Executive Summary

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Background

This is the first comprehensive review of censorship and classification since the ALRC report, *Censorship Procedure*, published in 1991 (ALRC Report 55). That report recommended a legislative framework that would enable the Commonwealth, states and territories to take a national approach to classification. Its recommendations formed the basis of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), and what is commonly referred to as the National Classification Scheme.

Censorship Procedure advanced classification policy in Australia by recommending a cooperative scheme between the Commonwealth, states and territories, and identified the important role to be played by an independent Classification Board and Classification Review Board. However, it was developed in a 'pre-internet' environment, when the wider implications of media convergence for content regulation generally were not yet understood.

In the context of ever greater convergence of media technologies, platforms and services, and more media being accessed from the home through high-speed broadband networks, the need for a comprehensive review of classification laws and regulations became apparent. In providing the reference for this Inquiry to the ALRC, the Attorney-General had regard to the rapid pace of technological change in media

available to, and consumed by, the Australian community, and the needs of the community in this evolving technological environment.

The major principles that have informed media classification in Australia—such as adults being free to make their own informed media choices and children being protected from material that may cause harm—continue to be relevant and important. While a convergent media environment presents major new challenges, there continues to be a community expectation that certain media content will be accompanied by classification information based on decisions that reflect community standards.

Inquiry in context

This Inquiry was one of a number of related inquiries taking place in Australia. The Convergence Review was established through the Department of Broadband, Communications and the Digital Economy (DBCDE) in 2011 to review Australia's media and communications legislation in the context of media convergence, due to report in the first quarter of 2012.

Other significant inquiries and reviews relevant to this Inquiry included: public consultation on the introduction of an R 18+ classification for computer games; a review of measures to increase accountability and transparency for internet service provider (ISP) filtering of Refused Classification (RC) material; a Senate Committee review of Australia's classification system; inquiries into cyber-safety and outdoor advertising; the Independent Media Inquiry into newspapers and online news publications; and a proposed national cultural policy.

Problems with the current framework

A strong underlying theme of many submissions to this Inquiry was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content now available to Australians. The *Classification Act* was described as 'an analogue piece of legislation in a digital world', and there were difficulties identified in how the *Classification Act* interfaces with the *Broadcasting Services Act 1992* (Cth), which covers broadcast and online media.

Respondents drew attention to aspects of the classification and content regulation framework that are failing to meet intended goals, and that create confusion for media content industries and the wider community. Among the problems identified were:

- inadequate regulatory response to changes in technology and community expectations;
- lack of clarity about whether films and computer games distributed online must be classified;
- 'double handling' of media content, with films and television programs being classified twice for different formats (eg, 2D and 3D) and different platforms (eg, broadcast television and DVD);

- concerns that the scope of the RC category is too broad and that too much content is prohibited online, including some content that may not be prohibited in other formats, such as magazines;
- inconsistent state and territory laws concerning restrictions and prohibitions on the sale of certain media content, such as sexually explicit films and magazines;
- low compliance with classification laws in some industries, particularly the adult industry, and correspondingly low enforcement; and
- the need to clarify the responsibilities of the Classification Board and the Australian Communications and Media Authority (the ACMA) and other Australian Government agencies and departments involved with classification and media content regulation.

The context of media convergence

This Inquiry provided the opportunity to reform Australia's classification laws to meet the challenges of a convergent media environment. Developments associated with media convergence include:

- increased household and business access to high-speed broadband internet;
- the digitisation of media products and services, as seen with the rise of YouTube, Apple iTunes and other global digital media platforms;
- the convergence of media platforms and services, for both established and new media;
- the globalisation of media platforms, content and services, making nationally-based regulations more difficult to apply;
- the acceleration of innovation, characteristic of a more knowledge-based economy;
- the rise of user-created content, and a shift in the nature of media users from audiences to participants;
- greater media user empowerment, due to greater diversity of choices of media content and platforms and the increased ability to personalise media; and
- the blurring of lines between public and private media consumption, as well as the ability to apply age-based access restrictions, as more media is accessed from the home through converged media platforms.

Piecemeal regulatory responses to changes in technologies, markets and consumer behaviour have created uncertainty for both consumers and industry, and raise questions about where responsibilities lie for driving change. Current legislation is characterised by what the ACMA has described as 'broken concepts': laws built upon platform-based media regulation, that become less and less effective in a convergent media environment.

A new National Classification Scheme

Guiding principles for reform

The ALRC identified eight guiding principles for reform directed to providing an effective framework for the classification and regulation of media content in Australia. These principles underpin the 57 recommendations for reform in this Report. The ALRC considers that these principles should inform the development of a new National Classification Scheme that can more effectively meet community needs and expectations, while being more responsive to the challenges of technological change.

The eight guiding principles are that:

(1) Australians should be able to read, hear, see and participate in media of their choice;

(2) communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;

(3) children should be protected from material likely to harm or disturb them;

(4) consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;

(5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;

(6) the classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;

(7) classification regulation should be kept to the minimum needed to achieve a clear public purpose; and

(8) classification regulation should be focused upon content rather than platform or means of delivery.

Key features

In this Report, the ALRC recommends a new classification scheme for a new convergent media landscape. The key features of the ALRC's model are:

- **Platform-neutral regulation**—one legislative regime establishing obligations to classify or restrict access to content across media platforms.
- **Clear scope of what must be classified**—that is feature films, television programs and certain computer games that are both made and distributed on a commercial basis and have a significant Australian audience.

- **A shift in regulatory focus to restricting access to adult content**—imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.
- **Co-regulation and industry classification**—more industry classification of content and industry development of classification codes, subject to regulatory oversight.
- **Classification Board benchmarking and community standards—**a clear role for the Classification Board in making independent classification decisions using classification categories and criteria that reflect community standards.
- **An Australian Government scheme**—replacing the current classification cooperative scheme with enforcement of classification laws under Commonwealth law.
- **A single regulator**—with primary responsibility for regulating the new scheme.

Platform-neutral regulation

A new Classification of Media Content Act should be enacted incorporating all classification obligations applying to media content, including:

- publications, films and computer games currently subject to the *Classification Act* and state and territory classification enforcement legislation;
- online and mobile content currently subject to the regulatory regime under schs 5 and 7 of the *Broadcasting Services Act*; and
- broadcast and subscription television content currently regulated under the *Broadcasting Services Act*.

Traditional distinctions based on how content is accessed or delivered are becoming less relevant. Accordingly, the three key statutory obligations recommended in this Report are 'platform-neutral'—that is, they apply to certain media content, whether the content is screened in cinemas, broadcast on television, sold in retail outlets, provided online, or otherwise distributed to the Australian public. The Report recommends platform-neutral laws for what media content must be classified, platform-neutral laws for what media content must be restricted to adults, and platform-neutral laws for what media content is prohibited.

The intention is to avoid inconsistencies manifest under the current scheme, and enable a new classification framework to be more adaptive to changes in technologies, products and services arising out of media convergence. This would also eliminate costly 'double handling' or 'double classification' of similar content on different media platforms. Further, all media content that is required to be classified would be classified according to a single set of classification categories and criteria.

Clear scope of what must be classified

The volume of media content available to Australians has grown exponentially. There are over one trillion web sites, hundreds of thousands of 'apps' available for download

to mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second). As it is impractical to expect all media content to be classified in Australia, the scope of what must be classified should be confined to feature films, television programs and higher-level computer games.

A classification obligation that applies to content must be focused on material for which Australians most need and demand classification information. Therefore, importantly, feature films, television programs and computer games should only be required to be classified if they are both made and distributed on a commercial basis and likely to have a significant Australian audience.

Laws that stipulate what media content must be classified, and who undertakes classification activities, are currently platform-based and historic. The need to classify should be based upon the nature of the content itself—including its likely audience reach—rather than being based primarily upon the platform from which it is delivered and accessed.

Obligations to classify content would not generally apply to persons uploading online content on a non-commercial basis. Internet intermediaries, including application service providers, host providers and internet access providers, would also generally be excluded from classification-related obligations other than those concerning Prohibited content.

A shift in regulatory focus to restricting access to adult content

Content providers should be required to take reasonable steps to restrict access to all adult content that is sold, screened, provided online, or otherwise distributed to the Australian public. Adult content refers to media content that has been, or if classified would be, classified R 18+ or X 18+.

This approach to adult content recognises that formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose.

The new Act should provide for essential requirements for restricting access. The various ‘reasonable steps’ that different types of content provider might be expected to take should be prescribed in industry codes and Regulator standards, approved and enforced by the Regulator.

What steps are reasonable to take to restrict access will be based upon what is appropriate for delivery platforms. Restricting access offline may be straightforward in some instances, such as the packaging of certain content in plastic, or requiring proof of age on purchase.

While the challenges are clearly greater with online content, content providers will still be expected take reasonable steps to restrict access. Some content providers may be able to issue warnings and use age-verification systems. Others may be expected to promote self-regulatory initiatives to assist consumers to manage their own access to media content, and protect children and others in their care.

Measures to restrict access to adult content are complementary to other Government and industry cyber-safety initiatives. Measures to assist parents and guardians in particular may include:

- public education about the use of parental locks and other technical means to protect children from exposure to inappropriate media content;
- digital literacy and education programs;
- use of personal computer-based dynamic content filters; and
- user reporting—or 'flagging'—of inappropriate content.

Co-regulation and industry classification

A greater role for industry in classification can allow the Government to focus on the content that generates the most concern in terms of community standards and the protection of children. The new scheme would introduce additional elements of co-regulation into the classification system.

The scheme provides for innovative and efficient classification decision-making mechanisms. Most content that must be classified under the new scheme may be classified by authorised industry classifiers, but subject to regulatory oversight and review.

The Regulator should also have the power to approve other rigorous and transparent classification decision-making systems, perhaps developed in other jurisdictions or by digital and online content distributors. Classification decisions made under an approved system could be deemed to have an equivalent Australian classification. This would facilitate the provision of Australian classification information in a media environment characterised by vast volumes of content. New classification decision-making instruments, such as comprehensive online questionnaires that incorporate Australian classification criteria, should also be developed.

The new scheme also provides for the development and operation of industry classification codes. The intention is that such industry codes will provide flexibility for different industries to comply with regulatory requirements in a manner that is suited to their particular business models and is responsive to their particular audience and consumers. Industry codes would include details on matters such as the application of classification markings, display requirements for restricted content, reasonable steps for restricting access and complaints handling.

Industry classification and the extended use of codes will assist classification regulation to be responsive to technological change and adaptive to new technologies, platforms and services. It also provides the basis for greater 'buy-in' by industry

players to the classification scheme, thereby allowing industry knowledge and expertise to be directly applied to addressing consumer issues.

The Regulator would provide a critical 'back stop' to the scheme by providing for safeguards and oversight to ensure that the scheme is operating effectively, that industry is complying with regulatory obligations and that consumer needs and concerns are being adequately met.

Classification Board benchmarking and community standards

The Classification Board will be retained as an independent statutory body responsible for making key classification decisions and reviewing decisions. The Board, whose members are intended to be broadly representative of the Australian community, is suited to a benchmarking role and there is a high level of public confidence in the Board's decisions.

Independent decisions that reflect community standards become more important under a system that allows for more content to be classified by industry. In this context, the role of the Classification Board is particularly important. The ALRC therefore recommends that films for cinema release and computer games likely to be classified MA 15+ or above continue to be classified by the Board. It is important that independent benchmarks are established across a range of media content and classification categories.

Classification categories should be harmonised and the criteria combined so that the same categories and criteria are applied in the classification of all media content—irrespective of its form and the platform by which it is delivered or accessed. Classification criteria should also be reviewed periodically, to ensure they continue to reflect prevailing community standards. This requires comprehensive research, including a mix of quantitative and qualitative research.

One classification category that may no longer align with community standards is the 'RC' category. This category should be renamed 'Prohibited', and its scope narrowed. The Australian Government should review current prohibitions in relation to the depiction of sexual fetishes in films, and 'detailed instruction in the use of proscribed drugs'. Further, the Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'.

An Australian Government scheme

The new scheme based upon the Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme. This conclusion is dictated by the need for classification law to respond effectively to media convergence and the desirability of consistent classification laws, decision making and enforcement.

At present, 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 and low compliance with classification laws in some industries.

An important part of the rationale for replacing the existing classification scheme is to avoid such inconsistencies. The Australian Government should be responsible for the enforcement of classification laws and a regime of offences and penalties. The new Act should express an intention that it is to cover the field.

It is envisaged that consultation with the states and territories on classification matters, including enforcement, will continue to be an important element of the new National Classification Scheme.

A single regulator

A single regulator would have primary responsibility for regulating the new scheme. The Regulator would be responsible for a range of functions similar to some of those currently performed by the Classification Branch of the Australian Government Attorney-General's Department; the Director of the Classification Board; the DBCDE; and the ACMA.

The ALRC has identified advantages in having one regulator responsible for all forms of content regulation, including classification matters. These advantages are likely to increase significantly in the context of media convergence.

The Regulator's functions should include:

- encouraging, monitoring and enforcing compliance with classification laws;
- handling complaints about the classification of media content;
- authorising industry classifiers and providing and approving classification training;
- facilitating the development of industry classification codes and approving and maintaining a register of such codes;
- liaising with relevant Australian and overseas media content regulators, classification bodies and law enforcement agencies; and
- educating the public about the new National Classification Scheme and promoting media literacy more generally.

In addition, the Regulator's functions may also include:

- providing administrative support to the Classification Board;
- maintaining a database of classification decisions;
- assisting with the development of classification policy and legislation; and
- conducting or commissioning research relevant to classification.

Net effect of the recommendations

The net effect of the ALRC's recommendations in this Report would be the establishment of a new National Classification Scheme that:

- applies consistent rules to content that are sufficiently flexible to be adaptive to technological change;
- places a regulatory focus on restricting access to adult content, helping to promote cyber-safety and protect children from inappropriate content across media platforms;
- retains the Classification Board as an independent classification decision maker with an essential role in setting benchmarks;
- promotes industry co-regulation, encouraging greater industry content classification, with government regulation more directly focused on content of higher community concern;
- provides for pragmatic regulatory oversight, to meet community expectations and safeguard community standards;
- reduces the overall regulatory burden on media content industries while ensuring that content obligations are focused on what Australians most expect to be classified; and
- harmonises classification laws across Australia, for the benefit of consumers and content providers.