Att: Jenny Duxbury, Digi

Submitted online via onlinesafety.org.au

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Phase 2 Draft Industry Codes

The Eros Association is Australia's industry association for adults-only retail, wholesale, media, and entertainment. We represent adult content producers, adult product retailers, and adult product wholesalers who would be affected by the Phase 2 Industry Codes.

We welcome the opportunity to make a submission in response to the Phase 2 Industry Codes. However, at the outset, we express our concern at comments reported in *The Guardian* that industry partners developing the Phase 2 Industry Codes "don't speak for the porn industry, and [...] can't predict what their reaction might be, whether they would withdraw from the market, or what's the likely outcome."[1] This suggests that industry partners may be indifferent to adult content producers withdrawing from the market as a result of the Phase 2 Industry Codes, which would have a deleterious impact on our members.

We ask that industry partners actively consult with the adult industry on the Phase 2 Industry Codes. Our submission, which follows, focuses on the Head Terms and the Designated Internet Services Online Safety Code.

Head Terms

Clause 1.1(a)

Clause 1.1(a) states that "The purpose of this Code is to establish appropriate safeguards for the community in relation to certain types of seriously harmful material or material not suitable for children, referred to in this Code as 'class 1C' and 'class 2' material." This suggests that class 1C and class 2 material is "seriously harmful", which is a loaded and disputable term to describe this material.

[1] Josh Taylor, 'Adult content sites without age checks may be blocked from Australian search results under draft code', *The Guardian* (22 October 2024).

We recommend that clause 1.1(a) be amended to delete 'seriously harmful material or' so that its first sentence reads:
"*The purpose of this Code is to establish appropriate safeguards for the community in relation to certain types of material not suitable for children, referred to in this Code as 'class 1C' and 'class 2' material.*"

Additional clause 1.4

As Scarlet Alliance have noted in their comments on the Head Terms, Australia's classification system is currently under review and, as such, the definition of 'class 1C material' may be subject to change. As you would be aware, class 1C material includes Refused Classification material including "fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting." The Review of Australian Classification Regulation (the Stevens Review) recommended that "the absolute prohibitions on legal fetishes… within the X 18+ category should be removed." Whilst we are awaiting a response from the Minister for Communications in relation to this recommendation, it is necessary that the Head Terms be future-proofed to respond to any changes to the classification system.

We recommend that an additional clause 1.4 be inserted to read:
"*Industry partners acknowledge the ongoing work on classifications review, namely that the Review of Australian Classification Regulation recommended that legal fetishes be removed from the X18+ (class 1) classification and that the National Classification Code and Classification Guidelines be updated. Where necessary, changes to the classification system will be reflected in future versions of this Code.*"

Clause 2.1 - definition of 'age assurance'

It is unclear from this definition whether an age assurance measure must include both age verification and age estimation.

We recommend that clause 2.1 be amended to delete 'both' and replace 'and' with 'or' so that it reads:
"***age assurance*** *is an umbrella term for a range of methods for assessing a user's age, including age verification solutions (being solutions that aim to verify the exact age or age range of a given user) or age estimation solutions (being solutions that aim to estimate the exact age or age range of a given user).*"

Clause 3(e)

Clause 3(e) states that "Industry participants may use different terminology to describe class 1C and class 2 material for different audiences." Industry participants using different definitions of class 1C and class 2 material could cause scope creep and confusion, and we believe that the terminology of class 1C and class 2 material should be consistently used and defined.

We recommend that clause 3(e) be deleted.

Clause 5.1(c)(iii)

Clause 5.1(c)(iii) states that "it is recognised that some end-users may be able to circumvent such measures, although a provider should seek to limit this where reasonably possible." In our view, this clause is unnecessary.

We recommend that clause 5.1(c)(iii) be deleted.

Clause 5.1(c)(vi)

Clause 5.1(c)(vi) provides a list of "examples" of an age assurance measure that would be considered appropriate, including facial age estimation. Whilst many of the examples provided are problematic, facial age estimation is hugely privacy invasive and often inaccurate. eSafety reports "ethnic and gender bias" in facial age estimation technologies (namely, that they are more accurate for males than females and more accurate for those with lighter skin than darker skin), as well as "privacy and security risks and concerns of surveillance." In addition, medical conditions may impact the age accuracy of the facial characteristics of a person. Given Australia's diverse population, any age assurance measure must treat everyone equally without appreciable biases.

Concerningly, there are no specifications in the Head Terms that end-users must be provided with information about the third-party company processing their information, nor how their data is assessed, used, or stored. We are particularly concerned that third-party companies may be incentivised to collect sensitive data (such as photos, facial images, credit card information) and, in some cases, may use that data, particularly facial images, to improve their AI's training sets, and end-users may not know that their data is being used to train AI. Furthermore, industry participants may be pressured by third-party companies to conduct facial age estimation or photo identification matching and provide that data to the third-party company to train its AI.

Potential methods of age assurance are currently subject to a trial being led by the Government, and we recommend that untested examples not be included until that trial is complete.

We recommend that clause 5.1(c)(vi) be deleted. If this clause is not deleted, we will raise our concerns with eSafety.

Clause 5.1(c)(vii)

Clause 5.1(c)(vii) states that age gating measures will not be considered appropriate age assurance methods. This clause appears to go above and beyond requirements in other standards and determinations, especially in an environment where age verification is still being trialled.

Under the Online Safety (Basic Online Safety Expectations) Determination 2022 (the Determination), websites take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to class 2 material.

Furthermore, access to class 2 material on a website must be subject to a restricted access system that complies with the requirements under the Online Safety (Restricted Access Systems) Declaration 2022 which requires that:

- a person who seeks access to class 2 material must apply for access and submit a declaration that they are at least 18 years of age;
- a warning must be given about the nature of class 2 material and safety information about how a parent or guardian may control access to class 2 material by persons under 18 years of age; and
- reasonable steps must be taken to confirm that the person is at least 18 years of age.

Whilst these provisions are flexible and allow a variety of methods to restrict access to class 2 material by children, we are concerned that clause 5.1(c)(vii) could remove this flexibility and close off potential methods of age assurance that are currently subject to a trial being led by the Government. We are also extremely concerned by the statement that "compliance with Australian privacy law is not a requirement" in relation to age assurance methods. This is legally doubtful and concerning given that right to privacy is recognised as a necessary aspect of age assurance methods, at clauses 5.1(b)(iii) and 5.1(c)(v).

We recommend that clause 5.1(c)(vii) be deleted and that the sentence in the note after clause 5.1(c)(vii) - "For the avoidance of doubt, compliance with Australian privacy law is not a requirement of this Code." also be deleted

Designated Internet Services Online Safety Code

Our submissions on the Designated Internet Services Online Safety Code focus on reducing the volume of compliance measures through consolidated clauses without taking away from the measures themselves.

Section 7, clauses 1.4 and 1.5

We recommend that clauses 1.4 and 1.5 be consolidated to read:
"**Reporting and complaints mechanism**
The provider of the service must provide tools which enable Australian end-users to report, flag and/or make a complaint about class 1C and/or class 2 material which they consider may be contrary to a service's terms and conditions and ensure that these reports are considered and actioned appropriately.
Such reporting mechanisms must:
(a) be easily accessible and easy to use;
(b) be accompanied by clear instructions on how to use them; and
(c) be available and accessible to Australian end-users on-the interface of the designated internet service.
Guidance: In implementing these measures, providers of a designated internet service should ensure that reporting tools are integrated within the functionality of the designated internet service in a manner that is visible and accessible at the point the Australian end-user accesses materials."

Section 7, clauses 1.7 and 1.14

We recommend that clauses 1.7 and 1.14 be consolidated to read:
"**Training for personnel on online safety**
The provider of the service must have, or have access to reasonably adequate personnel to oversee the safety of the service. Such personnel must have the skills, experience and qualifications needed to ensure that the provider complies with the requirements of this Code at all times and training in the designated internet service's policies and procedures for dealing with reports."

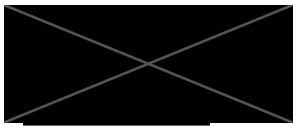
Section 7, clauses 1.10 and 1.11

We recommend that clauses 1.10 and 1.11 be consolidated to read:
"**Information for Australian end-users about online safety**
The provider of the service must establish a location accessible on or via the service that is dedicated to publishing and providing clear online safety information that:
(a) contains information required under this Code;
(b) explains the role and functions of eSafety, including how to make a complaint to eSafety;
(c) includes information about how Australian end-users can contact third party services that may provide counselling and support; and
(d) is accessible to Australian end-users."

We note that eSafety has flagged concerns with the guidance note at clause 1.11, so we have recommended that it be removed.

Conclusion

The Eros Association thanks you for your consideration and welcomes the opportunity to discuss these matters with you further.



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