

14. Enforcing Classification Laws

Contents

Summary	219
Enforcement of classification offline and online	220
Enforcement under the classification cooperative scheme	220
State and territory offences	220
State and territory law enforcement agencies	222
The Classification Liaison Service	222
Customs and Border Protection Service	223
Enforcement of online content regulation	223
<i>Broadcasting Services Act</i>	223
State and territory online content regulation	224
Enforcement problems	225
Classification cooperative scheme	225
Online regulation	225
ALRC's proposals	226
Enforcement under Commonwealth law	226
Alternative approach	227
Offences and penalties	228
Conducting enforcement activity	229

Summary

14.1 This chapter discusses enforcement of classification laws under the existing Commonwealth-state cooperative scheme for the classification of publications, films and computer games (the classification cooperative scheme); and schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth).

14.2 Under the classification cooperative scheme, the enforcement of classification laws is primarily the responsibility of states and territories. These arrangements contribute to problems of inconsistency in offence and penalty provisions between Australian jurisdictions and lack of compliance with classification laws. These problems and possible solutions to them are discussed in this chapter.

14.3 An important part of the rationale for having a new National Classification Scheme is to avoid inconsistency in enforcement of classification laws and associated penalties. The ALRC concludes that the Australian Government should, therefore, be responsible for the enforcement of classification laws and makes proposals for a regime of offences and penalties.

14.4 For political or pragmatic reasons, it may be considered necessary that the states and territories retain some enforcement powers. The chapter presents an alternative framework for a National Classification Scheme, applicable if the Australian Government determines that the states and territories should retain enforcement powers. In this circumstance, the ALRC proposes that a new intergovernmental agreement be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification decisions made under the new Classification of Media Content Act, but only with respect to publications, films and computer games.

Enforcement of classification offline and online

14.5 The following material describes the offences and penalties relevant to the enforcement of classification laws, including in relation to:

- offline content under the classification cooperative scheme—mainly by state and territory law enforcement agencies; and
- online content under the *Broadcasting Services Act*—mainly by the Australian Communications and Media Authority (the ACMA).

14.6 These laws include those that:

- impose obligations to classify media content according to prescribed criteria;
- impose prohibitions or restrictions on access to media content, or the sale, distribution or advertising of content; or
- provide for offences and penalties in relation to other classification laws.

Enforcement under the classification cooperative scheme

14.7 Under the classification cooperative scheme, state and territory enforcement legislation provides that the Director of the Classification Board may require publications, films or computer games to be submitted for classification.¹ Failure to comply with a notice ‘calling in’ a publication, film or computer game (a call in notice) is an offence under state and territory laws.

14.8 State and territory enforcement legislation also prohibits the sale, distribution and advertising of unclassified material; and restricts the sale, distribution and advertising of classified material in various ways.

State and territory offences

14.9 State and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. The main types of offence concern:

- failing to comply with call in notices;

¹ Except in the ACT, where the offence is contained in the Commonwealth Act: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23(3), 23A(3), 24(3).

- selling, screening, distributing or advertising unclassified material; and
- failing to comply with restrictions on the sale, distribution and advertising of classified material.

Offences in relation to call in notices

14.10 All states and territories have similar offence provisions relating to failure to comply with call in notices issued by the Director of the Classification Board. For example, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) provides that the Director may call in for classification:

- publications that are submittable publications;²
- unclassified films that are not exempt films; and
- computer games that contain contentious material.³

Offences in relation to unclassified material

14.11 State and territory enforcement legislation provides for offences in relation to selling, screening, distributing or advertising unclassified material. For example, in NSW, it is an offence to:

- sell or publicly exhibit an unclassified film;
- sell or deliver a submittable publication; or
- sell or publicly demonstrate an unclassified computer game.⁴

14.12 Similar offences apply in all other state and territory jurisdictions, with minor variations in formulation.⁵

Offences in relation to classified material

14.13 State and territory enforcement legislation provides for offences in relation to selling, screening, distributing or advertising certain categories of classified material (or material that, if classified, would be classified as being in a certain category). Offences vary significantly in relation to:

- the kinds of classified material that can be sold, screened, distributed, advertised or possessed; and
- how classified material can be sold, screened, distributed or advertised.

14.14 These differences can be illustrated by reference to X 18+ films. While the sale and public exhibition of X 18+ films is prohibited in all states, the ACT and the

² See Ibid s 5 definition of 'submittable publication'.

³ *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46, 46A, 47.

⁴ Ibid ss 6, 19, 27.

⁵ See, eg, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 6, 15, 25, 34.

Northern Territory permit it,⁶ subject to various restrictions. Similarly, while Queensland prohibits the selling, distributing or advertising of Category 1 Restricted and Category 2 Restricted publications,⁷ these publications may be sold in all other states and territories.

14.15 State and territory enforcement legislation contains provisions regulating how classified material can be sold, distributed or advertised. These provisions vary, particularly in relation to where certain material may be sold and how it may be displayed.

Penalties

14.16 Penalties for similar offences differ between jurisdictions. For example, the maximum penalty for failing to comply with a call in notice is as follows:

- Queensland \$2,000;
- Victoria \$11,945; and
- NSW \$11,000 for an individual (and \$22,000 for a corporation).⁸

State and territory law enforcement agencies

14.17 In most jurisdictions, state and territory police are responsible for enforcing classification laws.⁹ In the ACT, classification laws are enforced by ACT Policing (part of the Australian Federal Police (AFP)) and by the ACT Office of Regulatory Services.¹⁰

14.18 In Queensland, the Department of Employment, Economic Development and Innovation enforces classification laws using Office of Fair Trading inspectors. Police do not investigate or prosecute alleged classification offences, unless the complaint involves suspected child exploitation.¹¹

The Classification Liaison Service

14.19 The Australian Government provides some assistance in relation to enforcement, through the operation of the Classification Liaison Scheme (CLS). The Attorney-

6 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ss 9, 22; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 49. However, the Commonwealth Act prohibits the possession or control of Category 1 Restricted and Category 2 Restricted publications, X 18+ films, and RC material by persons in prescribed areas of the Northern Territory: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 101–102.

7 *Classification of Publications Act 1991* (Qld) s 12.

8 *Classification of Films Act 1991* (Qld) s 25CA(3); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 60(3), 60A(3), 61(3); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46(2), s46A(2), 47(2).

9 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

10 Ibid.

11 See, Explanatory Notes State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld).

General's Department operates the CLS—a joint Australian Government, state and territory initiative.

14.20 The primary functions of the CLS are to educate industry about legal obligations under the National Classification Scheme and to verify compliance with classification laws. In this context, CLS classification liaison officers visit premises throughout Australia checking whether classifiable material complies with classification laws and refer possible breaches of the law to police and other law enforcement agencies.¹²

Customs and Border Protection Service

14.21 As discussed in Chapter 12, the Australian Customs and Border Protection Service (Customs) identifies and confiscates 'objectionable material' at the Australian border. The definitions of 'objectionable material' in the *Customs (Prohibited Imports) Regulations 1956* (Cth) and *Customs (Prohibited Exports) Regulations 1958* (Cth) substantially mirror the definition of material classified RC under the National Classification Code.

Enforcement of online content regulation

Broadcasting Services Act

14.22 Under schs 5 and 7 of the *Broadcasting Services Act*, the ACMA investigates complaints about online content that the complainant believes to be 'prohibited content' or 'potential prohibited content'. The determination of whether online content is prohibited is made with reference to the National Classification Code and Classification Board decisions. The ACMA and content or hosting service providers may apply to the Board for classification of content.¹³ The steps the ACMA may take following an investigation, including the issuing of a take-down notice, are summarised in Chapter 2.

14.23 Schedules 5 and 7 of the *Broadcasting Services Act* provide for a range of offences, punishable by criminal, civil and administrative penalties.

14.24 Schedule 5 contains criminal offences concerning contravention of 'online provider rules',¹⁴ including contravening an industry code or industry standard.¹⁵

14.25 The maximum penalty for contravening an online provider rule or an ACMA direction with respect to an online provider rule is 50 penalty units (\$5,500)¹⁶ for an individual and \$27,500 for a body corporate. These are continuing offences, so that a

12 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

13 *Broadcasting Services Act 1992* (Cth) sch 7 cl 22.

14 See *Ibid* sch 5 cls 79, 82, 83.

15 For example, provisions of the Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008), obliging internet service providers to make Internet Industry Association Family Friendly Filters available.

16 *Broadcasting Services Act 1992* (Cth) sch 5 cls 82–83.

person who contravenes the provisions is guilty of a separate offence in respect of each day during which the contravention continues.¹⁷

14.26 Schedule 7 provides criminal, civil and administrative penalties for non-compliance with ‘designated content/hosting service provider rules’, which include the rules relating to prohibited content.¹⁸

14.27 It is a criminal offence to contravene a designated content/hosting service provider rule¹⁹ or a written direction from the ACMA with respect to a contravention of such a rule.²⁰ The maximum penalty for these offences is 100 penalty units (\$11,000) for an individual and \$55,000 for a body corporate. Again, these are continuing offences.

14.28 In addition, sch 7 provides that these contraventions are ‘civil penalty provisions’ and a person is deemed to commit a separate contravention in respect of each day during which the contravention continues.²¹ Such penalties must not exceed the maximum penalty that could have been imposed on conviction for the corresponding criminal offence.²²

14.29 Finally, a range of administrative ‘quasi-penalties’²³ apply to contraventions of designated content/hosting service provider rules. For example, where there is a contravention, the ACMA may apply to the Federal Court for an order that the person cease providing the designated content/hosting service.²⁴ In addition, contraventions of civil penalty provisions may have an effect on related ACMA decisions under the *Broadcasting Services Act*—for example, in relation to whether a company is a suitable licensee or a suitable applicant for a licence, such as a subscription television broadcasting licence.²⁵

State and territory online content regulation

14.30 Some state and territory enforcement legislation contains provisions dealing with matters beyond the classification of publications, films and computer games and including the regulation of online content. For example, the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic), among other things, makes it an offence to ‘use an on-line information service to publish or transmit, or make available for transmission’ objectionable material, child pornography

17 Ibid sch 5 cl 86.

18 Ibid sch 7 cl 53(6).

19 Ibid sch 7 cl 106.

20 Ibid sch 7 cl 108.

21 Ibid sch 7 cls 107, 108(7)–(8).

22 Ibid s 205F(4).

23 Administrative ‘quasi-penalties’ have been defined as those administrative actions that require the exercise of discretion that goes beyond a mechanistic application of the relevant legislation—such as licensing decisions—as opposed to true administrative penalties where monetary penalties are imposed administratively as with, for example, charges and interest payable under the *Taxation Administration Act 1953* (Cth): see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2002), [2.124], [2.146].

24 *Broadcasting Services Act 1992* (Cth) sch 7 cl 110.

25 Ibid s 98.

or ‘material unsuitable for minors’—the latter category being defined by reference to classification categories.²⁶

14.31 At the time the Broadcasting Services (Online Services) Bill 1999 (Cth) was introduced, it was intended that the Commonwealth would be responsible for regulating the activities of internet service providers and internet content hosts and the Attorney-General would encourage the development of uniform state and territory offence provisions, creating ‘offences for the publication and transmission of proscribed material by users and content creators’. However, such a scheme did not eventuate and the regulation of internet content in the states and territories continues to ‘vary drastically’.²⁷

Enforcement problems

Classification cooperative scheme

14.32 Problems with the enforcement of classification laws under the classification cooperative scheme were identified in the 2011 Senate Legal and Constitutional Affairs Committee review of the National Classification Scheme. The Senate Committee examined the effectiveness of the call in notice procedure and the enforcement of classification laws by the states and territories.²⁸

14.33 The report concluded that several aspects of the enforcement system require urgent attention. These included:

- the lack of enforcement of call in notices;
- the operations and resourcing of the CLS; and
- inconsistent provisions in state and territory enforcement legislation.²⁹

Online regulation

14.34 As discussed in various contexts elsewhere in this Discussion Paper, enforcing classification laws in relation to online media content poses significant challenges, including:

- the quantity of online content;
- the fact the content is dynamic or mutable;
- the number of persons producing content;
- that content is produced and hosted all over the world; and
- the difficulty of determining age and of restricting content.

26 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 56, 57, 57A, 58.

27 C Penfold, ‘Child Pornography Laws: The Luck of the Locale’ (2005) 30(3) *Alternative Law Journal* 123, 125.

28 See, Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), ch 6.

29 *Ibid*, Recs 12, 13, 15–21.

ALRC's proposals

Enforcement under Commonwealth law

14.35 The existing classification cooperative scheme, under which the Commonwealth classifies publications, films and computer games, and the states and territories enact complementary enforcement legislation, has resulted in substantial variations in state and territory enforcement provisions. This situation can be seen as inconsistent with the whole idea of a 'national scheme' for classification.

14.36 There are also inconsistencies in the regulation of classification rules between the classification cooperative scheme and schs 5 and 7 of the *Broadcasting Services Act*. For example, content rated X 18+ is prohibited content under the *Broadcasting Services Act*, but may be sold as a DVD or magazine in some Australian jurisdictions. Dr Gregor Urbas and Tristan Kelly noted that, with media convergence and increasing use of the internet, 'this inconsistency may be out of step with community standards'.³⁰

14.37 Many stakeholders emphasised the importance of consistency in the enforcement of classification laws,³¹ including in relation to international standards.³² Lack of consistency was identified as causing a number of problems, including higher compliance costs for media content publishers and distributors.³³

14.38 Some stakeholders—including some state or territory governments—may consider it an advantage for states and territories to be able to implement their own enforcement arrangements. However, arguably, in 'today's digital media landscape, the concept of state boundaries is no longer applicable'.³⁴ As the report of the Senate Legal and Constitutional Affairs Committee Inquiry observed, the fact that state and territory law enforcement agencies are responsible for law enforcement regarding classification matters is a 'particularly disjointed and fractured arrangement of the so-called "cooperative scheme"'.³⁵

14.39 The ALRC considers that the new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law. The Act

30 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

31 Internet Industry Association, *Submission CI 2445*, 28 July 2011; Australian Independent Record Labels Association, *Submission CI 2058*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011; Telstra, *Submission CI 1184*, 15 July 2011; Australian Federation Against Copyright Theft, *Submission CI 1182*, 15 July 2011; Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011; Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001; Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

32 Internet Industry Association, *Submission CI 2445*, 28 July 2011; Australian Mobile Telecommunications Association, *Submission CI 1190*, 15 July 2011.

33 Internet Industry Association, *Submission CI 2445*, 28 July 2011; Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011. Other stakeholders were less concerned about inconsistency than the prospect of consistency on an inadequate basis: Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011; Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001.

34 SBS, *Submission CI 1833*, 22 July 2011.

35 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 175.

should require media content providers to have certain content classified—whether by the new Classification Board or by authorised industry classifiers—and provide offences and penalties for failure to do so in accordance with the requirements of the legislation and approved industry codes of practice. It would be preferable if the Classification of Media Content Act also provided for restrictions on access to content, or on the sale, screening, distribution or advertising of content.

Alternative approach

14.40 Under the ALRC's proposals, existing inconsistencies in state and territory legislation concerning restrictions on the sale, distribution or advertising of classifiable publications, films and computer games would have to be resolved in the new Classification of Media Content Act—for example, in relation to the sale and distribution of X 18+ films and DVDs.

14.41 For this, and other, reasons—including the cost of enforcing classification laws—the Australian Government may be unwilling to enact new laws with regard to the enforcement of classification laws. In that case, the Classification of Media Content Act may have to contain provisions recognising that enforcement will be a matter for the states and territories.

14.42 However, without further agreement between the Commonwealth, states and territories, this would be likely to result in a new National Classification Scheme with similar inconsistencies in enforcement provisions to those that exist at present.

14.43 The ALRC proposes that, therefore, if the Australian Government determines that the states and territories should retain powers in relation to the enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact consistent legislation providing for the enforcement of classification laws with respect to publications, films and computer games.

14.44 Commonwealth, state and territory ministers should agree on the best approach to classification-related offences and penalties and to apply, or enact, uniform provisions. Two main approaches are possible in this regard.

14.45 First, agreement might be reached on adopting enforcement provisions as part of a complementary 'applied' law scheme for enforcement of classification laws. Under such a scheme, provisions would be enacted by one jurisdiction (most likely the Commonwealth), and then applied by other jurisdictions.³⁶ Alternatively, the states and territories might enact mirror legislation—that is, one jurisdiction enacts a law that is then enacted in similar terms by the other jurisdictions.³⁷

36 A recent example of such a scheme is the Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth).

37 The uniform Evidence Acts are an example of mirror legislation, although the original Acts have diverged somewhat over time.

14.46 In this context, the existing classification cooperative scheme has been criticised,³⁸ because the *Classification Act* provides that Commonwealth, state and territory ministers must agree to any amendment to the Classification Code and on classification guidelines or amendments to those guidelines;³⁹ and the Intergovernmental Agreement under which the scheme is established and maintained may be amended only by unanimous agreement.⁴⁰

14.47 The need for unanimity has been criticised⁴¹ and it has been suggested that any new intergovernmental agreement should provide only that amendments require the support of the Australian Government and six other parties, including the ACT.⁴²

Offences and penalties

14.48 If, as is proposed, the new Classification of Media Content Act provides for the enforcement of classification laws under Commonwealth law, an appropriate regime of offences and penalties should be incorporated in the Act, in accordance with best practice guidance.

14.49 Best practice guidance in the Commonwealth law context includes the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. This provides information about, among other things, provisions of the *Criminal Code* (Cth) and *Crimes Act 1914* (Cth) that have a bearing on the way that offences and related provisions should be framed; other legal and policy considerations that are relevant to how offence, civil penalty and enforcement provisions are framed; and suggested precedents for various types of offence, civil penalty and enforcement provisions.⁴³

14.50 One starting point for framing new offence and penalty provisions would be likely to be those set out in sch 7 of the *Broadcasting Services Act*—after taking into account any changes to the *Broadcasting Services Act* that may result from the conclusions of the Convergence Review.⁴⁴

14.51 The sch 7 offence and penalty regime, with significant adaptation, could be extended to apply to publications, films and computer games. This might mean that, for example, the sale of unclassified or RC content would be punishable under the new Classification of Media Content Act by criminal and civil penalties; and the broadcasting of unclassified television programs would be punishable by criminal, civil and administrative penalties (such as licence removal for repeated breaches). It may

38 I Graham, *Submission CI 1244*, 17 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011.

39 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 6, 12.

40 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), cl 3(2).

41 I Graham, *Submission CI 1244*, 17 July 2011. Also *Confidential Submission CI 1185*, 15 July 2011 (agreement of 6 of 9 jurisdictions should be required). MLCS Management stated that the existing Intergovernmental Agreement ‘creates logistical and practical difficulties in dealing with classification issues’ and the need to gain unanimous agreement on significant issues hampers change: MLCS Management, *Submission CI 1241*, 16 July 2011.

42 I Graham, *Submission CI 1244*, 17 July 2011.

43 Australian Government Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007).

44 See Ch 1.

also be appropriate, in relation to some offences involving publications, films and computer games, to provide for confiscation of unclassified products as a penalty.

14.52 Existing state and territory provisions are also starting points for the framing of new offences and penalties. Some states, for example, operate infringement notice schemes for minor breaches of classification laws. Under an infringement notice scheme, a non-judicial officer is empowered to give a notice alleging the offence to a suspected offender providing that the suspected offender may pay a specified penalty to avoid prosecution.⁴⁵ For example, in South Australia, offences under the *Classification (Publications, Films and Computer Games) Act 1995* (SA) are subject to ‘expiation fees’, set at around 5% of the maximum fine.⁴⁶ Failure to comply with a call in notice, for instance, is punishable by a maximum fine of \$5,000 and may be subject to an expiation fee of \$315.⁴⁷

14.53 This approach might be adopted for some minor offences in the new Classification of Media Content Act (or harmonised state and territory enforcement legislation). The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states that an infringement notice scheme ‘may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective’.⁴⁸

Conducting enforcement activity

14.54 If the new Classification of Media Content Act provides for enforcement of classification laws, questions arise about which agencies will be responsible for law enforcement activity.

14.55 This is relatively straightforward in the case of online content. Enforcement mechanisms, similar to those exercised by the ACMA under the *Broadcasting Services Act*, would be exercised by the new Regulator.⁴⁹ Depending on how the new Regulator is staffed and resourced, the ALRC would expect it also to have a role in investigating and enforcing classification laws in relation to publications, films and computer games, including through the issuing of infringement notices.

14.56 The Regulator would initiate criminal prosecutions through the Office of the Commonwealth Director of Public Prosecutions (CDPP) and bring any civil or administrative actions, such as obtaining cessation of service orders. The CDPP is responsible for the majority of prosecutions under Commonwealth criminal law—although some regulators such as the Australian Taxation Office, the Australian

45 Australian Government Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

46 In SA, expiation fees generally must not be more than 25% of the maximum fine prescribed for the offence: *Expiation of Offences Act 1996* (SA) s 5(3).

47 *Classification (Publications, Films and Computer Games) Act 1995* (SA).

48 Australian Government Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

49 The ACMA has guidelines relating to its enforcement powers under the *Broadcasting Services Act*. These set out the matters that it takes into account in making enforcement decisions: *Guidelines Relating to the ACMA’s Enforcement Powers under the Broadcasting Services Act 1992* (2011) (Cth).

Securities and Investments Commission and the Australian Competition and Consumer Commission, have power to prosecute some offences. The Regulator might be empowered to prosecute certain more minor offences and could, for example, issue infringement notices, if such a scheme were instituted.

14.57 The AFP might undertake the investigation of serious criminal offences, for example, providing content that would be classified RC over the internet on a commercial basis. It is questionable, however, whether the AFP would choose to place any higher priority on enforcement activity in relation to more minor offences, such as the prohibited sale or display of R 18+ or X 18+ magazines or DVDs, than state and territory police currently do.

14.58 There is no reason why state and territory law enforcement agencies could not also be involved in the enforcement of Commonwealth classification-related offences. Under existing legislation, state and territory police may perform functions related to the enforcement of Commonwealth legislation. These include powers of arrest, executing search warrants and confiscating property.⁵⁰ State and territory authorities may also institute proceedings for any Commonwealth offence in state and territory courts.⁵¹ The willingness of state and territory law enforcement agencies to become involved in classification-related enforcement may become an issue that needs to be resolved through inter-governmental discussions, including about the funding of enforcement activities.

Proposal 14-1 The new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.

Proposal 14-2 If the Australian Government determines that the states and territories should retain powers in relation to the enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification laws with respect to publications, films and computer games.

Proposal 14-3 The new Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with:

- (a) restrictions on the sale, screening, distribution and advertising of classified material;
- (b) statutory obligations to classify media content;
- (c) statutory obligations to restrict access to media content;

50 See, for example, *Crimes Act 1914* (Cth) pt 1AA, div 4 (powers of arrest) and pt IE (forfeiture of child pornography material).

51 *Ibid* s 13. However, the CDPP retains the power to take over the proceedings: Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [3.11].

- (d) an industry-based classification code; and
- (e) directions of the Regulator.

Proposal 14-4 Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the *Broadcasting Services Act 1992* (Cth).

Proposal 14-5 The Australian Government should consider whether the Classification of Media Content Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.

