

Summary of Reasons – Equipment Code

31 May 2023

eSafety decision

The eSafety Commissioner (**eSafety**) has decided to register the *Equipment Online Safety Code (Class 1A and Class 1B Material)* (**Equipment Code**). The Equipment Code meets the statutory requirements set out in section 140 of the *Online Safety Act 2021* (Cth) (the **Act**).

Background

The Act permits eSafety to register an industry code that has been developed and submitted by a body or association that represents a particular section of the online industry. To register an industry code, eSafety must be satisfied that it meets the requirements under section 140 of the Act, including that it provides appropriate community safeguards for any matters of substantial relevance to the community.

On 11 April 2022, eSafety gave a notice to the Australian Mobile Telecommunications Association, Communications Alliance Ltd, the Consumer Electronics Suppliers' Association and the Interactive Games and Entertainment Association (the **Applicants**) under section 141 of the Act requesting that they develop an industry code dealing with certain matters (the **Notice**).

On 18 November 2022, the Applicants submitted a draft of the Equipment Code to eSafety pursuant to the Notice. In February 2023, eSafety gave a statement of preliminary views on that draft to the Applicants, and invited the Applicants to submit a final version addressing the feedback in eSafety's statement.

On 31 March 2023, the Applicants submitted the Equipment Code to eSafety for registration, with a covering document entitled "request for registration of online safety codes" (the **Request**).

Scope of the Equipment Code

The Equipment Code applies to:

- equipment manufacturers, to the extent that equipment is for use by end-users in Australia
- equipment suppliers, to the extent that equipment is for use by end-users in Australia, and
- equipment maintenance and installation providers who provide maintenance or installation services to end-users in Australia (**equipment providers**) and

- equipment operating system providers, to the extent that equipment is for use by end-users in Australia (**OS providers**).

‘Equipment’ is defined to mean equipment for use by end-users in Australia of:

- a social media service
- a relevant electronic service
- a designated internet service, or
- an internet carriage service.

in connection with that service.

The Equipment Code contains measures to address, minimise and prevent harms associated with access and exposure to the most harmful forms of online material.

Material covered by the Equipment Code includes:

- **class 1A material**, which is comprised of child sexual exploitation material, pro-terror material, and extreme crime and violence material, and
- **class 1B material**, which is comprised of crime and violence material and drug-related material,

in each case as described in Annexure A to the Equipment Code Head Terms, which reflects the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**Classification Act**) and related instruments.¹

These types of material are subcategories of class 1 material under the Act, which is material that has been or would be refused classification under the Classification Act. Serious harms are associated with these kinds of material whenever it is produced, distributed or consumed.

A future industry code or industry standard will be developed to address class 2 material under the Act, which includes material that has been or would be classified X 18+, R 18+, Category 1 Restricted or Category 2 Restricted under the Classification Act.

The Equipment Code differentiates between three tiers of equipment:

1. **Tier 1 devices**, being devices that:
 - a. are ‘user-interactive’, in the sense of there being a ‘two-way flow of material between that device and the end-user’, and
 - b. are ‘personal and portable’, in the sense that they ‘may be carried with the end-user’, and
 - c. are capable of operation without the use of any other Tier 1 devices (a smart watch requiring connection to a smartphone is an example of a device that would not satisfy this limb), and
 - d. have ‘general internet browsing’ through a screen capable of displaying video or images as an intended primary or significant function of that device (an e-book

¹ Importantly, the nature of the material, including its literary, artistic or educational merit, and whether it serves a medical, legal, social or scientific purpose, is relevant to the assessment of class 1B material – see section 11 of the Classification Act. Material only falls within class 1B if there is no justification for the material.

reader is an example of a device that would not satisfy this limb).

2. **Tier 2 devices**, being devices that are not in Tier 1 but which:
 - a. are ‘user-interactive’ (as defined above), and
 - b. may be personal’ (as defined above) or ‘communal’ in the sense of being intended for use by more than one end-user (e.g. smart TVs), and
 - c. are capable of operation with or without a Tier 1 device, and
 - d. do not have general internet browsing as an intended significant function of the device.
3. **Tier 3 devices**, which captures equipment not falling within Tier 1 or Tier 2.

The Equipment Code also creates the following additional categories, to which some additional compliance measures apply:

1. children’s interactive devices, being Tier 1 devices targeted at children, and
2. gaming devices, being devices designed to enable end-users to play online games with other end-users. Any gaming device with general internet browsing functionality will be a Tier 1 device.²

eSafety assessment of the Equipment Code

The Equipment Code will provide appropriate community safeguards by requiring equipment providers and OS providers to:

1. create and maintain a safe online environment for Australian end-users³
2. empower people to manage access and exposure to class 1A and class 1B material, and
3. strengthen transparency of, and accountability for, class 1A and class 1B material.

Creating and maintaining a safe online environment for Australian end-users

Specific obligations relating to the first of these objectives require:

- equipment manufacturers and OS providers (for all Tiers) to share information with eSafety about material new features or functions released that are likely to have a material positive or negative effect on the access or exposure to, distribution of, and online storage of class 1A or class 1B materials in Australia
- manufacturers of Tier 1 devices, manufacturers of gaming devices and OS providers to take part in an annual forum organised by one of the industry associations responsible for the development of the Equipment Code to discuss and share relevant issues, advances and best practice in online safety with other industry participants, and
- manufacturers and suppliers of Tier 1 devices to implement policies and processes that ensure they respond in a timely and appropriate manner to communications from eSafety about complaints of breach of the Equipment Code.

² Provided that the functionality is not attained through unauthorised third-party software or modifications that may breach the applicable terms of use of that device.

³ ‘Australian end-users’ is used throughout the industry codes but is defined in clause 2 of the Head Terms as an end-user in Australia to align with the language and scope of the Act. Both terms are used in this document.

Empowering people to manage access and exposure to class 1A and class 1B material

Specific obligations relating to the second of these objectives require:

- gaming device manufacturers to develop and implement appropriate tools to reduce the risk of harm to children using those devices
- manufacturers of Tier 1 devices or gaming devices to ensure that easily accessible information with respect to the safe use of that device by Australian end-users is available in the form of online safety resources
- suppliers of Tier 1 devices, including children's interactive devices, and gaming devices to, at or around the time of a sale, provide easily accessible information on the safe use of those device, including how to support online safety in a child's use of those devices
- suppliers of Tier 1 devices to provide tools or training to staff to enable them to appropriately respond to questions from Australian end-users regarding online safety, including available complaints mechanisms
- manufacturers or suppliers of Tier 1 devices to:
 - make available information to Australian end users on their right to complain to a content provider and/or eSafety (including where a complaint to a content provider remains unresolved) about class 1A and 1B material, or unsolicited electronic messages that promote such material
 - make a link to eSafety's online content complaints reporting form available via their online safety resources
- manufacturers of Tier 1 devices and OS providers to have a complaints mechanism to deal with complaints of potential breaches of the Equipment Code from Australian end-users, and
- OS providers to develop, implement and make available tools to reduce the risk of harm to children, and, in the case of those devices identified as 'children's interactive devices', to set default safety settings to the most restrictive privacy settings and location settings available for that device.

Strengthening transparency of, and accountability for, class 1A and class 1B material

Specific obligations relating to the third of these objectives require:

- manufacturers of Tier 1 devices and OS providers to submit annual reports to eSafety setting out the steps they have taken to comply with the Equipment Code, an explanation as to why those steps are appropriate and, in the case of Tier 1 manufacturers, the volume of complaints received about compliance with the Equipment Code, and
- manufacturers of Tier 2 devices to submit reports to eSafety on request setting out why they consider their device is a Tier 2 device, steps taken to apply with the Equipment Code and an explanation as to why those steps are appropriate.

eSafety considers that these obligations will, together, create effective and meaningful obligations on equipment providers and OS providers in addressing the risks of class 1A and class 1B content.

Next steps

The Equipment Code will shortly be published on the eSafety Commissioner's Register of industry codes and industry standards for online safety. The Equipment Code will come into effect six months after registration.