

2. The Current Classification Scheme

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Summary

2.1 This chapter describes the historical background to current classification laws, and the framework of the current National Classification Scheme, including the classification cooperative scheme for publications, films and computer games, and classification laws as applied to broadcasting, online and mobile content under the *Broadcasting Services Act 1992* (Cth). The roles of the Classification Board, the Classification Review Board and the Australian Communications and Media Authority (the ACMA) are outlined, along with that of industry, under co-regulatory codes of practice for online and broadcast content. The chapter assesses the current scheme, looking at aspects that work reasonably well and those that are not working well and are in need of reform. The chapter concludes by noting the strong arguments made to the ALRC about the need for fundamental reform and for a new National Classification Scheme.

From censorship to classification

2.2 The history of censorship and classification in Australia has been marked by a general shift away from direct censorship by government authorities prior to the 1970s, towards classification of the broad range of media content.¹

1 A useful brief history is provided in Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), ch 2. Other historical accounts include I Bertrand, *Film Censorship in Australia* (1978); B Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945* (1997).

2.3 Censorship is used here to refer to the outright banning of media content on moral or other grounds. The primary purpose of classification, by contrast, is to provide prior information to prospective consumers as to the nature of media content. In some instances, classification also entails obligations to restrict access, as with the marking of content which indicates that it is only lawfully available to adults. In other instances, classification may also entail advice as to the suitability of such content to people within particular age groups, or recommendations as to how it should be consumed, particularly by children.

2.4 A key moment in the history of classification policy in Australia was the landmark 1968 case *Crowe v Graham*, which involved the interpretation of ‘obscene’ and ‘indecent’ under the NSW indecent publications legislation. The High Court of Australia upheld the use of a ‘community standards’ test—referring to offence to the ‘modesty of the average man’—rather than adopting the common law test of obscenity, based on the ‘tendency to deprave and corrupt’ and precedents dating back to 1868.²

2.5 Subsequent to *Crowe v Graham*, reforms first announced by the Minister for Customs and Excise, the Hon. Don Chipp MP in 1970, and enacted by the Whitlam Government in 1972, saw the Australian approach shift from a closed and highly interventionist model of censorship into a more open, liberal and accountable regime, based around classification as the norm and banning of material as the exception. Underpinning the classification framework has been the concept of the ‘reasonable adult’ which informs classification decision making.

2.6 The National Classification Scheme has, since the early 1970s, primarily revolved around the principle of classification rather than censorship, although any classification scheme is also likely to involve some censorship, based upon what has come to be known as the ‘community standards’ test. Gareth Griffith has described the distinction in these terms:

Prima facie classification implies that nothing is banned [but] only restricted if necessary. Classification has certainly a more neutral flavour than the more pejorative term censorship ... Whereas censorship is suggestive of public order and idea of the public good, classification is associated with the facilitation of informed choice in a community of diverse standards.³

2.7 The ALRC, in the 1991 report *Censorship Procedure* (ALRC Report 55), made the observation that much of what had occurred since the 1970s has involved classification rather than censorship, and on that basis, recommended renaming the Film Censorship Board as the Classification Board, and the Censorship Review Board as the Classification Review Board:

Rather than focusing on preventing material from being disseminated, policy now concentrates more on classifying films and publications into defined categories, with restrictions on dissemination only being imposed at the upper limits of what is considered acceptable by the general community.⁴

2 *Crowe v Graham* (1968) 121 CLR 375, 379.

3 G Griffith, *Censorship in Australia: Regulating the Internet and Other Recent Developments* (2002), 3.

4 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [2.6].

Classification cooperative scheme

2.8 The classification cooperative scheme for films, publications and computer games was implemented through the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* (*Classification Act*) and complementary state and territory enforcement legislation. The *Classification Act* is supplemented by a number of regulations, determinations and other legislative instruments, including the:

- National Classification Code (May 2005);
- Guidelines for the Classification of Publications 2005 (Cth); and
- Guidelines for the Classification of Films and Computer Games (Cth).

2.9 The cooperative classification scheme is underpinned by an Intergovernmental Agreement on Censorship made between the Commonwealth and all states and territories (the Intergovernmental Agreement). This agreement confirms that certain changes to the scheme, such as amendments to the National Classification Code and classification guidelines, must be considered and agreed to by Censorship Ministers.⁵

2.10 As the National Classification Scheme is overseen by Australian Government and state and territory Censorship Ministers, classification matters are dealt with by the Standing Council on Law and Justice (SCLJ).⁶ The SCLJ is a national ministerial council, whose members are the Attorney-General of Australia, the state and territory Attorneys General and the New Zealand Minister of Justice; Norfolk Island has observer status at SCLJ meetings.⁷ Censorship Ministers generally meet twice a year, as part of the SCLJ to discuss classification policy and legislative issues and the operation of the scheme

2.11 The Federal Attorney-General's Department provides administrative services to the Classification Board and Classification Review Board and supports the Censorship Ministers in their administration of the National Classification Scheme. The Attorney-General's Department has overall responsibility for Australian classification policy.

The Classification Board and the Classification Review Board

2.12 The Classification Board is the primary body classifying films, publications and computer games in Australia. The Classification Board may comprise up to 30 members, and currently has 12 members, including a Director and Deputy Director. The Governor-General of Australia appoints all members for either full or part-time appointments, having regard to ensuring that the Classification Board 'is broadly representative of the Australian community'.⁸ Currently, members are appointed for

5 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995) pt III.

6 Previously known as the Standing Committee of Attorneys-General.

7 Australian Attorney-General's Department, *Standing Council on Law and Justice* <www.ag.gov.au/www/agd/agd.nsf/Page/Committeesandcouncils_Ministerialcouncils_StandingCommitteeofAttorneysGeneral> at 23 January 2012.

8 *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* s 48.

three-year terms, and may be reappointed, but they can serve no longer than seven years. The Board charges fees for classifying material prescribed by regulation, with classification carried out largely on a cost recovery basis.

2.13 The Classification Review Board is an independent body comprised of part-time members who review Classification Board decisions on application. Like the Classification Board, its members are intended to be broadly representative of the Australian community. The Classification Review Board considers a much smaller volume of material than the Classification Board: in 2009–10, the Classification Review Board classified four films for public exhibition, one film not for public exhibition, two computer games and one publication.⁹

Broadcasting Services Act

2.14 The *Broadcasting Services Act* came into force in 1993, replacing the *Broadcasting Act 1942* (Cth). The Act contains an objects section that states the goals and principles of broadcasting policy. It also contains a statement of regulatory policy, expressing a commitment to accommodating technological change and the development of new services, and ‘enabling public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens’ on regulated industries and services.¹⁰

2.15 The *Broadcasting Services Act* also devolved responsibility for the development of program classification, and the handling of complaints, to industry bodies in a co-regulatory framework, through the development of industry codes of practice approved and registered with the ACMA.

Broadcasting industry codes and standards

2.16 In developing classification standards for television programs, broadcasters are required under pt 9 of the *Broadcasting Services Act* to take account of:

- the objects of the *Broadcasting Services Act* (s 3);
- code of practice requirements stated in s 123 of the *Broadcasting Services Act*;
- classification standards for other media, as administered by the Classification Board; and
- outcomes of consultation with the community and the ACMA about these standards.

2.17 The commercial television code of practice is developed and administered by Free TV Australia as the relevant industry body for free-to-air commercial networks. The subscription television codes of practice, the subscription narrowcasting codes of practice, and the open narrowcasting codes of practice are developed and administered by the Australian Subscription Television and Radio Association (ASTRA). The

⁹ Classification Review Board, *Annual Report 2009–10*, 62.

¹⁰ *Broadcasting Services Act 1992* (Cth) ss 3, 4.

Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) codes of practice are developed and approved within those organisations. These codes are discussed in more detail in Chapter 13.

2.18 The *Broadcasting Services Act* also mandates time-zone restrictions for commercial television broadcasting licensees and community television broadcasting licensees.¹¹ These require that films classified as Mature (M) may be broadcast only between the hours of 8:30 pm on a day and 5:00 am on the following day, or between the hours of noon and 3:00 pm on any day that is a school day. It is also required that films classified as MA 15+ may be broadcast only between the hours of 9:00 pm on a day and 5:00 am on the following day. Under the codes of practice, these time-zone restrictions also apply to television programs with the same classifications. This statutory requirement does not apply to the digital multi-channels or subscription broadcasting services.

Online content

2.19 The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) established the legislative framework for online content regulation in Australia. It extended the co-regulatory system for broadcasting to online content, combining this with a complaints-based mechanism for content assessment.¹²

2.20 Schedule 5 of the *Broadcasting Services Act* sets out provisions in relation to internet content hosted outside Australia, and sch 7 does so in relation to content services, including some content available on the internet and mobile services hosted in or provided from Australia. Broadly, the scheme places constraints on the types of online content that can be hosted or provided by internet service providers (ISPs) and content service providers. This is expressed in terms of ‘prohibited content’.

2.21 Schedule 7 defines ‘prohibited’ or ‘potentially prohibited’ content.¹³ Generally, ‘prohibited content’ is content that has been classified by the Classification Board as X 18+ or Refused Classification (RC) and, in some cases, content classified R 18+ or MA 15+ where the content is not subject to a ‘restricted access system’. Content is ‘potentially prohibited content’ if the content has not been classified by the Classification Board and, if it were to be classified, there is a substantial likelihood that it would be prohibited content.

2.22 Under the *Broadcasting Services Act*, the ACMA investigates complaints about online content that the complainant believes to be ‘prohibited content’ or ‘potential prohibited content’ with reference to the National Classification Code. The Classification Board will classify online content on receipt of an application for classification.

11 Ibid pt 9 s 123(3A).

12 Overviews of online content regulation in Australia can be found in P Coroneos, ‘Internet Content Policy and Regulation in Australia’ in B Fitzgerald and others (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008); and K Crawford and C Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011), 53–57.

13 *Broadcasting Services Act 1992* (Cth) sch 7 cls 20, 21.

2.23 The ACMA may choose to investigate on its own initiative, and must investigate all complaints that are not frivolous, vexatious, made in bad faith, or made to undermine the effective administration of the schedules.¹⁴

2.24 The action that the ACMA must take depends, among other things, on where the content is located. Where prohibited content is hosted in Australia, the ACMA must issue a final notice to the content service provider seeking removal of the content, the link or service, or requiring the use of a restricted access system, depending on the nature and classification category of the content.¹⁵ The ACMA must issue an interim notice for Australian-hosted potential prohibited content and apply to the Classification Board for classification of the content.¹⁶ Content hosts must undertake the action required by the notice by 6:00pm the next business day, and financial penalties apply for failing to comply with a notice.¹⁷ Where Australian-hosted prohibited or potential prohibited content is also considered to be sufficiently serious, the ACMA must notify law enforcement agencies.

2.25 Where prohibited or potential prohibited content is hosted outside Australia, the ACMA notifies filter software makers accredited by the internet industry in accordance with the code of practice in place under sch 5 of the *Broadcasting Services Act*.¹⁸ The filters are made available by ISPs to their customers for free or on a cost recovery basis. Where prohibited or potential prohibited content hosted overseas is also considered to be sufficiently serious, the ACMA notifies the member hotline in the country where the content appears to be hosted. Where no member hotline exists, the ACMA notifies the Australian Federal Police for action through Interpol.

Internet industry codes

2.26 Schedules 5 and 7 of the *Broadcasting Services Act* are intended to establish a co-regulatory framework based on industry codes developed by sections of the internet industry.

2.27 Under sch 5, the matters that must be dealt with in industry codes for ISPs include: enabling parents to better monitor the online activities of their children; provision of filtering technologies; content labelling; legal assessments of content; and complaints handling procedures.¹⁹

2.28 Under sch 7, the matters that must be dealt with in industry codes for commercial content service providers include: the engagement of trained content assessors; and ensuring that content is assessed by these content assessors. Matters that may be dealt with include: complaint-handling procedures; promoting awareness of

14 Ibid sch 7 cl 43.

15 Ibid sch 7 cls 47, 56, 62.

16 Ibid sch 7 cl 47(2)–(5).

17 Ibid sch 7 cl 53.

18 Ibid sch 5 cl 40.

19 Ibid sch 5 cl 60.

safety issues; and assisting parents to supervise and control children's access to online content.²⁰

2.29 In accordance with schs 5 and 7, the Internet Industry Association (IIA) has developed two industry codes—the Internet and Mobile Content Code²¹ and the Content Services Code.²² The codes impose various obligations on content hosts, ISPs, mobile carriers, and content service providers. Subjects addressed include:

- obligations in responding to notices;
- requirements about what information must be provided to users;
- requirements about making filters available;
- requirements about establishing complaints procedures; and
- the appropriate use of restricted access systems.

2.30 Peter Coroneos, former chief executive of the IIA, has described the IIA codes as 'promoting industry facilitated user empowerment' and 'designed to achieve the broad objectives of the legislation without significant burden on or damage to the industry'.²³

Assessing the current scheme

2.31 In any set of recommendations for a new National Classification Scheme, there needs to be not only a consideration of the changing external environment and the underlying principles that inform proposed recommendations, but also an evaluation of both the nature of the problems that policy makers are seeking to address, and the ways in which existing policy instruments are working – or failing to work – in approaching those problems.

2.32 In the Australian Public Service Commission's paper, *Smarter Policy: Choosing Policy Instruments and Working with Others to Influence Behaviour*, these questions are addressed in the following way:

- (1) A rigorous analysis requires an assessment that the policy intervention will achieve net benefits for the community after taking account of its impacts. The identification of a social, economic or environmental problem does not justify government intervention in itself. Policy makers need to demonstrate that the benefits of intervening outweigh the costs.

20 Ibid sch 7 cls 81–82.

21 Internet Industry Association, *Internet Industry Codes of Practice: Codes for Industry Co-regulation in Areas of Internet and Mobile Content* (2005).

22 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008).

23 P Coroneos, 'Internet Content Policy and Regulation in Australia' in B Fitzgerald and others (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008), 58.

- (2) Policy makers do not start with a clean slate. The choice of policy instruments is invariably constrained, to some extent, by the existing array of government interventions. Thus an audit of current policy instruments already operating in the policy space is a prerequisite for a good policy design process. This audit would ideally include interventions by all levels of government and the full range of policy instruments—both regulatory and non-regulatory.²⁴

2.33 The Terms of Reference require the ALRC to inquire into whether the existing National Classification Scheme continues to provide an effective framework for the classification of media content in Australia. Some of the perceived positive and negative aspects of the current scheme are discussed below.

Positive aspects of the current scheme

2.34 Through its consultations and submissions, the ALRC found that positive aspects of the current classification scheme included:

- well understood classification categories and markings;
- high levels of public awareness and familiarity with the classification scheme;
- statutory independence of the Classification Board and the Classification Review Board; and
- promptness of the Classification Board in classifying media content.

2.35 The ALRC also found strong support for the co-regulatory arrangements that had operated in broadcast and subscription television under the *Broadcasting Services Act*.

2.36 Prior to the establishment of the cooperative scheme in 1995, the complex network of Commonwealth, state and territory laws could sometimes result in the classification of a single film involving 13 pieces of legislation across various jurisdictions.²⁵

2.37 John Dickie, the last Chief Censor and the first Director of the Office of Film and Literature Classification, observed that the 1995 reforms had considerable merit. He proposed that because of ‘the investment by Government and industry over many years to inform media consumers’, the latest ALRC Inquiry

should try to improve the system rather than start all over again. It took many years for the viewing public to synthesise the classification categories for film and DVDs with those for television when they were altered in the early 1990s.²⁶

2.38 Under the current system, the Classification Board typically makes over 7,000 decisions within prescribed time limits every year, and few of these decisions attract

24 Australian Public Service Commission, *Smarter Policy: Choosing Policy Instruments and Working with Others to Influence Behaviour* (2009).

25 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [1.11].

26 J Dickie, *Submission CI 582*.

controversy.²⁷ Commentators have noted that distributors generally have realistic expectations about eventual classifications, particularly for films and DVDs.²⁸

2.39 The public generally knows and understands the current classification system. In a 2005 survey undertaken by the Office of Film and Literature Classification, virtually all who responded were familiar with the classification system for film and DVDs, and the vast majority believed that classification symbols were useful.²⁹

2.40 The Classification Board and the Classification Review Board are independent statutory bodies, operating apart from government, industry, and each other. This formal independence has been viewed as one of the Australian classification system's very important and highly valued features.

2.41 A co-regulatory framework has now operated in broadcast and subscription television since the 1990s, and it has strong support from the industries involved. In its submission in response to the ALRC's Issues Paper, Free TV Australia observed that the level of complaints received about commercial television program classification and content were very low relative to the amount of material broadcast and the audience size, and that very few complaints led to subsequent investigations by the ACMA or evidence of breaches of the classification guidelines.

There is a very low level of complaint about programming content (including advertisements), even though commercial free-to-air broadcasters are transmitting content twenty-four hours a day, three hundred and sixty five days a year across nine channels—an annual total of 78,840 broadcast hours. In 2010 Free TV's average daily reach was 13.8 million people. Yet only 834 classification complaints were received for the whole year, with only six upheld by broadcasters. In 2009–2010, the ACMA conducted 85 investigations into commercial television broadcasters, of which only 30 related to classification matters, with only 11 of those resulting in a breach finding.³⁰

2.42 ASTRA was also highly supportive of co-regulatory arrangements for subscription television:

ASTRA supports an approach where general principles and a national framework for content classification are determined by the Government through Parliament, but where content providers are primarily responsible for ensuring compliance with classification and content regulations that may apply. Working within a framework that reflects prevailing community attitudes and standards, content providers are best placed to respond appropriately and in a timely manner to consumer concerns relating to content classification. The current co-regulatory model for subscription television is an example of industry-based content classification regulation that works well both for consumers and broadcasters.³¹

27 From 1 July 2009 to 30 June 2010, the Classification Board received 7,302 applications, including applications to classify 4,820 films, 1,101 computer games, 291 publications (228 single issue and 63 serial publications), 258 online content referrals from the ACMA, and 88 referrals from enforcement agencies. These figures are generally consistent with the number of applications the Classification Board has received over the previous two years: D McDonald, *Correspondence*, 6 May 2011.

28 See, eg, J McGowan, 'Classified Material' (2007) *Law Society Journal* 22.

29 Office of Film and Literature Classification, *Classification Study* (2005), 6, 17, 32.

30 Free TV Australia, *Submission CI 1214*.

31 ASTRA Subscription Television Australia, *Submission CI 1223*.

2.43 The ACMA has noted that co-regulatory mechanisms as applied through industry codes can be an important part of any future regulatory framework, as they can, subject to a number of conditions, provide the basis for more efficient and effective ways of achieving policy goals by influencing the behaviour of relevant industry stakeholders.

Under communications and media legislation, self- and co-regulatory arrangements require industry participants to assume responsibility for regulatory detail within their own sectors, and this is underpinned by clear legislative obligations, with the regulator retaining reserve powers. These arrangements provide flexibility for the ACMA, as the regulator, to exercise a variety of roles dependent on the nature of the concern, such as whether the issue is a policy matter or market issue. This includes the flexibility to not intervene to allow market-based solutions to develop, provide advice to government on policy issues, or encourage industry-based solutions.³²

Negative aspects of the current scheme

2.44 Stakeholders have identified aspects of the current classification and content regulation framework that have become dysfunctional, are failing to meet intended goals, and create confusion for industry and the wider community.

2.45 Inconsistencies exist in relation to content permitted across different media platforms and content that must be classified under different regulatory frameworks. An often cited anomaly has been the treatment of computer games, as compared to films and publications, with the absence of an R 18+ classification for computer games.³³ This arose out of concerns that existed in 1994 about the possible effects of interactivity, and the underlying assumption that the primary consumers of computer games are children.

2.46 Another problem of the current scheme is the pervasive ‘double handling’ of media content. Feature films classified for cinematic release need to be classified again when released on DVD, because the content has been ‘modified’ by adding ‘extras’—even if the final classification is often the same. Films are also classified again before they are broadcast on television, and classified twice if they are released in both 2D and 3D versions. Television programs that are classified when initially broadcast have to be reclassified by the Classification Board when released on DVD. This ‘double-handling’ is costly to media content industries, time consuming for the Classification Board, and diverts resources from other areas of potentially greater public concern.

2.47 The *Classification Act* provides that Commonwealth, state and territory ministers must unanimously agree to amendments to the National Classification Code and classification guidelines. The Intergovernmental Agreement is premised upon the understanding that ‘in relation to the Code and the classification guidelines, the Commonwealth, and the Participating States are equal partners and that the policy on

32 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010), 1.

33 During the course of this Inquiry, the Australian Government, state and territory censorship ministers agreed to introduce an R 18+ classification for computer games. A bill to amend the *Classification Act* to establish an R 18+ classification category for computer games was introduced by the Minister for Home Affairs and Justice, Jason Clare MP, in February 2012.

these matters is derived from agreement between all jurisdictions'.³⁴ Critics argue that this process is time consuming and poorly designed to deal with significant changes in technology and community expectations. For example, agreement among the Commonwealth, states and territories over the introduction of an R 18+ classification for computer games took over a decade.

2.48 While the classification cooperative scheme addressed some of the previous anomalies between different states and territories in Australia, significant differences remain. The sale and distribution of X 18+ material is permitted in the ACT and the Northern Territory, but not in the states and not online. The states also have different regulations relating to restricted publications and the sale and the display of R 18+ films. The 'grey market' in adult publications and DVDs is estimated to be worth about \$20–30 million a year.³⁵ The significance of this market becomes even greater as adult content migrates to the internet, and is distributed on an international basis.

2.49 There are also significant differences in enforcement and penalty provisions between states and territories. Some states and territories approach enforcement of classification laws as a criminal matter dealt with by the police, while others, such as the ACT and Queensland, deal with it through trade and commerce related agencies.

2.50 The relevance of jurisdictional differences between states and territories diminishes significantly in the context of media convergence and the blurring of boundaries between physical 'hard copy' and online media, as well as the shift of entertainment media online. The Victorian Government observed that:

Treating identical entertainment media differently based on the media platform on which it is viewed or played (ie creating different regulatory obligations for a film that is rented from the local video shop compared to a film that is downloaded and viewed on a mobile tablet device) creates confusion, inconsistencies and inefficiencies ... Because the National Classification Scheme (NCS) primarily aims to regulate media content in a commercial context, most industry bodies captured by the NCS distribute, sell or exhibit material nationally. Jurisdictional differences have the effect of creating significant compliance burdens on such industry groups that are then required to comply with eight different regulatory frameworks. Unnecessary complexity inevitably leads to higher rates of non-compliance and increases costs to business.³⁶

2.51 There is evidence of considerable, and growing, non-compliance with laws concerning the distribution of incorrectly marked adult content, unclassified adult content and X 18+ classified content. In particular, there is concern about the refusal on the part of distributors to submit such content to the Board for classification or to comply with call in notices. It has also been noted that current resources have been insufficient to effectively investigate and prosecute breaches.³⁷

34 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), recital C.

35 Eros Association, *Submission CI 1856*.

36 Victorian Government, *Submission CI 2526*.

37 See 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; Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Estimates: Transcript of Public Hearing* 18 October 2010, 11, 14 (D McDonald).

2.52 The scope of the current RC category has been identified as a problem with the current scheme. Problems have been identified with the disparate range of material that may be RC and the extent to which current prohibitions align with community standards.

2.53 As it currently stands, RC incorporates material that is illegal under criminal law to produce, distribute or possess—for example, child abuse material—and material that is illegal to distribute, but not necessarily illegal to possess—for example, ‘gratuitous, exploitative or offensive depictions of sexual activity accompanied by fetishes or practices which are offensive or abhorrent’.³⁸ A number of submissions to this Inquiry argued that these are distinct categories of material, and should be treated differently.

2.54 The RC category also covers material that ‘promotes, incites or instructs in matters of crime or violence’.³⁹ This means that material relating to drug use, shoplifting, graffiti or euthanasia could potentially be classified RC. While almost all submissions accepted the need for some forms of content to be banned outright (eg, material advocating murder, rape or terrorist acts), many considered the current RC category to be overly broad, too ambiguous in its application, and problematic in its application in the online environment.

2.55 It has also been argued that more content may be prohibited online than in other media formats. Under the *Broadcasting Services Act*, certain online publications are prohibited if they have been classified Category 1 Restricted or Category 2 Restricted.⁴⁰ Dr Gregor Urbas and Mr Tristan Kelly observed that,

With the introduction of iPads and the rise in popularity of digital books, more existing publications are likely to become available over the Internet, and this inconsistent standard will become more problematic.⁴¹

2.56 The relationship between classification laws and the separate regulation of online content under the *Broadcasting Services Act* is problematic. For example, providing online content, without breaching the *Broadcasting Services Act*, may nevertheless breach classification enforcement legislation that, for example, prohibits the distribution of unclassified films and computer games. These enforcement provisions may apply to online content because the definitions of ‘film’ and ‘computer game’ in the *Classification Act* are broad, and not confined to content on specific media, such as DVDs or other data storage devices.⁴²

2.57 The *Broadcasting Services Act* provisions regulating online content have been described as ‘highly complex and confusing legislation that is almost incomprehensible’⁴³ and legally uncertain. Telstra pointed out that, where content is assessed under sch 7, the legislation may involve a costly ‘double classification’ obligation, which disadvantages Australian online content providers.

38 *Guidelines for the Classification of Films and Computer Games* (Cth).

39 *National Classification Code 2005* (Cth) cls 1–4.

40 *Broadcasting Services Act 1992* (Cth) sch 7, cl 20(2).

41 G Urbas and T Kelly, *Submission CI 1151*.

42 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 5, 5A.

43 I Graham, *Submission CI 1244*.

This superfluous 'double classification' obligation for online content creates unnecessary uncertainty for industry participants implementing these arrangements and raises the spectre of prohibitive compliance costs should online content provided by Australian content providers need to be formally classified by the Classification Board ... Australian online content providers subject to this requirement would be put at a major competitive disadvantage to overseas based content providers who would not be subject to these obligations.⁴⁴

2.58 Lack of clarity in responsibilities relating to the regulation of online and offline media content also manifests itself in an uncertain relationship between the ACMA as a regulator of media content online and the Classification Board as a classification decision-making body. A complaints-based approach to content online, and separate statutory requirements to classify other media content offline, generates inconsistencies of treatment across media platforms.

The need for fundamental reform

2.59 In the Issues Paper, the ALRC asked whether, in this Inquiry, the focus should be on developing a new framework for classification, or on improving key elements of the existing framework.⁴⁵ The ALRC sought community input on the question of whether incremental 'fine tuning' of the National Classification Scheme was appropriate, or whether more fundamental reform was required.

2.60 Most stakeholders to this inquiry advised the ALRC that the National Classification Scheme requires fundamental reform in order to address the challenges of a convergent media environment. The current scheme was described as 'an analogue piece of legislation in a digital world'⁴⁶ that has failed to respond to the challenges of media convergence.

2.61 Telstra argued that there was a need for the ALRC to undertake a holistic examination of the National Classification Scheme with the objective of developing a new classification framework for the new media environment:

Despite its worthy underlying intent, successive Governments have responded to challenges to the system posed by rapid technological change with a series of issue specific regulatory responses. After more than a decade of incremental changes, the National Classification Scheme as it stands today is a complex arrangement of parallel and sometimes overlapping systems of classification ... In this context, rather than seeking to address the issues with the classification scheme that have emerged as a result of rapid technological change with further ad hoc reforms ... the ALRC should undertake a holistic examination of the National Classification Scheme with the objective of developing a new classification framework for the modern media environment.⁴⁷

44 Telstra, *Submission CI 1184*.

45 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 1.

46 Australian Publishers Association, *Submission CI 1226*.

47 Telstra, *Submission CI 1184*.

2.62 The Australian Home Entertainment Distributors Association argued that it supports the intent of the Scheme as it currently stands but also strongly supports reform to recognise the realities of digital distribution, simultaneous release of content across platforms, the explosion in volume of content (including user generated) and the current fractured jurisdictional nature of the Scheme.⁴⁸

2.63 SBS questioned the continued relevance of a National Classification Scheme that applies different rules for different media platforms.

The current classification scheme adopts an ‘old media’ view that applies stricter controls to delivery platforms that previously had greater influence than others and that assumes that consumers have limited control over what they, or their children, watch. These underlying assumptions are, increasingly, less valid and distinctions between distribution platforms will ultimately become meaningless ... There is a need for a framework that applies across platforms in a consistent and equitable manner, and which takes into account the growing availability of tools which enable consumers to control access to content.⁴⁹

2.64 Google observed that there has been a shift from ‘vertical media silos’ and stand-alone media platforms, to what it termed a ‘horizontal model of networks, platforms and content’:

The media environment has changed dramatically in the twenty years since the ALRC last considered censorship and classification. The existing classification regime was developed in an age where the media landscape was characterised by technologically distinct vertical media silos: radio, television, Internet etc. These media publishers created the content to be consumed by a passive audience.

Today’s media landscape is very different. The ‘audience’ of passive recipients of content has been replaced by citizen creators and citizen journalists engaging interactively with media platforms/services such as YouTube, Facebook, Yahoo!7 and ninemsn, to create and distribute content. Vertical media silos have been replaced by a horizontal, converged landscape of platforms, content providers and users, facilitated by communications networks ... In this changed environment, how we determine the appropriate policy approach to regulation of content needs to be fundamentally reconsidered.⁵⁰

2.65 Analysis of the responses to the Issues Paper was also informed by text analysis software that demonstrated considerable support for the view that the development of a new classification framework was required for Australia, rather than continuing to modify the existing framework.⁵¹

2.66 In the *Convergence Review: Interim Report*, the Convergence Review Committee argued that

Australia would benefit from a new policy framework that reflects the vitality of services provided on new and existing communications infrastructure. There should

48 Australian Home Entertainment Distribution Association, *Submission CI 1152*.

49 SBS, *Submission CI 1833*.

50 Google, *Submission CI 2336*.

51 See Australian Law Reform Commission, *Responses to ALRC National Classification Scheme Review Issues Paper (IP40) - Graphical Representation of Submissions* (2011) <<http://www.alrc.gov.au/publications/responses-IP40>> at 26 January 2012.

be a flexible approach to regulation that can keep pace with these opportunities. Policy and regulatory levers will need to promote open access, competition and innovation. They will also need to encourage a range of voices and provide incentives and government support to ensure that Australian and local content are still widely available in a global environment.⁵²

2.67 The Senate Legal and Constitutional Affairs References Committee, in its 2011 report *Review of the National Classification Scheme: Achieving the Right Balance*, argued that the National Classification Scheme is ‘flawed, and cannot be sustained in its current form’:

This is primarily because the scheme has not been successful in achieving a uniform and consistent approach to classification in Australia. Further, the current situation where the National Classification Scheme is loosely paralleled by co-regulatory and self-regulatory systems is far from adequate, particularly given the increasing convergence of media.⁵³

2.68 While a convergent media environment presents major new challenges for the National Classification Scheme, there continues to be an important role for the classification of media content in Australia, and community expectations are that media content will continue to have classification markings based on well understood classification categories.

2.69 The ALRC considers the major principles that have informed media classification in Australia—such as balancing the rights of adults to make informed media choices with the protection of children—to continue to be relevant. However, the framework that underpins these principles is in need of reform.

2.70 In the context of media convergence, there is a need to develop a framework that focuses upon media content rather than delivery platforms, and which can be adaptive to innovations in media platforms, services and content. Failure to do so is likely to disadvantage Australian digital content industries in a highly competitive global media environment.

2.71 The current classification framework is highly fragmented, with different guidelines and regulatory arrangements for different media platforms, and unclear lines of administrative responsibility. The relationship between the Commonwealth, states and territories in particular requires significant reorganisation, and there is a case for a new Act governing all media content classification, as well as revised regulatory arrangements.

2.72 The costs and regulatory burden of the current classification framework align poorly to community standards and expectations. There is too much top-down regulation of some media content and platforms, while regulatory requirements are unclear in relation to other media.

52 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), iv.

53 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 23.

2.73 The ALRC is of the view that a more co-regulatory approach would better align the activities of government agencies to community expectations, by enabling a greater role for industry in classifying content, and allowing government regulators to focus on the content that generates the most concern in light of community standards and the protection of children.