draft code before I finalise my decision. Separate letters will be sent to the relevant industry associations in relation to each draft industry code.

If I decide not to register a code for a section of the online industry, I intend to determine an industry standard under section 145 of the Act for that section of the online industry.

Next steps

I invite you to respond to this letter and/or submit an amended draft App Distribution Code by 5pm AEDT on 9 March 2023.



If you have any questions about this letter, please contact Morag Bond, Executive Manager, Legal MarComms and Research [REDACTED], or Maggie Law, Co-Manager, Industry Codes Team, on [REDACTED], or the eSafety Industry Codes Team at [REDACTED]

Yours faithfully,

A handwritten signature in black ink that reads "Julie Inman Grant".

Julie Inman Grant
eSafety Commissioner

Statement of Preliminary Views – App Distribution Services Code

Summary

On the information currently available, the eSafety Commissioner’s preliminary view is that:

- the draft App Distribution Code does not meet the requirement under s 140(1)(b) of the Act, because the code is expressed to apply in respect of ‘Australian end-users’ rather than ‘end-users in Australia’,
- the draft App Distribution Code does not meet the requirement under s 140(1)(d) of the Act, because it does not provide appropriate community safeguards for matters of substantial relevance to the community (as identified in the Request for registration), namely Matters 1, 5, and 11, and
- as a result, the eSafety Commissioner’s jurisdiction to register an industry code under s 140(2) is not enlivened.

Industry Bodies are invited to provide a response to this Statement of Preliminary Views and/or submit an amended industry code addressing the areas of concern set out in the Next Steps section below.

Background

1. On 11 April 2022, the eSafety Commissioner (**eSafety**) issued a notice to the Industry Bodies, requesting the development of an industry code that applies to participants in the group consisting of providers of app distribution services, so far as those services are provided to end-users in Australia (as defined under s 135(2)(e)).
2. The notice required an industry code dealing with specified matters to be submitted to eSafety by close of business on 9 September 2022. By variation issued on 24 June 2022, eSafety extended the due date for submission of the industry code to 18 November 2022.
3. By email dated 18 November 2022, the Industry Bodies submitted the draft App Distribution Code to eSafety for registration. Accompanying the draft App Distribution Code were a cover letter, an explanatory document titled ‘Request for registration’, and a submission log from the public consultation and industry associations’ responses to public consultation.

Section 140 requirements

4. eSafety has reviewed the Industry Bodies’ submission, including the accompanying documents. eSafety has also closely considered the draft App Distribution Code in light of previous discussions with members of the Steering Group, as well as other factors such as the current industry practices. eSafety has the effectiveness and enforceability of the proposed compliance measures.
5. Section 140(1) of the Act sets out the conditions which must be met in order to enliven the eSafety’s discretionary power under s 140(2) to register a code. Based on the information currently available, eSafety is unlikely to be satisfied that all of the conditions in s 140(1) are met. Consequently, the power to register an industry code under s 140(2) of the Act would not be enlivened. The reasons for this are set out below.

Section 140(1)(b) requirement

6. Section 140(1)(b) of the Act requires eSafety to be satisfied that an industry code submitted by a body or association referred to in s 140(1)(a) applies to participants in that section of the online industry and deals with one or more matters relating to the online activities of those participants.
7. The relevant 'section of the online industry' for the draft App Distribution Code is the group consisting of providers of app distribution services, so far as those services are provided to end-users in Australia, as described in s 135(2)(e).¹
8. The relevant 'online activity' for the draft App Distribution Code is providing an app distribution service, so far as the service is provided to end-users in Australia, as defined in s 134(e).
9. Clause 2(a) of the draft App Distribution Code stipulates its scope applies only 'to the extent that they provide a service that enables the download of third-party apps by Australian end-users'. The term 'Australian end-users' is also used throughout the App Distribution Code.
10. eSafety considers that 'end-users in Australia' and 'Australian end-users' are materially different concepts, despite the likely overlap, because the former reflects an end-user's geographical location, while the latter (as defined in the head terms) reflects the ordinary residency status of the end-user.
11. While some parts of the Act refer to 'Australians' and 'end-user' who is 'ordinarily resident in Australia', the provisions identifying the sections of industry and online activities subject to the proposed codes (ss 134-135) are not expressed in these terms. eSafety considers that the registration criteria in s 140 must be considered by reference to ss 134-135.
12. eSafety considers it is unlikely the draft App Distribution Code would satisfy s 140(1)(b) of the Act because the code is expressed to apply in respect of 'Australian end-users' and not to the relevant group of providers, described in s 135(2)(e), or to the relevant online activity, described in s 134(e).

Section 140(1)(d) requirement

13. Section 140(1)(d)(i) of the Act requires eSafety to be satisfied that, to the extent the draft App Distribution Code deals with one or more matters of substantial relevance to the community, the code provides appropriate community safeguards for that matter or those matters.
14. eSafety considers that the draft App Distribution Code will unlikely meet the requirement under s 140(1)(d)(i) of the Act, because it does not provide appropriate community safeguards for Matters 1, 5 and 11 for the reasons outlined below.

¹ For the avoidance of doubt, eSafety is satisfied at this stage that the requirement under s 140(1)(a) that the Industry Bodies represent providers of app distribution services, so far as those services are provided to end-users in Australia, has been met. This Statement of Preliminary Views relates only to the scope of the draft App Distribution Code as submitted.

Matter 1

Measures directed towards achieving the objective of ensuring that industry participants have scalable and effective policies, procedures, systems and technologies in place to take reasonable and proactive steps to detect and prevent access or exposure to, distribution of, and online storage of class 1A material.

15. The draft App Distribution Code proposes minimum compliance measures (**MCMs**) 1 and 2 to deal with Matter 1.
16. eSafety's preliminary view is that MCM 1, as currently drafted, is insufficient to provide appropriate community safeguards for Matter 1 because:
 - (a) there is no clear commitment by app distribution service providers to apply or enforce their terms of agreements with third-party app providers where they fail to comply with Australian content laws; and
 - (b) there is insufficient specificity on the review process that app distribution service providers are required to undertake before third-party apps are released on the service (for example specific material and/or policies).

Enforcement of agreements with third-party app providers

17. eSafety has previously identified in earlier versions of the code a lack of clarity on the enforcement action to be taken by app distribution service providers where third-party app providers fail to comply with Australian content laws. In response, the Steering Group raised concerns that requiring enforcement of policies risked being too prescriptive on enforcement measures and interfering with parties' freedom to contract.
18. eSafety recognises the importance of proportionality in responding to potential breaches of policies. However, eSafety considers it reasonable and appropriate for MCM 1 to include a commitment on app distribution service providers to apply and enforce the terms of *their agreements* with third-party app providers, which cover compliance with Australian content laws and regulations.
19. eSafety also has concerns that the absence of such commitment may impact the effectiveness of the reporting mechanism under MCM 8. This is because an app distribution service provider's reporting requirement will not include reporting on enforcement action taken under their agreements in response to third-party app providers failure to comply with Australian content laws (as regards class 1 material). This omission may affect the ability of the code to provide transparency of and accountability for class 1 material.

Review of third-party apps

20. eSafety has also raised previously with the Steering Group a need for greater clarity around the review processes for third-party apps. MCM 1(c) requires app distribution service providers to 'review, to the extent reasonably practicable, third-party apps', but offers no further requirements as to scope or content of the reviews.

21. eSafety recognises app distribution service providers have limited visibility over the content populated after an app is downloaded, however this MCM falls short of providing meaningful requirements regarding the content of a review process or policy of an app distribution service provider prior to an apps' release on their services.
22. Most app distribution service providers currently have review policies which stipulate the content and policies considered prior to the app being approved and made available to end-users. These policies often require third-party apps comply with content laws as well as have policies on user generated content. The existence of such review policies suggest that app distribution providers are able to put in place and follow policies which involve meaningful review of the apps they distribute.

Matter 5

Measures directed towards achieving the objective of ensuring that industry participants have effective and scalable policies and procedures in place to facilitate consultation, cooperation and collaboration with other industry participants in respect of the removal, disruption and/or restriction of class 1A material and class 1B material, as well as accounts associated with this material.

23. The draft App Distribution Code proposes MCM 4 to deal with Matter 5. eSafety's preliminary view is that participation in annual forums alone is likely to be insufficient to provide appropriate community safeguards for Matter 5.
24. eSafety views the timely and effective cooperation between app distribution service providers regarding apps hosting class 1A material as important to provide appropriate community safeguards in relation to this matter. Without timely intervention, bad actor apps may forum shop between app distribution services or potentially remain undetected and available on other app distribution services.
25. eSafety's preliminary view is that, in order to provide appropriate community safeguards for Matter 5, the draft App Distribution Code should include a commitment from app distribution service providers to communicate in a timely manner in order to collaborate on the removal of apps as a result of class 1A and 1B material. eSafety considers this more effective than relying on direction from law enforcement or on eSafety exercising its formal app removal power under the Act. eSafety's Position Paper set out a number of examples of such active collaboration measures (page 70).

Matter 11

Measures directed towards achieving the objective of ensuring that industry participants publish annual reports about class 1A material and class 1B material, and their compliance with industry codes.

26. The draft App Distribution Code proposes MCM 8 to deal with Matter 11. Under MCM 8, app distribution service providers are required to submit a code compliance report within 6 months of receiving a request from eSafety.
27. Under this MCM, the report must be submitted within 6 months of receiving the request, although any request that would otherwise be due within the first 12 months after the code comes into effect is not due until 12 months after the code comes into effect. The head terms further provide that a code does

not come into effect until 6 months after registration. This means that no reports would be due to eSafety until 18 months after registration at the earliest.

28. eSafety has concerns that the timeframe for responding to requests for reports under MCM 8 will impact eSafety's ability to consider an app distribution service provider's compliance with code commitments, as well as eSafety's ability to provide constructive input into the first review of the App Distribution Code. Without an effective review process, the capability of the App Distribution Code to provide appropriate community safeguards may be compromised.
29. eSafety's preliminary view is that the proposed 6 months' response timeframe in MCM 8 is likely to prevent this MCM from providing appropriate community safeguards in relation to this matter, and suggests that a reasonable response timeframe of 2 months would be appropriate.

Enforceability of the code

30. In order to provide appropriate community safeguards under s 140(1)(d) of the Act, the head terms and the specific provisions in each industry code, when read as a whole, must be capable of being implemented and being enforced. This means ensuring service providers, eSafety and other parties have sufficient certainty and clarity about the obligations under the codes. At the same time, eSafety recognises the importance of a balance between flexibility and ensuring compliance can be assessed and enforced.
31. eSafety has identified provisions in the head terms which are phrased and/or structured in ways that risk rendering the proposed compliance measures ineffective, or potentially impractical to measure and enforce.

Limitation clause in the head terms

- Clause 6.1 (e)(iii), (h), (i) and (j) and clause 6.2 each limit the code commitments from requiring industry participants to take action or engage in conduct that would violate other laws. As previously communicated to Industry Bodies, eSafety considers that the blanket exclusions are not desirable and that it would be more appropriate for service providers to communicate concerns to eSafety when a specific issue arises as to how compliance with a code requirement may breach a law and/or explore alternative approaches to meeting the minimum compliance measures of the code while still meeting other legal requirements.

Next steps

32. The Industry Bodies are invited to respond to the Statement of Preliminary Views and submit an amended code that addresses all of the following:
 - (a) the scope and application of the draft App Distribution Code should align with the language of the Act where the relevant section of the online industry and relevant online activity are described by reference to 'end-users in Australia';
 - (b) MCM 1 should be expanded to include:

- i. a clear commitment from app distribution service provider to apply and enforce the terms of their agreements with third-party app providers where they fail to comply with Australian content laws (eSafety's interest is in relation to class 1A material); and
 - ii. greater specificity on the review process that app distribution service providers are required to undertake before third-party apps are made available on the service (for example specific factors that would be considered and/or policies to be followed).
 - (c) a commitment to the timely sharing of information app distribution service providers to address Matter 5 to facilitate timely removal of 'bad actor' apps.
 - (d) the response timeframe in MCM 8 to submit a code compliance report upon eSafety's request should be revised to 2 months.
33. If Industry Bodies decide not to submit an amended code but wish to provide further-information, the information should clearly explain how the MCM will, despite the express concerns identified above, provide appropriate community safeguards.
34. Any submission and revised code will need to be provided to eSafety by 5pm AEDT Thursday 9 March 2023, in order for the eSafety Commissioner to take it into account before making her final decision. For the avoidance of doubt, eSafety makes no representations that an amended code addressing the above concerns will be registered by default.