

9 February 2023

John Stanton  
Chief Executive Officer  
Communications Alliance

Sunita Bose  
Managing Director  
Digital Industry Group Inc

By email: [REDACTED] and [REDACTED]

### Invitation to respond and/or submit amended draft code – Internet Search Engine Services

Dear John and Sunita,

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 and Digital Industry Group Inc. (collectively, the **Industry Bodies**) indicated that together they represent providers of internet search engine services and were responsible for developing the Internet Search Engine Services Online Safety Code (Class 1A and Class 1B Material) (**draft SES 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 SES Code, but have formed a preliminary view. The **attached** statement sets out my preliminary views on the draft SES 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 do not 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 provide a response to this letter and/or submit an amended draft SES 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], Vicki Buchbach, Co-Manager, Indusy 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 – Internet Search Engine Services (SES) Code

### Summary

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

- the draft SES Code does not meet the requirement under s 140(1)(b) of the Act, because the code is expressed to apply in respect of services provided to 'Australian end-users' rather than 'end-users in Australia',
- the draft SES 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 and 11, 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 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 internet search engine services, so far as those services are provided to end-users in Australia (as defined under s 135(2)(d)).
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 SES Code to eSafety for registration. Accompanying the draft SES 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 SES Code in light of previous discussions with members of the Steering Group, as well as other factors such as the current industry practices and 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. 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 SES Code is the group consisting of providers of internet search engine service providers, so far as those services are provided to end-users in Australia, as described in s 135(2)(d).<sup>1</sup>
8. The relevant 'online activity' for the draft SES Code is providing an internet search engine service, so far as the service is provided to end-users in Australia, as defined in s 134(d).
9. Clause 2(a) of the draft SES Code stipulates its scope 'applies to providers of internet search engine services, so far as those services are provided to Australian end-users'.
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 that the draft SES 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)(d), or to the relevant online activity, described in s 134(d).

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

13. Section 140(1)(d)(i) of the Act requires eSafety to be satisfied that, to the extent to which the draft SES 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 SES Code, as submitted, is unlikely meet the requirement under s 140(1)(d)(i) of the Act, because it does not provide appropriate community safeguards for Matters 1 and 11 for the reasons outlined below.

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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 providers of internet search engine 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 SES 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 SES Code proposes minimum compliance measures (**MCMs**) 1, 2, 3 and 4 to deal with Matter 1.
16. MCM 1 requires that a provider of internet search engine services makes ongoing investments in technology to support algorithmic optimisation. To comply with MCM 1, providers must, at a minimum, make available information about its approach to indexing web pages and conduct regular performance testing of its algorithms.
17. eSafety considers it is unclear how adherence to the minimum requirements identified in MCM 1 will, in themselves, effectively ensure 'ongoing investments to support algorithmic optimisation'. This presents a risk of the measure being implemented by SES Providers without action taken to improve ranking algorithms following the review or testing envisaged, and/or expenditure in research and development in technology to reduce the accessibility or discoverability of class 1A material.

## 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.*

18. The draft SES Code includes MCM 18 which requires internet search engine providers to publish an annual report on request by eSafety which contains:
  - information on the steps taken by the SES Provider to comply with their applicable minimum compliance measures;
  - an explanation as to why these measures are appropriate; and
  - annual updates about the volume of CSEM or pro-terror material flagged and responded to by the internet search engine service.
19. Under MCM 18, internet search engine providers are required to submit a code compliance report to eSafety upon request and have a 6 months' response time. Internet search engine providers are not required to submit a report more than once in any 12-month period.
20. 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.
21. eSafety has concerns that the timeframe for responding to requests for reports under MCM 18 will impact eSafety's ability to consider a service provider's compliance with code commitments, as well as eSafety's ability to provide constructive input into the first review of the SES Code, noting that all

reporting data will be at least six months out of date. Further, without an effective review process, the capability of the SES Code to provide appropriate community safeguards may be compromised.

22. eSafety's preliminary view is that the proposed 6 months' response timeframe in MCM 18 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.
23. eSafety also considers that the reporting requirements under MCM 18 are unlikely to be sufficient for the purposes of providing appropriate community safeguards. While eSafety recognises that in many cases an internet search engine provider will not regularly receive reports of class 1A and class 1B material, eSafety considers that service providers should collect further relevant information, for inclusion in a report to eSafety which 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

24. 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.
25. eSafety has identified provisions in the head terms which are phrased and 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 service 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.

### Next steps

26. Industry Bodies are invited to respond to the Statement of Preliminary Views and submit an amended code addressing all the following:

- (a) the scope and application of the draft SES 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 ensure that there is a clearer commitment regarding ongoing investment;
  - (c) MCM 18 should be amended 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.
27. 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.
28. 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.