



Mr. Toby Dagg
Executive Manager, Investigations
By email: submissions@esafety.gov.au

Tuesday November 23 , 2021

Submission on draft Restricted Access System Declaration 2021

Dear Mr Dagg,

The Digital Industry Group Inc. (DIGI) thanks you for the opportunity to provide our views on the draft Restricted Access System Declaration 2021 (RAS), and the accompanying draft Explanatory Statement, that address the extremely important topic of the exposure of minors to age-inappropriate online material.

By way of background, DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia. DIGI's founding members are Apple, eBay, Google, Linktree, Meta, Twitter, Snap and Yahoo, and its associate members are Redbubble, Change.org and Gofundme. Our members have made, and continue to make, major, longstanding investments in the safety of their users, with many specific products and initiatives targeted at protecting young people.

DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected. DIGI shares the Government's strong commitment to online safety; not only is it a part of our organisational vision, we have invested in the development of *The Australian Code of Practice on Disinformation and Misinformation* which we developed and oversee. As you know, DIGI is also working with a diverse range of industry participants to develop industry-wide mandatory codes under the *Online Safety Act 2021* (the Act), in partnership with the Office of the eSafety Commissioner (the Office) that also address the exposure of minors to age-inappropriate material.

We want to emphasise that DIGI and our members share the Office's goal in these initiatives to ensure minors are protected from pornography and other age-inappropriate materials. DIGI's founding members have age restrictions in place for their services, processes to address reports of violations of those restrictions in accordance with their policies, restrictions in their content and advertising policies, and an enforcement infrastructure of proactive technology detection and/or human moderators. They also have tools to restrict the experience of minors online and invest in social programs aimed at minors and parents.

At the outset, we wish to emphasise that DIGI supports the Commissioner's goal of establishing a flexible restricted access system that allows for industry to meet the legislative requirements in a way that is relevant to their business, the size of the service and its sophistication¹.

¹ *Draft Explanatory Statement Issued by the eSafety Commissioner Restricted Access Systems Declaration 2021 Online Safety Act 2021*, p. 5.

While we share that goal, the aim of our submission is to address three key areas of the RAS:

1. **User privacy and security:** The operationalisation of the RAS Declaration raises user privacy and security concerns for the diverse range of industry participants caught in scope, which we believe are important to address as the RAS is finalised.
2. **Clarity of operationalisation:** Improved clarity within the RAS will aid its operationalisation across the diverse industry participants in scope.
3. **Consistency with related reform:** In addition to the RAS Declaration, the Government is progressing a range of regulatory proposals that will comprise an overall framework of regulating for age-appropriate experiences online; these contain overlapping requirements, which need to be reviewed and reconciled.

Again, we wish to underscore our strong commitment to online safety, and our alignment with the goal of the RAS to restrict the exposure of minors to age-inappropriate content. To that end, we would like to work constructively with you and your Office in resolving these issues before the RAS comes into force. We note that there is a limited window in which to do this, as the RAS is currently set to come into effect on January 23, 2021. In this submission, we also suggest that an appropriate “grace period” be introduced in order to provide diverse industry participants with the necessary time to implement the final RAS.

We thank you for your consideration of the matters raised in this submission. Should you have any questions, please do not hesitate to contact us with any questions.

Best regards,

A handwritten signature in black ink, appearing to read "Sunita Bose".

Sunita Bose
Managing Director, DIGI
sunita@dig.org.au

A handwritten signature in black ink, appearing to read "Jennifer Duxbury".

Dr. Jennifer Duxbury
Director of Policy, Regulatory Affairs & Research, DIGI
jenny@dig.org.au

Time needed to operationalise RAS Declaration	3
Impact of RAS on user privacy and security	4
Need for clarity about how the RAS scheme will be operationalised	5
Scope of RAS declaration	5
Application to private messaging and encrypted services	6
Approach to classification	6
Operationalisation of RAS	6
Overlap with other Government policy initiatives	7

Time needed to operationalise RAS Declaration

The submissions for this round of consultation for the RAS conclude on November 23 2021, and the RAS comes into effect with the Online Safety Act on January 23, 2022. It is unclear when the RAS will be finalised. The timing also coincides with the traditional Christmas and New Year summer holiday time in Australia.

Product roadmaps within large, scale-up and start-up technology companies alike work with long-lead planning; this timeframe does not provide the wide variety of services not previously caught up by the RAS determinations with sufficient time to meet their new obligations. Given the expanded scope of the RAS, we wish to stress that industry requires more lead time for the implementation of the RAS. We also note that there is a similar timeframe for the BOSE which requires implementation by the same industry sectors.

Any major changes to a service provider's technology and practices to comply with the requirements of the RAS Declaration will take time and will need to be informed by a consistent and transparent guidance from the Commissioner on the matters identified in this submission. This may necessitate a grace period for enforcement of the declaration. We suggest that if the Restricted Access System declaration takes effect in January 2022 (as contemplated in the Online Safety Act), that the eSafety Commissioner provide an undertaking to service providers that it will not be enforced for a reasonable transitional period after commencement to enable service providers to make the necessary adjustments to their systems and processes.

The transitional period should take into account the projected timeframes for other overlapping workstreams progressing in the area of age verification, including under the Online Privacy Bill 2021 and the Age Verification Roadmap under the Online Safety Act. It is also important to consider that if companies do not have enough lead time to make the necessary changes to their systems and processes that they will need to remove access to Class 2 materials.

Recommendations in this section

1. If the Restricted Access System Declaration takes effect in January 2022 (as contemplated in the Online Safety Act), the eSafety Commissioner provide an undertaking to service providers that it will not be enforced for a reasonable transitional period after commencement, so as to allow a reasonable period for service providers to make the necessary adjustments to their systems and processes.

Impact of RAS on user privacy and security

A consistent theme in evidence to the Parliamentary inquiry into age verification for online wagering and online pornography was the importance of any system for online age verification having strong controls for the safety, security, and privacy of users². DIGI supports the acknowledgment in the Explanatory Statement that technical solutions that implement the RAS should preserve users' privacy:

Age confirmation methods should be privacy-preserving. They should limit the scope of information collected by the system to ensure the only attribute being tested is the age of the applicant. For the avoidance of doubt, age confirmation does not involve identity verification³.

The clarification that compliance with the requirements of the RAS Declaration does not necessarily require service providers to use hard identification data is welcome. However, it is important to understand that the RAS, as currently drafted, will entail the widespread collection of age data, and that some services will likely rely on identity verification documentation such as drivers' licences. The following statement in the Explanatory Statement seems to suggest that a credit card alone does not suffice for larger platforms:

Whereas a sole trader operating an adult website might implement a restricted access system using a credit card to confirm age (along with the other access control steps prescribed by the instrument), more will likely be expected of a larger, better-resourced and more technically sophisticated service. Such services may be expected to employ multiple measures working in concert, rather than relying on a single method.

We therefore suggest that the Restricted Access Declaration should contain a clear statement that the implementation of the requirements of the Declaration by service providers should preserve users' privacy and security, and in particular should be respectful of the data protection principle of data minimisation. This will help to ensure that implementation of the RAS is not dependent on excessive collection of personal data. We also urge that further consultation on this issue take place with the Office of the Australian Information Commissioner before the RAS is finalised.

Recommendations in this section

2. We recommend that the RAS Declaration be amended to include a requirement that service providers implementing its requirements should preserve users' privacy and security, and in particular should be respectful of the principle of data minimisation.
3. We ask the Office to consult with the Office of the Australian Information Commissioner on the privacy implications of the requirements of the RAS Declaration before it is finalised.

Need for clarity about how the RAS scheme will be operationalised

The RAS Declaration forms part of the enhanced online content scheme under the Online Safety Act

² See APP 3 and APP 11. APP 11:

<https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines/chapter-11-app-11-security-of-personal-information/>. APP 3:

<https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines/chapter-3-app-3-collection-of-solicited-personal-information/>

³ Draft Explanatory Statement, p. 7.

2021. The online content scheme of the Act requires that services remove or limit access to certain age-inappropriate material through the implementation of an access control system. Although the draft RAS Declaration 2021 replaces a prior scheme and instrument (the RAS Declaration 2014), we understand that the Office has not exercised powers to issue a remedial direction requiring service providers to implement a restricted access system to ensure minors do not access Class 2 materials⁴. As a result service providers will have difficulty in assessing how the Office's approach to RAS Declaration will impact on their services. In that context it is critical that the Commissioner provide transparent guidance about how the new online content scheme will be administered, and the steps service providers should take to comply with the requirements of the RAS Declaration. This will help to promote consistency, consumer trust and the certainty needed by businesses to comply with the relevant requirements of the Act. In this section of the submission, we offer suggestions about some of the key issues that the guidance should cover.

Scope of RAS declaration

As the RAS discussion paper explains, the RAS Declaration 2021 replaces the Restricted Access Declaration 2014, but broadens the scope of services that are obligated to meet age restriction requirements to include social media services, designated internet services and relevant electronic services that are providing access to material from Australia⁵. These are very broad and overlapping categories that are not confined to large technology companies, but encompass any service that allows users to share user generated content, including blogs and community online forums; every website or app that is accessible to Australian users including those used in non-technology sectors and by small business; all email and online messaging and gaming services, including text messages. Furthermore, the RAS also applies to Australian hosting service providers.

The RAS Explanatory Statement says that "The relevant provisions of the Act apply to sole traders operating websites offering niche adult services, through to major social media companies with global resources."⁶ However, the scope of the relevant provisions of the Act is far broader. Notably, it also captures any website or service that may host Class 2 Materials or materials that would likely be classified as Class 2 Materials. A key challenge for the range of service providers captured by the RAS Declaration will be determining if their services fall within the scope of relevant provisions. For example, it is not clear whether 'a designated internet service of any kind' would also include an 'app distribution service'. As DIGI has requested in other submissions concerning initiatives under the Act, it would be helpful if the Office could provide published guidance on this point.

Application to private messaging and encrypted services

The application of the 'notice and remove' and 'notice or restrict access' requirements of the Act to private messaging and encrypted services is particularly complex. Such services will be faced with unique challenges in implementing measures that comply with these provisions, especially if they will be required to remove or age-gate specific pieces of content. We suggest that guidance from the Commissioner should provide clarity to private messaging services and encrypted services about how they will administer and enforce the relevant 'notice and remove' and 'notice and restrict access' provisions of the Act in the light of these challenges.

In developing guidance for messaging services, we ask that the Commissioner take into account users' expectations about the privacy of their personal communications. We expect that users will likely be

⁴ *Environment and Communications Committee*, Tuesday, 26 October 2021, Senate 47

⁵ eSafety Commissioner, *Restricted Access System, Online Safety Act 2021, Discussion Paper, August 2021*

⁶ *Draft Explanatory Statement Issued by the eSafety Commissioner Restricted Access Systems Declaration 2021 Online Safety Act 2021*, p. 5.

seriously concerned if businesses take steps to control users' access to their messages, or remove messages that contain lawful content. Similarly, we ask that in providing guidance for encrypted services the Commissioner considers the practical challenges of removing or age-gating materials on those services. Encryption is a vital part of modern electronic communications as it allows two or more parties to securely and confidentially engage with each other in many forms of communication and online activities. We consider that it is important for the Commissioner to clarify that, in administering the scheme, service providers will not be required to engineer vulnerabilities into their services that may compromise the security their users are afforded by encryption.

Approach to classification

The draft RAS Declaration applies to certain Class 2 materials that are unsuitable for young people under the age of 18, including R18+ rated films and computer games and unclassified films or games that are likely to be classified R18+. It is important to note that this category of material is not limited to legal pornography, but also captures high impact violence, high impact language and high impact drug use. It also includes content with certain language and 'themes' including social Issues such as crime, suicide, drug and alcohol dependency, death, serious illness, family breakdown and racism. The Explanatory Statement provides a short description of the criteria for classification under the National Classification Scheme:

When content is classified, a number of matters must be taken into account, including the literary, artistic or educational merit (if any), as well as the general character of the content, including whether it is of a medical, legal or scientific character⁷.

While the National Classification Board publishes guidance about how it applies these criteria to classified films, games and some publications, there is no such transparency around how the Office applies these criteria to the much broader category of materials which are classified by the Office under the Online Safety Act. For example, it is unclear how the Commissioner would approach the classification of user-generated content, such as live videos of violent protests or police brutality. We suggest that the Commissioner provide interim guidance on how the criteria of the National Classification Scheme will be applied to the range of online materials, noting that the Classification Review (which is relevant to these questions) is still underway.

Operationalisation of RAS

The draft RAS Declaration does not prescribe particular technologies to be used for restricting access to Class 2 materials, which provides service providers with a degree of flexibility in designing and implementing systems and processes that meet the minimum requirements. DIGI welcomes the flexible approach adopted in the draft RAS Declaration, however difficult questions still remain as to how businesses should go about operationalising these requirements in practice. We therefore suggest that the Commissioner also provide published guidance to business about how to approach compliance with the RAS requirements.

DIGI appreciates that the Office has sought to provide some clarification about how these requirements should apply to different sized businesses; We note, for example, that there is an explicit expectation that larger, better resourced service providers will be capable of doing more than small, single purpose services. We suggest that guidance about compliance with the requirements should also take into account the need for technical solutions to be designed in a way that are proportionate to the risk of harm posed by materials available on a service. Additionally, there should be different guidance for websites

⁷ *Ibid*, p. 3.

that are primarily used to distribute Class 2 materials (e.g. adult websites) than those with a wider purpose (e.g. social media and other designated internet services). It would also be helpful if the Office can publish a list of 'validated age verification platforms' for different services of different sizes and risk profiles that meet with the RAS Declaration requirements.

Recommendations in this section

4. We ask that the Commissioner publish clear and transparent guidance about how the new RAS scheme will be administered by the Office including information about:
 - a. How service providers should assess whether their services are within the scope of the online content scheme under the Act, given the areas of overlap and ambiguity in the definitions of 'social media services', 'designated internet services', 'relevant electronic services', 'app distribution services' and 'hosting services';
 - b. The application of the online content scheme and the requirements of the RAS Declaration to private messaging services and encrypted services;
 - c. How the Commissioner will apply the classification criteria of the National Classification Scheme to different kinds of online materials; and
 - d. The steps that should be taken by different types of service providers to operationalise the requirements of the RAS Declaration, noting the importance of the risk of harm in designing appropriate technical solutions and the diverse services that are within scope.
5. We ask that the Commissioner publish a list of 'validated age verification platforms' for different services of different sizes and risk profiles that meet with the RAS Declaration requirements.

Overlap with other Government policy initiatives

The RAS Declaration forms part of the reactive 'notice and takedown' or 'notice or restrict access' provisions of the Act. However, the RAS is an aspect of a broader framework which the Government is developing for online age verification, and it is important that service providers understand how it interacts with other policy initiatives concerning this topic. There is a general need for a whole of Government approach to digital regulation, to address areas of overlap. In this submission, we confine our comments to the areas of potential overlap in two key initiatives under the Act: the Basic Online Safety Expectations (BOSE) and the Codes under the Online Safety Act, which are both under development.

As currently drafted, the proposals for the BOSE and the Codes require service providers to proactively search and restrict access to Class 2 Materials. Section 12 of the draft BOSE contains a requirement that the provider of the service will take reasonable steps to ensure that technological or other measures are in effect to restrict the access of young people under the age of 18 to Class 2 Materials. Similarly the Office's position paper on the Industry Codes says that the Codes will be directed to ensuring that Class 1 and Class 2 Material is prevented, or limited, on services accessible to Australian end-users⁸. How the new RAS Declaration relates to the BOSE and the Codes, should be clarified to avoid the potential for inconsistent age-gating requirements.

In a separate submission on the BOSE to the Department, DIGI has recommended that the BOSE be amended to clarify that service providers who have established systems and processes that meet the

⁸ eSafety Commissioner, *Development of industry codes under the Online Safety Act September 2021 Position Paper*, p. 38



requirements of the RAS Declaration will also meet the requirements of Section 12 of the BOSE. We acknowledge that the RAS was released just under a month after the Office's position paper on the Codes; It would also be helpful if the Office could clarify the position on Codes to explain how requirements of the RAS Declaration relate to the Codes.

Recommendations in this section

6. The BOSE be amended to clarify that service providers who have established systems and processes that meet the requirements of the RAS Declaration will also meet the requirements of Section 12 of the BOSE.
7. The Commissioner update the Office's position on industry Codes to explain how requirements of the RAS Declaration relate to the Codes.