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The Proposed Restricted Access System Declaration

Below is the Australian Visual Software Distributors Association Ltd's submission in response to the proposed Restricted Access System Declaration. We would be pleased to provide further information upon request.

1. Executive summary

In summary, the Australian Visual Software Distributors Association (AVSDA):

- (a) is concerned that the proposed RAS Declaration does not meet the policy objectives of the *Broadcasting Services Act 1992* (Cth) (BSA), or the public interest.
- (b) is concerned that:
 - online and convergent device content delivery will not be treated consistently with other platforms;
 - film piracy will be encouraged and an undue financial and administrative burden will be placed on industry;
 - the provision of services made practicable by technology will be discouraged and customer choice will be limited;
 - the practical implementation problems with the proposed RAS Declaration will bring the system into disrepute; and
 - the role of parental/guardian supervision and control is not recognised.
- (c) believes that these adverse impacts can be minimised and the policy objectives of the BSA and the public interest can be met through amendments to the proposed RAS Declaration, including:
 - the introduction of an inclusive definition of 'evidence';
 - the flexibility to allow differing approaches for business models that involve an on-going relationship with a customer and those that do not; and
 - the removal of certain requirements.

2. **About the Australian Visual Software Distributors Association Ltd**

AVSDA appreciates the opportunity to provide this submission to the Australian Communications and Media Authority (ACMA) in relation to the proposed Restricted Access System Declaration and associated consultation paper.

AVSDA represents the interests of copyright owners and distributors of film and television in Australia. AVSDA's members range from all the major international film distribution companies through to wholly-owned Australian companies. AVSDA members include: All Interactive, Buena Vista Home Entertainment, Starz Entertainment, Paramount Home Entertainment, Icon Films, Madman Entertainment, Palace Films, Roadshow Entertainment, Shock DVD, Sony Pictures Home Entertainment, Time-Life Australia, Twentieth Century Fox Home Entertainment, Universal Pictures Video and Warner Home Video. A growing number of distributors of television programs in Australia are either currently represented by AVSDA or are aligning themselves to become members and their views are also represented in this submission.

Television programs and film for home entertainment represents a significant part of the Australian economy in terms of revenue, employment and culture. In 2006/2007 the wholesale sales of DVDs in Australia amounted to \$1.243 billion. According to ABS data, the entire film and television production and distribution industry in Australia employs directly or indirectly over 50,000 people.

3. **The significance of the proposed Restricted Access System Declaration to AVSDA members**

The proposed Restricted Access System Declaration (RAS Declaration) is of major importance to AVSDA members. The RAS Declaration will implement the requirements of Schedule 7 to the BSA, which introduces new regulation for the provision of R18+ content and, of key significance to AVSDA members, MA15+ content.

The Office of Film and Literature Classification (OFLC) Annual Report for 2005/06 shows the classification breakdown for DVDs as follows:

G	1,158
PG	1,594
M	1,940
MA 15+	632
R 18+	245
X 18+	828
RC	30
Withdrawn	89
Total	6,516

These statistics show that around 10% of all DVDs classified by the OFLC in the 12 month period were classified MA15+. The real proportion of business affected will in fact be even higher for AVSDA members as they do not distribute X-rated films. The significant proportion of AVSDA member content that is classified MA15+ means that the requirements of the final RAS Declaration will have a significant impact on AVSDA members.

The regulatory regime introduced by Schedule 7 to the BSA and in particular the need for potential customers to navigate a restricted access system in order to access content, will make it more difficult for a potential customer to access film and television content where

they are legally able to do so. This will adversely impact a potential customer's ability and inclination to legitimately purchase online content classified MA15+ and above. This has significant implications for business, including:

- the fact that content providers will prefer to host their content outside Australia, taking their service outside the scope of Schedule 7 to the BSA;
- the fact that potential customers will be encouraged to access content that infringes copyright, increasing film piracy;
- the fact that potential customers will be encouraged to access content from overseas sources;
- a reduction in consumers' willingness to pay for content provided by AVSDA members;
- increasing the reluctance of industry to invest in the development of emerging business models; and
- a reduction in the range of choice available to potential customers, both in terms of the films and television programs that are made available online and across convergent devices and the ways in which that content can be accessed.

4. AVSDA member business models – existing and future

AVSDA members and the wider industry are embracing and leading efforts to provide content to Australian consumers in new and exciting ways. In fact, Australia has led the world in many delivery models. For example, in late 2006 Universal Pictures, in conjunction with ReelTime Media Ltd, launched the video world's first 'download to own' business model.

When a potential customer is seeking to access AVSDA member content online or across a convergent device, they are often required to register for the service. They are then able to access content on a 'pay per use' basis or on a subscription basis.

However many existing and potential business models allow a customer to access content on a 'one off' basis, with no registration requirement and no on-going relationship between the provider and the customer.

In Australia, payment online is predominantly by credit card.

Examples of AVSDA members' online and convergent device business models include:

- (a) AVSDA members contract with providers, such as ReelTime Media Ltd, to provide members' content online for customers to download on a permanent basis (to own). For example, Universal Pictures makes *The 40 Year Old Virgin* available for download to own through ReelTime Media Ltd.
- (b) AVSDA members contract with providers, such as ReelTime Media Ltd, Anytime Pte Ltd and BigPond Movies, to provide members' content online for customers to download for a limited period of time (to rent). For example, Warner Home Video makes *Eyes Wide Shut* available for download to rent on a 24 hour basis through Anytime Pte Ltd, and Sony Pictures Home Entertainment makes *Ghost Rider* available for download to rent through BigPond Movies.

- (c) AVSDA members contract with television networks (both free-to-air and subscription) for the online delivery of their content. For example, Warner Home Video may make episodes of *Entourage* available for download or streaming through Arena TV. Similarly, Paramount may make episodes of *Medium* available through the Channel 10 website.
- (d) AVSDA members make trailers, short films and specialist content available for delivery to portable devices, including hand-held devices and mobile phones.

Movie rental businesses are trialling business models that involve the lease of Internet-enabled set-top boxes to customers. A customer hires an Internet-enabled set-top box from the business which is then connected to their television. Customers use an online content menu and select movies and television programs to be downloaded to their set-top box. This content may be downloaded permanently (download to own), or for a limited time frame (download to rent). Customers pay for content via credit card, BPAY or Paypal. This particular business model is referred to in this submission as a "set-top box business model".

In addition to the above, AVSDA members directly market their content to potential customers, including through the provision of links on their websites and provision of trailer films online and across mobile devices.

5. The proposed RAS Declaration

New Schedule 7 to the BSA (clauses 20 and 21) will require a restricted access system (RAS) to be in place for content that is, or is substantially likely to be, classified

- MA15+ if it is to be provided as a Mobile Premium Service (as that term will be defined in Schedule 7 to the BSA);
- MA15+ if it is audiovisual and provided by a Commercial Content Service that is not a news or current affairs service or an Ancillary Subscription Television Content Service (as those terms will be defined in Schedule 7 to the BSA); or
- R18+.

A Commercial Content Service is essentially one where the customer is charged a fee for access to content. MA15+ content provided online is only required to be subject to a RAS if it is audiovisual and provided upon payment of a fee.

Content that is classified (or substantially likely to be classified) MA15+ that is *not* provided upon payment of a fee (ie is 'free') is not required to be subject to a RAS.

The proposed RAS Declaration sets out four essential elements of a RAS:

- (1) A provider must have in place a documented 'age verification plan'. This plan comprises:
 - a risk analysis that identifies and assesses the risk that a kind of evidence of age could be held or used by a person other than the person it purports to identify or a person younger than the age the evidence attributes to the person. In identifying and assessing these risks, a provider must take into account the kind of evidence that may be provided as well as the manner in which that evidence is received;

- age verification measures, being rules or procedures that address the identified risks; and
 - quality assurance measures, being procedures to implement age verification measures, to remove a person's access to content if found necessary and to periodically review the age verification measures.
- (2) The potential customer must request access to the content and provide 'evidence' of their age. 'Evidence' is not defined.
 - (3) If the evidence is satisfactory, the provider must allocate an 'access key', being a password, pin number or similar. Access to the relevant content may only be provided upon entry of the access key.
 - (4) The provider must retain records of:
 - the receipt of the request for access; and
 - the verification process followed to ensure that the person requesting access is of the appropriate age to be granted an access key.

The proposed RAS is complicated by the fact that 15, 16 and 17 year olds, who are entitled to view MA15+ content, will face practical difficulties providing evidence of their age. In fact, these difficulties mean that many 15, 16 and 17 year olds simply will not be able to legitimately access MA15+ content online, or over a convergent device.

There is no known and certainly no fool-proof practical system that will allow a 15, 16 or 17 year old to provide evidence of their age. Putting in place a requirement for 15, 16 and 17 year olds to provide evidence of age when there is no workable way for them to do so will encourage access to MA15+ content through the circumvention of the requirements of the RAS and will bring the system into disrepute.

6. The Schedule 5 adult verification system declaration

Currently, Schedule 5 to the BSA regulates Internet content. That Schedule requires content that is or is substantially likely to be classified R18+ to sit behind an adult verification system. There is an ACMA adult verification system Declaration (Schedule 5 Declaration) in place (Restricted Access Systems Declaration 1999 (No.1)).

The Schedule 5 Declaration requires an adult verification system to have three elements:

- (1) a potential customer must request access;
- (2) the potential customer must provide a declaration that they are 18 years of age or over and either their credit card details or digital signature; and
- (3) the provider must allocate the customer a pin number or password. Access to the content can only be provided upon entry of the pin number or password.

This adult verification system differs from the proposed RAS Declaration in four material respects:

- first, it does not apply to any MA15+ content;

- second, under the current Schedule 5 Declaration, a declaration of age and credit card details are clearly adequate evidence of age;
- third, a provider is not required to have in place a documented age verification plan; and
- fourth, there is no record keeping requirement.

7. The policy objectives of new Schedule 7 to the *Broadcasting Services Act 1992* (Cth)

The policy objectives of the BSA are outlined in s4(3AA) which is specifically directed to new Schedule 7. Section 4(3AA) states the objective:

'that designated content/hosting services be regulated in a manner that:

- (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on the providers of those services; and*
- (b) will readily accommodate technological change; and*
- (c) encourages:*
 - (i) the development of communications technologies and their application; and*
 - (ii) the provision of services made practicable by those technologies to the Australian community'*

Further, the Explanatory Memorandum to the *Communications Legislation Amendment (Content Services) Bill 2007* (Cth) (which introduces Schedule 7 to the BSA) recognises the need for consistency in regulation. It states at paragraph 29 (under the heading 'Objectives') that:

'...the framework will be consistent with content regulation over other media in Australia.'

8. The public interest considerations

A number of public interest concerns must be considered.

The public interest includes protecting minors from exposure to content that would be likely to offend a reasonable adult. However the public interest also requires the deterrence of film piracy and the furtherance of customer choice. It is important that the regulatory framework balances all public interest concerns.

The Government continues to recognise that parental/guardian guidance and control of children's access to content is also of key importance.

During the Senate Environment, Communications, Information Technology and the Arts Committee (Senate Committee) inquiry, the representative for the Department of Communications, Information Technology and the Arts (DCITA) stated that the new regulation is *complementary* to the Government's Protecting Australian Families Online program. The Senate Committee recognised that 'home filtering will be an important vehicle for users managing content'. The DCITA representative noted that 'the regulation of content needs to be seen as a holistic exercise which is tackled on a number of fronts'.

On 10 August 2007, Senator Coonan stated in a media release: 'Regulatory measures such as the Online Content Scheme have been matched with tough law enforcement, a

specialised online child sex exploitation police team, criminal sanctions, *education and family support services*. ... Unfortunately, no single measure alone can protect children from online harm and in fact, *traditional parenting skills have never been more important'* (emphasis added).

9. AVSDA's concern that the proposed RAS Declaration does not meet the public interest nor the policy objectives

Contrary to the stated objectives of the BSA and new Schedule 7:

- the provision of services made practicable by technology to the Australian community will be discouraged. The impacts of the proposed RAS Declaration on business models AVSDA members are presently and may in the future be involved with will affect the success of these business models, meaning that these business models may no longer be pursued and technological advances will not be encouraged;
- content that is classified or is substantially likely to be classified MA15+ that is delivered online or over a convergent device on a commercial basis will not be treated consistently with other platforms;
- the proposed RAS Declaration will not deter film piracy or further customer choice;
- the proposed RAS Declaration would place an undue financial and administrative burden on industry;
- the proposed RAS Declaration does not recognise that a RAS is just one aspect of ensuring children do not access inappropriate content; and
- the proposed RAS Declaration would be impossible to practically implement for 15, 16 and 17 year olds as they are not able to readily provide evidence of their age, this will encourage circumvention of the system, rather than compliance, bringing the system into disrepute. Putting in place a system that is not possible to implement also ignores and possibly undermines the fact that parental/guardian guidance is required. It may lead parents/guardians to take the view that their role has been absorbed by others and lead them to experience a false sense of security.

10. Delivery of content on payment of a fee

As mentioned above, MA15+ content is required to sit behind a RAS if it is audiovisual and provided on payment of a fee (ie on a commercial basis).

Content provided by a Commercial Content Service:

- (a) needs to be paid for; and
- (b) can only be provided upon a customer providing evidence of their age.

The additional step of proving age may mean that potential customers may not take the time to pursue the process and gain access to content.

This is particularly so for content that is provided on a one-off basis, with no requirement for customers to register for the service. In this case, there is no on-going relationship between the provider and the customer and no opportunity for the provider to receive and evaluate evidence then provide an access key. A RAS that requires this would be at a significant financial and administrative cost to industry. Also, it would be likely to deter potential customers from using the content service.

MA15+ content that is provided for free does not have to be subject to a RAS. Therefore, potential customers aged 15, 16 and 17 are able to access MA15+ content, without needing to navigate a RAS, through online sources where content is not purchased.

This is an inconsistent result that will mean that commercial online delivery will be discouraged, further business models building on this technology will not be developed and customer choice will thereby be reduced.

An additional concern is that if the RAS is not easy to navigate, 15, 16 and 17 year old customers will be encouraged to circumvent the system by importuning others to provide the necessary evidence of age. This will bring the system into disrepute.

These consequences should be minimised through a RAS that is easy for potential customers to navigate.

11. The proposed RAS Declaration will encourage consumers to seek free (pirated) content

AVSDA member content is predominantly provided on payment of a fee. Where that same content *is* available for free, it is generally made available in breach of copyright.

If the RAS is not easy to navigate, then potential customers will be discouraged from accessing AVSDA member content through legitimate channels and are likely to turn instead to sources that are likely to be infringing.

Piracy of AVSDA member content is a significant concern for industry and for the Government. Independent research conducted by LEK in 2005 found that piracy is estimated to be costing Australia's local industry over \$230 million each year.

Both industry and Government have been taking significant measures to prevent and deter piracy. This is evident in the amendments to the *Copyright Act 1968* (Cth) in late 2006 and the significant financial contributions to copyright enforcement. It is also evident in AVSDA members' commitment to industry initiatives to combat piracy, including its contribution (both in time and effort and its \$2 million financial contribution) to the IP Awareness Trust.

AVSDA submits that the regulatory framework should avoid bringing about a situation where piracy is encouraged. AVSDA is concerned that the proposed RAS Declaration, by making it difficult for potential customers to access content, has the potential to increase film and television piracy in Australia.

Equally, it is important that the regulatory framework is respected. AVSDA acknowledges that parents and guardians are a necessary part of the approach to protecting minors from exposure to content that would be offensive to reasonable adults. This fact is also recognised by the regulatory framework for television. If the regulatory framework for online and convergent device content does not recognise this also, the system will be brought into disrepute. In practice, it is parents and guardians who are in a

position to control and guide minors, supported by the regulatory framework and appropriate Government re-enforcement through advertising and education campaigns.

12. Content available on television

It has been sensibly decided that MA15+ content provided by a subscription television service is not required to be subject to an access control system. Also, free-to-air television may broadcast MA15+ content after 9pm. In both situations, reliance is placed on parental and guardian guidance and control to ensure that minors are not exposed to content that is likely to offend a reasonable adult.

Similarly, the regulatory framework for content provided online should recognise this.

This is particularly true for the set-top box business model described at paragraph 4 above, which is comparable to subscription television. In this case, a customer voluntarily leases an Internet-enabled set-top box so that they can download movies and television programs. The regulation of this business model should be consistent with the regulation for subscription television – MA15+ content should be made available without obstacle.

AVSDA also notes that industry is currently trialling business models that allow a customer to download a film or television program to a memory device, take that device home and watch the content for a limited period of time. This business model is not subject to the requirements of Schedule 7 to the BSA and, sensibly, there is no requirement to put in place a RAS to restrict the downloading of content to a memory device. This highlights again the fact that the regulation contained in Schedule 7 to the BSA and the proposed RAS Declaration is inconsistent with regulation on other platforms and the fact that the role of parental/guardian supervision is recognised in other regulatory frameworks.

13. Age verification plans and record keeping

The requirement to create documented age verification plans and keep records of requests for access and age verification will create a significant cost for industry. These costs will include:

- creating an age verification plan;
- educating staff about the age verification plan;
- ongoing monitoring and review of the age verification plan;
- implementing protocols for record keeping; and
- allocating resources for record keeping.

Further, the risk analysis required by the proposed RAS Declaration is not a realistic reflection of the role of content providers. The proposed RAS Declaration requires a provider's risk analysis to identify and assess the risk that a kind of evidence of age *could be held or used by a person other than the person it purports to identify or a person younger than the age the evidence attributes to the person.*

The RAS Declaration should recognise that a RAS is just one aspect of ensuring children do not access inappropriate content. The RAS Declaration should represent a considered approach that shares responsibility between industry and parents/guardians. It should

recognise, as the regulatory frameworks for content provided for free, free-to-air television and subscription television do, that it is parents and guardians who are in a position to control and guide minors.

The burden placed on industry by the age verification plan and record keeping requirements is disproportionate to the benefit AVSDA members believe will flow from the requirement.

AVSDA members are already conscious of the need to protect children from offensive content and always seek to further this objective. Being required to maintain this level of documentation and records is not required to ensure industry approaches the issue seriously and with adequate regard for safety in the online and convergent device environment.

14. Suggested amendments to the proposed Restricted Access System Declaration

Evidence of age

14.1 An inclusive definition of 'evidence' should be introduced. This definition should allow:

- (a) the making of a declaration (which may be made online) that the potential customer is 15, 16 or 17 years old to be sufficient evidence for the purpose of obtaining an MA15+ access key; and
- (b) payment by credit card to be sufficient evidence that a person is 18 years old

14.2 The RAS Declaration should expressly state that proof of age may be required either:

- (a) if an access key will be allocated, once at the start of the on-going relationship between customer and provider, for example when the customer registers for the service (see below at 14.3); or
- (b) if an access key will not be allocated, each time access to content is sought, for example where there is no on-going relationship between a customer and provider (see below at 14.3).

Access keys

14.3 As an alternative to allocating a customer an access key, the RAS Declaration should allow providers to give a customer access to content upon receipt of evidence of age, that evidence being received each time access is sought.

This would accommodate business models that do not involve an on-going relationship between the customer and provider, for example where the customer does not register for the service but instead accesses content on a 'one-off' basis.

For example, it should be possible for a 16 year old seeking to access MA15+ content on a one-off basis to be provided with that content upon their request and provision of evidence (which may be a declaration).

Similarly, a person wishing to access R18+ content on a one-off basis should be able to request access and provide evidence (such as their credit card details) in order to gain access, without the need to be allocated an access key.

The access key requirement should be retained for business models where there is an on-going relationship between customer and provider so that, in this circumstance, evidence of age need only be provided by the customer once at the start of the relationship (see above at 14.2).

Age-verification plans and record keeping requirements

- 14.4 The requirements for documented age verification plans and record keeping should be removed.

15. Conclusion

AVSDA is grateful for the opportunity to present its views. If further information would be helpful or any assistance can be provided, please contact me on 02 8233 6174 or by email at simon.bush@avsda.com.au.

Yours sincerely

A handwritten signature in blue ink that reads "Simon Bush". The signature is written in a cursive style and is positioned above the printed name and title.

Simon Bush
Chief Executive
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