NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

Submission

to the

Australian Communications and Media Authority (ACMA)

on the draft

Restricted Access Systems Declaration 2007

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About the NSW Council for Civil Liberties

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a non-government organisation in Special Consultative Status with the Economic and Social Council of the United Nations.

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

To this end CCL attempts to influence public debate and government policy on a range of human rights issues. We try to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected.

We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

Abbreviations

ACMA	Australian Communications and Media Authority
BSA	*Broadcasting Services Act 1992* (Cth)
CCL	NSW Council for Civil Liberties
Cth	Commonwealth of Australia
ICCPR	International Covenant on Civil and Political Rights
NSW	New South Wales
PIN	Personal Identification Number
RAS	Restricted Access Systems
US	United States of America

1. Executive Summary

1. The New South Wales Council for Civil Liberties ('CCL') submits that ACMA must consider freedom of speech when drafting a Restricted Access System (RAS) Declaration. In fact, it would be an error of law not to consider freedom of speech.
2. CCL submits that the opt-in system proposed by the draft RAS Declaration should be abandoned. The opt-in system is an unnecessary restriction on freedom of speech. Adults should be free to access material which they can lawfully see, hear and read *without* having to seek permission.
3. CCL is concerned that the proposed methods of restricted access systems (PIN, password, etc) are ineffective, intrusive and encourage identity theft.
4. CCL submits that, in order to preserve free speech, the RAS Declaration should provide exceptions for providers of political, academic, scientific and artistic content. Parliament has not expressed an intention to override these important forms of speech and they should be protected in the RAS Declaration.
5. CCL also submits that ACMA should completely exempt non-commercial providers from the excessive burden of providing RAS systems. These systems will effectively silence home-based not-for-profit content providers and students. This is completely unacceptable in a free and democratic society.

2. Free speech and Restricted Access Systems

6. In our recent submission to the Senate inquiry into the Content Services Bill, CCL recorded its opposition to Schedule 7 of the *Broadcasting Services Act 1992* (Cth) ('the BSA').[1] It is still CCL's position that Schedule 7 should be repealed, because the Schedule violates freedom of speech. Schedule 7 bans lawful speech (material classified X18+) and unnecessarily restricts access to material classified R18+ and MA15+. Similar legislation has been struck down by the highest court in the United States.[2] In our submission, CCL argued that end-user device filtering is the only proven and effective way to protect children from adult content.
7. In reference to restricted access systems, CCL pointed the Senate Committee to a recent US court case which, after taking several weeks of expert evidence, found that restricted access systems (or 'age verification technologies') simply do not work.
8. In the March 2007 decision of *ACLU v Gonzales*, the US Federal Court judge concluded that:[3]

> From the weight of the evidence, I find that there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor.

9. ACMA should closely study this US court decision, and the reasons for his Honour's conclusions, before adopting any re-draft of the Restricted Access Systems Declaration. A copy of the decision is annexed to this submission.

> *"…there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users."*

[1] NSWCCL, *Submission to the Senate Environment, Communications, Information Technology and the Arts' Inquiry into the Provisions of the Communications Legislation Amendment (Content Services) Bill 2007* (25 May 2007), <http://www.nswccl.org.au/docs/pdf/content%20service%20submission.pdf>.
[2] *Ashcroft v ACLU*, 542 U.S. 656, (2004) (striking down the *Communications Decency Act* on the grounds it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available).
[3] *ACLU v Gonzales* (2006) 478 F. Supp 2d 775 (22 March 2007), fact.[138].

3. Free speech is a relevant matter

10. CCL submits that freedom of speech is a relevant matter under clause 14(4)(c) of Schedule 7 to which ACMA must have regard in the development of the RAS Declaration. CCL submits that failing to have regard to free speech is an error of law.

11. CCL notes that Schedule 7's parent legislation (the BSA) relies heavily on the National Classification Code, which requires that 'adults should be able to read, hear and see what they want'[4] – a clear statement of the principle of free speech.

12. In 1980, Australia ratified the *International Covenant on Civil and Political Rights* (ICCPR).[5] Article 19 of the ICCPR guarantees freedom of expression. Australia has international obligations to adhere to the ICCPR.

13. While the ICCPR is not enforceable in domestic law,[6] it is nevertheless a long-established rule of statutory interpretation that civil rights (such as free speech) are only overridden by legislation that *expressly* abrogates such rights.[7]

14. Parliament has not expressed an intent in Schedule 7 to abrogate freedom of speech completely, therefore ACMA should do its utmost to uphold the principle of free speech in the drafting of the RAS Declaration. CCL submits that it would be an error of law for ACMA not to consider the implications for free speech when drafting the Declaration.

> *"It would be an error of law for ACMA not to consider the implications for free speech when drafting the Declaration."*

[4] *National Classification Code* (May 2005) F2005L01284, clause 1(a).
[5] *International Covenant on Civil and Political Rights* [1980] ATS 23 (entry into force: 13 November 1980).
[6] e.g. *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ): 'treaties do not have the force of law unless they are given that effect by statute'.
[7] e.g. *Pyneboard v Trade Practices Commission* (1983) 45 ALR 609, 617 (Mason ACJ, Wilson & Dawson JJ): '...a statute will not be construed to take away a common law right unless the legislative right to do so clearly emerges, whether by express words or necessary implication'.

4. What is free speech?

15. Freedom of speech is the right to express and to communicate our thoughts and opinions. It goes far beyond just speaking: people can express themselves by writing, publishing, protesting, texting, drawing and by many, many other methods (which is why it is sometimes called freedom of *expression*).

16. Freedom of speech is not an absolute right. Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) permits laws that restrict free speech, where necessary, to protect the rights and reputations of others, and to protect national security, public order, public health or morals.[8]

17. But, as the UN Human Rights Committee has observed, these exceptions to free speech:[9]

> ...must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. ...The [ICCPR] stipulates that the purpose of protecting [the rights and reputations of others, national security, public order, public health or morals] is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value.

18. In other words, in a free and democratic society, causing offence is not sufficient reason to prohibit or restrict expression. Material should only be restricted or prohibited where it is *necessary* to do so and where there is no less restrictive alternative (i.e. it is *proportionate*).

19. CCL submits that these are the principal tests against which every aspect of the draft RAS Declaration must be tested. At every step, ACMA should always ask: is this necessary *and* is there a less restrictive alternative? If a step is not necessary or if it is more restrictive than other measures, then it should be rejected.

> *"ACMA should always ask: is this necessary <u>and</u> is there a less restrictive alternative?"*

[8] see text of Article 19, annexed to this submission.

[9] *Faurisson v France* (1996) UN Doc CCPR/C/58/D/550/1993 (Mrs Evatt, Messrs Kretzmer & Klein), 8. See also, *Gauthier v Canada* (2003), UN Doc. CCPR/C/78/D/941/2000, [13.6]: the operation and application of laws that restrict freedom of speech must be 'necessary and proportionate to the goal in question and not arbitrary'.

5. 'opt in': an unnecessary infringement of free speech

20. Under the draft RAS Declaration, access to age-restricted content will be on an 'opt-in' basis. In other words, by default, service providers cannot provide R18+ or MA15+ content to adults without a specific request to receive such content. This is a clear violation of free speech.

21. It is an *unnecessary* duplication to require a further step for adults to 'opt-in' for access to restricted content.

22. When a customer signs up for a service, as part of proof of identity, providers will ask for age information (probably a birth date). This information is sufficient to determine whether restricted content should be available or not. It is *unnecessary* to ask any further questions.

23. Because this 'opt-in' step is *unnecessary*, it contravenes the principle of free speech.

24. To use a 'real world' analogy: when an adult joins a library, they receive an 'adult borrowing card'. That card entitles the adult to access any material in the library (no matter what the literature classification). They do not expect to be given a borrowing card granting them access only to material suitable for children under 15 years of age. There is no legitimate reason why online or mobile content services should be any different.

25. There are many reasons why an individual might not wish to request access to restricted content. They might be embarrassed. They might value their privacy. Adults should be free to access material which they can lawfully see, hear or read – without having to justify themselves or seek permission.

26. ACMA should be careful not to reduce adults to a level of expression suitable only for children. As in your local library, services that are suitable for children should be available, but they should not be the default option for adults.

> *"When an adult joins a library…they do not expect to be given a borrowing card granting them access only to material suitable for children…"*

6. PINs and passwords are ineffective

27. ACMA invites comment on the effectiveness of Personal Identification Numbers (PIN), password and other technologies to restrict access to content.

28. CCL notes that in *ACLU v Gonzales* the learned judge found that "credit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age. As a result, their use does not, in good faith, restrict access by minors".[10]

29. While it might be possible to setup an age verification system that verifies that each person who signs up to a service is an adult, it is not possible to build a system that guarantees that the person subsequently accessing the service is the same person who signed up and that she or he is an adult.

30. PIN numbers and passwords can be discovered by children. Some computer operating systems remember passwords. Children can also gain unauthorised access to credit cards. In fact, in the United States, credit card companies prohibit Web sites from using debit and credit cards to verify age for this very reason.[11]

> *"…credit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age."*

[10] *ACLU v Gonzales* (2006) 478 F. Supp 2d 775 (22 March 2007), law.[17].
[11] *ACLU v Gonzales* (2006) 478 F. Supp 2d 775 (22 March 2007), fact.[140].

7. RAS technologies are intrusive and invite identify theft

31. In *ACLU v Gonzales*, the US Federal Court judge was critical that restricted access systems require individuals to identify themselves and to hand over personal information across the Internet. His Honour found that this chills free speech to an unacceptable level.[12]

32. His Honour pointed out that there are many reasons why people are reluctant to hand over such information: they might have an embarrassing medical or sexual question to which they seek answers; or, anonymity is often important for woman seeking information about sexuality.[13]

33. Increasingly, many Internet users are reluctant to handover personal or credit card details because they have legitimate security fears, including identity theft.[14]

34. The significance of these findings is that Schedule 7, which requires the use of restricted access technology, exposes Australians to an unacceptably high risk of fraud and identity theft on the Internet.

35. If we require adults to hand over sensitive personal information (such as credit card details and dates of birth) on a regular basis, then we create a dangerous expectation among users that they should hand over this sensitive information on the internet every time they are asked for it. This plays directly into the hands of online fraudsters and identity thieves. We should be encouraging people to handover *less* personal information, not *more*.

36. ACMA should also acknowledge and address the reality that identity thieves and conmen will not respect the provisions of the National Privacy Principles.

> *"We should be encouraging people to handover <u>less</u> personal information, not <u>more</u>."*

[12] *ACLU v Gonzales* (2006) 478 F. Supp 2d 775 (22 March 2007), law.[21].
[13] *ACLU v Gonzales* (2006) 478 F. Supp 2d 775 (22 March 2007), fact.[172].
[14] *ACLU v Gonzales* (2006) 478 F. Supp 2d 775 (22 March 2007), fact.[174].

8. RAS technologies unreasonably burden content providers

37. The US Federal Court judge in *ACLU v Gonzales* noted that requiring content providers to implement age-verification systems imposed a significant and unacceptable economic burden on content providers, by way of setup and administration fees.[15] This was particularly a concern for providers of free content and providers who have millions of visitors a year.

38. The significance of these findings is that Schedule 7, by requiring the employment of restricted access systems, places an illegitimate financial and legal burden on providers of free and commercial content.

39. For example, why should film students who produce an MA15+ film have to provide an RAS facility if they wish to share their work on the internet? This restriction on freedom of speech places a disproportionate burden on non-commercial and small business content providers in Australia.

40. ACMA should place exceptions in the RAS Declaration for providers of political, academic, scientific and artistic content. Such an exception ensures that Schedule 7 is interpreted in accordance with the common law right of free speech. CCL submits that such an interpretation is not inconsistent with the BSA or Schedule 7.

41. CCL also submits that ACMA should completely exempt non-commercial providers from the excessive burden of providing RAS systems. These systems will effectively silence home-based not-for-profit content providers and students. This is completely unacceptable in a free and democratic society. It is inconceivable that Parliament intended Schedule 7 to affect these kinds of content providers.

> *"Why should film students who produce an MA15+ film have to provide an RAS facility if they wish to share their work on the internet?"*

[15] *ACLU v Gonzales* (2006) 478 F. Supp 2d 775 (22 March 2007), fact.[161] ff.

Appendix 1: Freedom of Expression

International Covenant on Civil and Political Rights

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

    (a) For respect of the rights or reputations of others;

    (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Appendix 2: ACLU v Gonzales

ACLU v Gonzales

(2006) 478 F. Supp 2d 775

(22 March 2007)

This judgment is 84 pages long. To conserve space it is not reproduced here.

The full judgment can be accessed on the website of the United States District Court for the Eastern District of Pennsylvania at:

http://www.paed.uscourts.gov/documents/opinions/07D0346P.pdf