

# Summary of Reasons – Hosting Services Code

31 May 2023

## eSafety decision

The eSafety Commissioner (**eSafety**) has decided to register the *Hosting Services Online Safety Code (Class 1A and Class 1B Material)* (**Hosting Code**). The Hosting 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 BSA | The Software Alliance and the Communications Alliance (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 Hosting 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 Hosting Code to eSafety for registration, with a covering document entitled 'Request for Registration of Online Safety Codes' (the **Request**).

## Scope of the Hosting Code

The Hosting 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 Hosting 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 Hosting Code Head Terms, which reflects the

*Classification (Publications, Films and Computer Games) Act 1995 (Cth) (Classification Act)* and related instruments.<sup>1</sup>

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.

## eSafety assessment of the Hosting Code

The Hosting Code applies only to ‘third-party’ hosting providers – that is, those who provide a ‘back-end’ hosting function to support the delivery of another entity’s social media service (**SMS**), relevant electronic service (**RES**) or designated internet service (**DIS**). Obligations imposed under the Hosting Code will, therefore, ordinarily complement and bolster the obligations of SMS, RES and DIS providers who use these hosting services.

Consistent with the descriptions of the ‘relevant online activity’, and ‘section of the online industry’ in the Act, the Hosting Code applies only to hosting services so far as they host material in Australia.

The Hosting Code sets out a range of minimum compliance measures for third-party hosting providers that the Applicants submit provide appropriate community safeguards in relation to the matters identified in the Request.

eSafety agrees that the matters identified by the Applicants in their Request, which are materially the same as those matters identified by eSafety in the Notice requesting a code, are matters of substantial relevance to the community.

The Hosting Code will provide appropriate community safeguards by requiring third-party hosting providers that host material in Australia (including providers such as Amazon Web Services and Microsoft Azure), to:

1. take reasonable and proactive steps to create and maintain a safe online environment for Australian end-users<sup>2</sup>
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.

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<sup>1</sup> 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.

<sup>2</sup> ‘Australian end-user’ 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.

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

Specific obligations relating to the first of these objectives require third-party hosting providers to:

- have in place policies and/or contractual terms requiring customers to comply with Australian content laws concerning class 1A and class 1B material, and take appropriate enforcement action where policies and terms concerning class 1A and class 1B material have been breached
- have a mechanism for end-users to contact them about class 1A and class 1B material hosted by the hosting provider which appears on one of their customers' services
- take demonstrably reasonable steps to consult, cooperate and collaborate with other industry participants in respect of removing, disrupting and/or restricting class 1A and class 1B material, and
- respond in a timely and appropriate manner to communications from eSafety about code compliance.

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

Specific obligations relating to the second of these objectives require third-party hosting providers to provide customers with tools, settings or information appropriate to the nature of the hosting service to enable those customers to address class 1A and class 1B material on a customer's service. Clear and accessible guidance about such tools, settings and information must also be provided.

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

Specific obligations relating to the third of these objectives require third-party hosting providers to:

- provide information online for Australian end-users about safety issues associated with class 1A and class 1B material and the role and functions of eSafety, and
- submit reports to eSafety setting out steps they have taken to comply with the Hosting Code, an explanation as to why those steps are appropriate and the volume of reports received about class 1A and class 1B material on their service.

eSafety considers that these obligations will, together, create effective and meaningful obligations on third-party hosting providers, commensurate with their role in the online service supply chain, in addressing the risks of class 1A and class 1B content.

The Hosting Code only applies to third-party hosting providers. However, 'first-party' hosting providers (those that host material available through an SMS, RES or DIS that they also operate) will be covered by the industry codes or industry standards applying to RES, DIS or SMS, as the case may be, which will include measures relating to hosting of class 1A and class 1B material. Accordingly, there is no shortfall in coverage arising from this distinction.

The Hosting Code contains a smaller number of measures than some other industry codes and does not require third-party hosting services to deploy technology, systems or processes to proactively detect class 1A or class 1B material. This reflects the role of third-party hosting

services in the supply chain. Hosting services provide infrastructure services which are contracted for by enterprises and lack a direct interface with end-users. eSafety considers it appropriate that the obligations on third-hosting providers should be less extensive than the obligations on SMS, RES and DIS providers, reflecting both the direct relationship held by SMS, RES and DIS with end-users, typically in the form of a contract, as well as the tools available to such providers.

## Next steps

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