

9 February 2023

Louise Hyland  
Chief Executive Officer  
Australian Mobile Telecommunications Association

John Stanton  
Chief Executive Officer  
Communications Alliance

Ian McAlister  
Chief Executive Officer  
Consumer Electronics Suppliers' Association

Ron Curry  
Chief Executive Officer  
Interactive Games & Entertainment Association

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

#### Invitation to respond and/or submit amended draft code – Equipment

Dear Louise, John, Ian, 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, the Australian Mobile Telecommunications Association, Communications Alliance Ltd, the Consumer Electronics Suppliers' Association and the Interactive Games and Entertainment Association (collectively, the **Industry Bodies**) indicated that together they represent persons who manufacture, supply, maintain or install equipment for use by end-users in Australia of a social media service, relevant electronic service, designated internet service or internet carriage service in connection with those services, and were responsible for developing the Equipment Online Safety Code (Class 1A and Class 1B Material) (**draft Equipment 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 Equipment Code, but have formed a preliminary view. The **attached** statement sets out my preliminary views on the draft Equipment Code, and provides you with an opportunity to respond and/or submit an amended draft code before I finalise my decision. Separate letters are being sent in relation to each draft industry code to the applicable Industry Bodies.

If I decide not to register a draft industry codes 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 provide a response to this letter and/or submit an amended draft Equipment 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 on [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 – Equipment Code

### Summary

On the information currently available, the eSafety Commissioner is likely to conclude that:

- the draft Equipment Code does not meet the requirement under s 140(1)(b) of the Act, because the code is expressed to apply in respect of equipment to be used by ‘Australian end-users’ rather than ‘end-users in Australia’,
- the draft Equipment 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, 2, 6, 7, 8, 9, 10 and 11. Most concerns eSafety has identified can be traced to the risk assessment methodology, and
- as a result, the eSafety Commissioner’s jurisdiction to register an industry code under s 140(2) is not enlivened.

The Industry Bodies are invited to provide a response to this Statement of Preliminary Views and 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 persons who manufacture, supply, maintain or install equipment for use by end-users in Australia of a social media service, relevant electronic service, designated internet service or internet carriage service in connection with those services (as specified under s 135(2)(h)).
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 Equipment Code to eSafety for registration. Accompanying the draft Equipment 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.

### Assessment of the s 140 requirements

4. eSafety has reviewed the Industry Bodies’ submission, including the accompanying documents. eSafety has closely considered the draft Equipment Code in light of previous discussions with members of the Steering Group, together with a range of factors such as current industry practice and the type of technological tools available to and used by participants in the Equipment industry. eSafety has closely considered the effectiveness and the 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 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, and that the power to register an industry code under s 140(2) of the Act is consequently not 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 a 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 Equipment Code is the group consisting of persons who manufacture, supply, maintain or install equipment for use by end-users in Australia of a social media service, relevant electronic service, designated internet service or internet carriage service in connection with those services, as specified in s 135(2)(h).<sup>1</sup>
8. The relevant 'online activity' for the draft Equipment Code is manufacturing, supplying, maintaining or installing equipment that is for use by end-users in Australia of the above services in connection with those services, as specified in s 134(h).

### Scope of the Draft Equipment Code

9. The scope of the draft Equipment Code is defined by reference to multiple interlinking definitions which need to be considered in light of the description of the relevant section of the online industry and the relevant online activity, set out in the Act.
10. Clause 2 of the draft Equipment Code stipulates its scope applies to:
  - (a) 'manufacturers', to the extent that equipment is for use by Australian end-users,
  - (b) 'suppliers', to the extent that equipment is for use by Australian end-users,
  - (c) 'maintenance and installation providers', who provide maintenance or installation services to Australian end-users, and
  - (d) 'operating system providers', to the extent that equipment is for use by Australian end-users.
11. 'Equipment' is defined at clause 3 of the draft Equipment Code to mean equipment for use by Australian end-users of social media services, relevant electronic services, designated internet services or internet carriage services, in connection with that service.
12. 'Installation provider' is defined at clause 3 to mean a person who installs equipment for use by Australian end-users.
13. 'Maintenance provider' is defined at clause 3 to mean a person who maintains equipment for use by Australian end-users.

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<sup>1</sup> For the avoidance of doubt, eSafety is satisfied at this stage that the requirement under s 140(1)(a) that the Industry Bodies represent persons who manufacture, supply, maintain or install equipment for use by end-users in Australia of a social media service, relevant electronic service, designated internet service or internet carriage service in connection with that service, has been met. This Statement relates only to the scope of the draft Equipment Code as submitted.

14. 'Manufacturer' is defined at clause 3 to mean a person who:
- (a) manufactures equipment for the purposes of supply (whether by way of sale, lease, hire or hire purchase) to Australian end-users, including by undertaking a number of activities set out in full at clause 3 of the draft Equipment Code, and
  - (b) where there is no manufacturer falling within (a) above, imports equipment into Australia for the purposes of supply (whether by way of sale, lease, hire or hire purchase) to Australian end-users (provided that if a distributor imports on behalf of another entity, that other entity will be considered the manufacturer).
15. 'OS Provider' is defined at clause 3 to mean a person who:
- (a) is the provider of an operating system; and
  - (b) controls the final overall operating system for the device.
16. 'Supplier' is defined at clause 3 to mean means a person who supplies, by way of sale, lease, hire or hire purchase, equipment to Australian end-users (e.g. retailers of equipment), but does not include supply in several circumstances listed in full at clause 3 not relevant for present purposes.

#### Preliminary views

17. eSafety considers that 'end-users in Australia' (as set out in ss 134-135) and 'Australian end-users' (as used in the definitions set out above) are materially different concepts, despite the likely overlap. This is 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.
18. 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.
19. Accordingly, eSafety considers it unlikely that the draft Equipment Code will satisfy s 140(1)(b) of the Act. This is because the scope of the Equipment Code, via the definitions above, are linked to equipment used by Australian end-users and not to the group of persons described in s 135(2)(h) or the to the relevant online activity, described in s 134(h).

#### **Section 140(1)(d) requirement**

20. Section 140(1)(d)(i) of the Act requires eSafety to be satisfied that, to the extent to which the draft Equipment 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.
21. eSafety considers the draft Equipment Code is unlikely to meet the requirement under s 140(1)(d) of the Act, because it does not provide appropriate community safeguards for the reasons outlined below.

## Risk assessment methodology

22. The draft Equipment Code classifies devices into the following tiers:

- interactive (**Tier 1**) devices,
- secondary (**Tier 2**) devices,
- non-interactive (**Tier 3**) devices,

with additional categories for children's interactive devices (a subset of Tier 1) and devices designed primarily to enable end-users to play online games with other end-users (which may fall within any of the three tiers) (**Gaming Devices**).

23. eSafety notes that industry's risk assessment methodology gives greatest weight to the *intended primary or significant* functions for relevant devices and/or marketing strategy, notwithstanding that:

- functionality considered to be secondary may be a source of significant risk,
- devices with a significant proportion of regular users who are children may not be relevantly 'targeted' at children specifically, and
- reasonable minds may differ about what constitutes a 'significant' function or a 'primary' design purpose.

24. eSafety's preliminary view is that the risk methodology in the draft Equipment Code results in meaningful compliance measures being placed on a too narrow group of devices which is not commensurate with their risk profiles.

25. Relying on a, likely, subjective assessment as to what constitutes a 'significant' function or 'primary' design purpose does not provide eSafety, stakeholders or end-users with a clear basis for determining a device's tiering (or status as a Gaming Device) and consequent commitments by the supplier, manufacturer or other party.

26. For example, it appears that devices such as the Nintendo Switch, which can be used for general internet browsing relatively easily (despite not offering this functionality at a surface level), may be excluded from compliance measures applicable to devices with similar capability. Further, it is unclear whether the Nintendo Switch is 'primarily designed' to enable online multiplayer functionality. It is also unclear whether the device would be considered as 'targeted' at children, despite its wide use by children, given marketing materials look to be focused on a general audience. eSafety is concerned that under the Equipment Code, devices with similar risk attributes (e.g. web browsing functionality, end-user interactivity, significant use by children) may be treated inconsistently due to the uncertainty associated with these terms.

27. eSafety is also concerned with the significant weight in the risk assessment given to the presence or absence of a screen, which means some devices for use in immersive environments may potentially be excluded from Tier 1 where they do not make use of a 'screen' in the traditional sense (such as VR or AR goggles).

28. eSafety considers that, in order to provide appropriate community safeguards, the Equipment Code should:

- assign risk assessment categories that are based on objective, readily ascertainable factors;
- broaden the definition of Tier 1 to include devices that have general web browsing functionality; and
- be drafted in a way that both existing devices which have a material degree of risk attached to them (including equipment for use in immersive environments that may not make use of a screen in the traditional sense) and those devices which are likely to be made available in Australia in the foreseeable future will be required to comply with appropriate compliance measures.

#### 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.*

#### Matter 2

*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 prevent or limit access or exposure to, and distribution of class 1B material.*

#### Matter 7

*Measures directed towards achieving the objective of providing people with a range of technical tools and/or information to limit their access and exposure, and the access and exposure of children in their care, to class 1A material and class 1B material.*

29. As set out above, the risk assessment methodology in the draft Equipment Code relies on subjective factors such as intended significant functions or primary design purpose. This means actual usage or secondary functions which may be associated with material risks will not be part of the risk assessment.

30. eSafety considers that the minimum compliance measures (**MCMs**) proposed in the draft Equipment Code to address Matters 1, 2 and 7 (namely, MCMs 5-7) are together unlikely to provide appropriate community safeguards for those matters due to their limited application based on these risk categories. There is a significant risk that the current methodology will exclude devices (currently or likely to be supplied in the foreseeable future) that carry material risks for end-users from code requirements to have in place appropriate measures concerning class 1A or 1B materials, or to provide appropriate information or tools.

31. eSafety also notes that even for devices that are covered (Tier 1 and Gaming Devices), MCM 5 does not require suppliers to provide information on children's online safety *at or about the time of sale*. eSafety's preliminary view is that making relevant resources available online to end-users is unlikely in itself to provide appropriate community safeguards. eSafety considers it important to provide

information 'at or about the time of sale' as this is the time when end-users are likely most interested, and most motivated, to investigate relevant safety resources.

32. eSafety also notes that there is no requirement under MCM 6 for OS Providers to develop and implement relevant tools within operating systems to assist in reducing the risk of harm to children using Tier 1 devices. The commitment on OS Providers is to take 'reasonable steps' towards this outcome. eSafety considers a commitment to take 'reasonable steps' is unlikely to be effective or measurable.

#### Matter 6

*Measures directed towards achieving the objective of ensuring that industry participants have effective and scalable measures in place which ensure communication and cooperation with the eSafety Commissioner with respect to matters about class 1A and class 1B material, including complaints.*

33. The draft Equipment Code includes MCMs 3 and 4 to deal with this matter. MCM 3 applies to manufacturers and suppliers of Tier 1 devices, while MCM 4 applies to manufacturers of Tier 1 devices and OS Providers.
34. As noted above, eSafety's preliminary view is that the draft Equipment Code's risk assessment methodology may exclude devices from Tier 1 that carry significant online safety risks for end-users.
35. The limitation of MCM 4 in particular to Tier 1 devices leaves manufacturers of many devices without obligations to advise eSafety about new functions or features that may have a 'significant' effect on end-users' access or exposure to, distribution of, and online storage of class 1A or 1B material.
36. While eSafety recognises that such developments are more likely to occur for devices that belong in Tier 1, eSafety's preliminary view is that in order for appropriate community safeguards to be provided, any relevant development with a 'significant' impact on end-users' safety in this respect should be communicated to eSafety, regardless of the nature of the device.

#### Matter 8

*Measures directed towards achieving the objective of providing people with clear, easily accessible and effective: reporting mechanisms for class 1A and class 1B material, as well as associated user accounts; and complaints mechanisms to address complaints about the handling of reports about class 1A material and class 1B material and codes compliance.*

#### Matter 9

*Measures directed towards achieving the objective of ensuring that industry participants have scalable and effective policies, procedures, systems and technologies in place to effectively respond to: reports about class 1A and class 1B material, as well as associated user accounts; and complaints about the handling of reports about class 1A material and class 1B material and codes compliance.*

37. According to the Request for registration, the draft Equipment Code proposes MCMs 10 and 11 to deal with Matter 8, and MCM 11 to deal with Matter 9. eSafety also considers MCM 12 to be relevant for both these matters, although it is not described as such in the Request for registration.



38. Reflecting eSafety’s preliminary views concerning the risk assessment methodology, eSafety considers that, to ensure proper community safeguards are provided with respect to Matters 9 and 10, these MCMs should apply to a broader range of devices than those currently captured by Tier 1, noting that end-users of a wide range of devices may need information about making complaints or seeking assistance from eSafety in connection with their devices (for instance, Gaming Devices falling outside of Tier 1 and devices with general web browsing functionality which may not be considered a ‘primary’ or ‘significant’ function).

#### Matter 10

*Measures directed towards achieving the objective of ensuring that industry participants publish easily accessible and plain language policies, procedures and guidelines that set out how they handle class 1A material and class 1B material.*

*Measures directed towards achieving the objective of ensuring that industry participants provide end-users with information about the safety issues associated with class 1A material and class 1B material.*

39. The draft Equipment Code proposes MCMs 5-7 to deal with this matter.

40. MCMs 5-7 are considered above with respect to Matters 1, 2 and 7, and eSafety’s assessment of MCMs 5-7 in relation to Matter 10 largely aligns with the analysis above. eSafety’s preliminary view is that, in order to provide appropriate community safeguards, the range of devices to which MCMs 5-7 apply should be broader than is the case under the Code’s risk allocation methodology, covering for example devices with general web browsing functionality and ensuring information about children’s online safety is provided at or about the time of sale where appropriate.

#### 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.*

41. The draft Equipment Code proposes MCMs 13 and 14 to address this matter. MCM 13 prescribes mandatory annual reporting by OS Providers and manufacturers of Tier 1 devices. MCM 14 prescribes reporting for manufacturers of Tier 2 devices only, on request from eSafety, setting out:

- why the manufacturer considers the device falls within Tier 2,
- steps taken to comply with applicable MCMs, and
- an explanation as to why those steps are appropriate.

42. Under MCM 14, a report must be submitted within 6 months of receiving a request from eSafety, 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 from manufacturers of Tier 2 devices would be due to eSafety until 18 months after registration at the earliest.

43. eSafety has concerns that the timeframe for responding to requests for reports under MCM 14 will impact eSafety's ability to consider a manufacturer's compliance with code commitments, as well as eSafety's ability to provide constructive input into the first review of the Equipment Code. Without an effective review process, the capability of the Equipment Code to provide appropriate community safeguards may be compromised.
44. eSafety's concerns with the limited definition of Tier 1 devices (described above) increases eSafety's concerns with the effectiveness of MCM 14. eSafety's preliminary view is that the proposed 6 months' response timeframe in MCM 14 for Tier 2 devices is likely to prevent this MCM from providing appropriate community safeguards in relation to this matter. eSafety suggests that a reasonable response timeframe of 2 months would be appropriate.
45. eSafety also considers that the reporting requirements listed under MCMs 13 and 14 are unlikely to be sufficient for the purposes of providing appropriate community safeguards. While eSafety recognises that in many cases OS Providers and device manufacturers will not receive reports of class 1A and class 1B material, eSafety considers that these participants should collect further relevant information for inclusion in a report to eSafety that could include the:
- number of reports received for class 1A and class 1B material;
  - number of complaints received in respect of the handling of class 1A and class 1B material;
  - number of complaints related to code compliance;
  - an explanation of the appropriateness of those measures and responses; and
  - data and information on safety innovations, investments and third-party engagements etc.

#### Enforceability of the code

46. 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 equipment 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.
47. 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. The following examples are not exhaustive:

#### *Limitation clause in the head terms*

- Clause 6.1 (e)(iii), (h), (i) and (j) and clause 6.2 each limit the codes 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 it would be more appropriate for equipment providers to communicate specific 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.

#### *Risk assessment methodology*

- In relation to the risk assessment methodology in the draft Equipment Code, eSafety is concerned that Equipment providers may underestimate their risk level if application of the tiers and relative weighting of the factors listed in the Schedule is left to industry participants to determine without further guidance.
- The process to identify applicable compliance measures is entirely reliant on an effective risk assessment. While Equipment providers are required to demonstrate that the compliance measures they have adopted are reasonable, it would be difficult for eSafety to critically assess risk profile assigned by the Equipment provider to the equipment if those risk factors are open to broad interpretation and the risk profile adopted does not accurately reflect the risk of harm.

#### Next steps

48. The Industry Bodies are invited to respond to the Statement of Preliminary Views and submit an amended code that provides appropriate community safeguards by addressing all the following:
- (a) the scope and application of the draft Equipment 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 equipment for use by 'end-users in Australia';
  - (b) the risk assessment methodology should:
    - i. ensure that the risk assessment categories are based on objective, readily ascertainable factors;
    - ii. broaden the definition of Tier 1 to include devices that have general web browsing functionality; and
    - iii. be drafted in a way that both existing devices which have a material degree of risk attached to them (including equipment for use in immersive environments that may not make use of a screen in the traditional sense) and those devices which are likely to be made available in Australia in the foreseeable future will be required to comply with appropriate compliance measures,  
  
(this is to ensure that MCMs 3, 10, 11 and 12 provide appropriate community safeguards with respect to devices carrying material risks of online harm);
  - (c) MCM 4 should be expanded to provide that all manufacturers of devices covered by the Equipment Code are required to advise eSafety about developments that have a material effect on the access or exposure to, distribution of, and online storage of class 1A or class 1B materials in Australia;

- (d) MCM 5 should be expanded to:
    - i. ensure that all relevant information is provided to end-users at or around the time of sale; and
    - ii. cover devices other than those currently captured by Tier 1 and children’s interactive devices (e.g. Gaming Devices) and the information provided should specifically support children’s safe use of such devices (where appropriate) as required under Matter 7;
  - (e) MCM 6 should be clarified to require OS Providers to develop and implement relevant tools where appropriate, rather than taking ‘reasonable steps’; and
  - (f) MCMs 13 and 14 should be expanded to require reporting on a broader range of metrics, with a shortened response timeframe of 2 months, to ensure that eSafety is appropriately informed and able to carry out its functions effectively, based on timely information.
49. If Industry Bodies decide not to submit an amended code but wish to provide further information, the information should clearly explain how the existing MCMs will provide appropriate community safeguards despite the express concerns identified above.
50. Any submission and revised code will need to be provided to eSafety by 5pm AEDT on 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.