

5. The New National Classification Scheme

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Summary

5.1 This chapter presents the ALRC's central recommendations to establish a new National Classification Scheme regulating the classification of media content, through the enactment of the Classification of Media Content Act. Under the new Act, a single agency (the Regulator) would be responsible for regulating the classification of media content. The provisions of the new Act, and the functions and responsibilities of the Regulator, are discussed in more detail throughout this Report.

5.2 The Classification of Media Content Act will impose obligations to classify and restrict access to some content. The persons and organisations who would be subject to these obligations are referred to in this Report as 'content providers'. This chapter explains the obligations of content providers under the new Act, including online content providers. It makes related recommendations, including that the Act should apply to any online content with an appropriate Australian link.

5.3 Finally, the chapter notes questions about the application of the Act to content provided by the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). The special position of the ABC and SBS as national public broadcasters is not under review in the context of this Inquiry, and the ALRC does not make specific recommendations in this regard.

The Classification of Media Content Act

5.4 The ALRC recommends that a new National Classification Scheme should be established based on a new Act—the Classification of Media Content Act.

5.5 A new scheme based on the Classification of Media Content Act would replace the existing classification cooperative scheme for the classification of publications, films and computer games—based on the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*) and complementary state and territory classification enforcement legislation—and online content regulation under schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth).

5.6 In addition, bringing television content within the scheme would require it to encompass some matters currently dealt with by other parts of the *Broadcasting Services Act*—and, possibly, the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth).

5.7 The *Broadcasting Services Act*, and codes under that Act, regulate broadcasting services and the content of television in ways that are not directly related to classification—including, for example, in relation to standards for children’s programs and Australian content.¹ The new scheme would govern television content only in so far as it relates to content classification. Other content matters would continue to be regulated by the Australian Communications and Media Authority (ACMA) under the *Broadcasting Services Act* and codes.²

5.8 The ALRC recommends that the new Act should provide, among other things, for:

- what types of media content may, or must be classified;
- who should classify different types of media content;
- a single set of statutory classification categories and criteria applicable to all media content;
- access restrictions on adult content;
- the development and operation of industry classification codes; and
- the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.

5.9 Each of these matters is discussed in more detail in the following chapters.³ However, the new Act would be likely to draw on concepts already contained in the

1 See *Broadcasting Services Act 1992* (Cth) pt 9.

2 Including those made under the *Australian Broadcasting Corporation Act 1983* (Cth) and *Special Broadcasting Service Act 1991* (Cth).

3 A table summarising what content must be classified and by whom, and what must be restricted, is in Appendix 2.

Classification Act (or complementary state and territory enforcement legislation) and the *Broadcasting Services Act*. For example, the Act would:

- establish a Classification Board, with functions similar to those currently performed by the existing Classification Board (see Chapter 7);
- prescribe a single set of classification categories similar to those currently prescribed by the *Classification Act* for films (see Chapter 9);
- establish a mechanism for industry codes similar to those currently provided for under the *Broadcasting Services Act* (see Chapter 13);
- provide for a Regulator that would exercise a combination of powers currently exercised by the Director of the Classification Board and the ACMA (see Chapter 14);⁴ and
- provide for a regime of offences and penalties based on those currently existing in the *Classification Act* (and complementary state and territory enforcement legislation) and the *Broadcasting Services Act* (see Chapter 16).

5.10 While adapting some existing concepts, the new scheme would also constitute a significant modification and consolidation of existing regulation. In this context, the ALRC also recognises the arguments made by the ACMA that the process of convergence can be said to have ‘broken, or significantly strained, the legislative concepts that form the building blocks of current communications and media regulatory arrangements’.⁵

Recommendation 5–1 A new National Classification Scheme should be enacted regulating the classification of media content.

Recommendation 5–2 The National Classification Scheme should be based on a new Act, the Classification of Media Content Act. The Act should provide, among other things, for:

- (a) what types of media content may or must be classified;
- (b) who should classify different types of media content;
- (c) a single set of statutory classification categories and criteria applicable to all media content;

⁴ Such as a power to require that a content provider submit a film for classification (the equivalent of the existing call in power of the Director of the Classification Board): *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 23A; and a power to issue ‘take-down’ notices with respect to online content: *Broadcasting Services Act 1992* (Cth) sch 7 cl 47.

⁵ Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 5.

- (d) access restrictions on adult content;
- (e) the development and operation of industry classification codes; and
- (f) the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.

Recommendation 5–3 The Classification of Media Content Act should provide for the establishment of a single agency (‘the Regulator’) responsible for the regulation of media content under the National Classification Scheme.

Responses to the Discussion Paper

5.11 The recommendations reflect affirmation by industry, government and community stakeholders that the existing classification framework is in need of reform.

5.12 As discussed in Chapter 2, stakeholders identified several significant flaws with the current classification framework, which is widely seen as resulting from its development in an *ad hoc* and reactive manner. The need for more fundamental reform was also a common theme in individual responses to the Inquiry.⁶

5.13 As observed in Chapter 3, the existing classification framework is particularly poorly equipped to respond to the challenges of media convergence. It is characterised by inconsistencies in its treatment of similar content across different media platforms, and there is a need to develop an architecture for classification of media content that can be more adaptive to unanticipated changes in media technologies, products and services. Commentators have described the existing framework as being ‘like a bowl of spaghetti ... complex, tangled and, from a media user point of view, impossible to tell which bit of media content connects to which regulatory framework’.⁷

5.14 The arguments outlined in the Discussion Paper for a new scheme were supported by many stakeholders. For example, Telstra observed that

The scale of technological, commercial and cultural change that has occurred over the past years and the ongoing pace of change in media industries justifies taking a holistic approach to the reform of the National Classification Scheme rather than attempting further incremental reform.⁸

5.15 The Arts Law Centre of Australia stated that the ALRC’s proposals for a new classification scheme, rather than seeking to amend the current one, ‘recognises the

6 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, Responses to Question 1.

7 Professor Catharine Lumby, Director, Journalism and Media Research Centre, University of New South Wales, statement at launch of K Crawford and C Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011), Sydney, 5 May 2011.

8 Telstra, *Submission CI 2469*.

need for fundamental comprehensive reform particularly for the digital environment'.⁹ Similarly, Free TV Australia supported greater harmonisation of regulatory requirements across convergent media platforms:

Harmonisation and common classification markings across all regulated media will ensure the communication of clear and consistent information on content, regardless of the delivery method or platform ... In particular, Free TV supports the development of a single set of classification criteria, underpinned by common high-level principles which can then be specialised for each industry as appropriate.¹⁰

5.16 The development of a new National Classification Scheme that provides a proactive response to the challenges of media convergence is consistent with the analysis of the Convergence Review Committee, as outlined in its interim report:

Given the opportunities offered by convergence, it is timely to rethink our approach. Australia would benefit from a new policy framework that reflects the vitality of services provided on new and existing communications infrastructure.

Whilst technology has eroded the traditional divisions between free-to-air (FTA) television and the internet, newspapers and websites, radio and streaming services, our policy and regulation is still based on the industry and service structures of the early 1990s.

Calibrating the policy and regulatory framework for the new environment is vital. The reforms recommended by the Convergence Review will require fundamental changes to communications legislation.¹¹

5.17 A small number of respondents, however, argued against the implementation of the proposed new National Classification Scheme. Some argued that the case for an ongoing role for a media classification scheme had not been made sufficiently, particularly in terms of the scope of the current Refused Classification (RC) category. For example, one respondent stated:

This review starts with the unstated premise that censorship of what adults watch is necessary and will continue because a vocal minority claim to have a special insight on what represents 'community standards'. How can this be a valid review if the possibility that censorship is not necessary is not included in the review, and no attempt is made to determine if there is actual proof that censorship of legal adult material and video games for adults is required?¹²

5.18 The ALRC's recommendations relating to the RC category (to be renamed 'Prohibited content') are discussed in Chapters 11 and 12. However, it is worth reiterating that, since the 1970s, the Australian classification system has largely operated around a principle of classification, with censorship or the banning of content occurring only in exceptional circumstances.

9 Arts Law Centre of Australia, *Submission CI 2490*.

10 Free TV Australia, *Submission CI 2452*.

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

12 L Mancell, *Submission CI 2492*.

5.19 The 2010–11 Annual Reports of the Classification Board and the Classification Review Board record that, of the 5,579 films, publications and computer games submitted to the Classification Board in 2010–11, only 26 films not for public exhibition and two computer games were classified RC, or 0.5% of media content classified by the Board. No publications or films for public exhibition received an RC classification in 2010–11.¹³

5.20 Others argued that the proposed provisions for classification of online content, including obligations to restrict access to some content likely to be classified R 18+ or X 18+, were too onerous for non-commercial content providers, and would inappropriately impinge upon freedom of online communication. For example, Amy Hightower submitted that:

While the current framework is outdated and ineffective, it is actually less impactful and poses fewer restrictions on ‘ordinary Australians’ than the scheme effectively proposed in [the Discussion Paper]. I therefore cannot support a new Classification Scheme based on the proposals in [the Discussion Paper] unless it undergoes substantial revision.¹⁴

5.21 Issues concerning the application of the new scheme to online content and content providers are discussed in more detail below.

Content and content providers

5.22 The Classification of Media Content Act will impose obligations:

- to classify and mark some content and not to sell, screen, provide online, or otherwise distribute content that has not been properly classified and marked (obligations to classify);
- to restrict access to R 18+ and X 18+ content (obligations to restrict access); and
- not to sell, screen, provide online, or otherwise distribute Prohibited content (obligations in relation to Prohibited content).

5.23 Any definition of content would need to be both broad and platform-neutral, and should include:

- content that is made available online;
- content that is published or distributed in ‘offline’ media formats such as books, magazines, computer games, films and DVDs; and
- content that is broadcast on free-to-air and subscription television.¹⁵

13 Classification Board and Classification Review Board, *Annual Reports 2010-2011* (2011), 32–35.

14 A Hightower, *Submission CI 2511*. Similar views were expressed by: I Graham, *Submission CI 2507*; J Trevaskis, *Submission CI 2493*.

15 The *Broadcasting Services Act* contains definitions of ‘content’ and ‘content service’, which might form one useful starting point, expanded to apply to books, magazines, films and DVDs, and including its exclusions for content such as SMS and emails: *Broadcasting Services Act 1992* (Cth) sch 7 cl 2.

5.24 The category of persons and organisations who would be subject to obligations in relation to particular content are referred to in this Report as ‘content providers’. In general terms, a content provider is a person or organisation that sells, screens, provides online, or otherwise distributes content to the public. As discussed below, in some circumstances, non-commercial content providers will have obligations to classify or restrict access to content. However, these obligations would not apply to persons uploading content, other than on a commercial basis, to a website.

5.25 This section briefly explains to whom the ALRC intends obligations should apply, including by discussing how provisions of the Act might operate in different contexts.

5.26 The ALRC does not make recommendations on exactly how legislative provisions should be drafted to achieve these intended results. The drafting of the legislative provisions may require definitions of ‘content’ and ‘content provider’, as well as references to conduct, such as selling or distributing content that gives rise to obligations. As discussed below, the eventual legislative language may also be influenced by the Australian Government’s response to the Convergence Review¹⁶—and parallel reform of broadcasting and telecommunications regulation more generally.

Obligations to classify

5.27 An important consideration is that obligations to classify under the new Act will only apply to content that has been made and is distributed on a commercial basis. Leaving aside online content, the main contexts in which obligations to classify will arise under the new Act concern films, computer games and television.¹⁷

5.28 In relation to films, the process by which a film for cinema release is made available to the public may involve a producer, a distributor and an exhibitor. The producer would generally have no obligation to classify content because it does not directly provide the content to the public. The exhibitor would have an obligation not to exhibit an unclassified film—and, therefore, an obligation to ensure the film is classified before exhibition. However, in practice, distributors are generally in the best position to apply for the classification of films because they have access to the content in advance of exhibition and deal with multiple film releases.

5.29 Therefore, the obligation to classify should be broad enough to apply to a distributor who ‘sells’ the film to an exhibitor knowing that the film is to be screened to the public by the exhibitor. The obligation to classify should not, however, apply to

16 For example, by using the concept of a ‘content service enterprise’ to help define commercial content that should be required to be classified: Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 5. The ACMA has identified current legislative definitions of ‘content service’ and ‘content service provider’ as ‘broken concepts’ in the convergent media environment, through which ‘content is treated differently across different distribution networks and devices’ and there is different regulatory treatment according to delivery platforms: Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 40, 47.

17 The specific contexts in which content may be required to be classified are discussed in more detail in Ch 6.

an entity earlier in the chain of creation and distribution—for example, a distributor who sells the film to another distributor.

5.30 Similarly, the creators of a console-based computer game would generally have no obligation to classify it. A retailer would have an obligation not to sell an unclassified game (with a likely classification of MA 15+ or higher)¹⁸—and therefore, an obligation to ensure the game is classified before being offered for sale. Distributors who sell games to retailers would also have an obligation to classify them.

5.31 In practice, the obligation to classify might be discharged at any point along the chain of distribution and where this is may depend on industry practices and contractual arrangements. Where more than one entity has failed to comply with an obligation to classify, the Regulator should be able take action against one or more parties.

5.32 In the case of broadcast television, the broadcaster provides the content to the public and has an obligation to classify content.

5.33 In general, where films, games or television content are provided to the public through an internet website, any obligation to classify would apply to a person or organisation that uploads content on a commercial basis, as well as the website owner.

Obligations to restrict access

5.34 As distinct from obligations to classify content, under the Classification of Media Content Act obligations to restrict access to content would extend to non-commercial or user-created content. However, the obligation is only applicable to content that is likely to be R 18+ and X 18+ content, and is limited to taking ‘reasonable steps’ to restrict access to such content.

5.35 The obligation to restrict access to R 18+ and X 18+ magazines and DVDs would apply to retailers, such as newsagencies, book stores and specialist adult shops. It would also apply to publishers and distributors, who may have to mark their products with warnings and perhaps package their content in opaque plastic.¹⁹

5.36 In relation to films for cinema release, the obligation to restrict access to content—for example, to ensure that an R 18+ film is shown only to adults—would apply only to an exhibitor, who controls entry to the cinema.

5.37 Similarly, an obligation to restrict access to a console-based computer game—for example, to ensure that an R 18+ game is sold only to adults—would apply to a retailer who sells games to the public.

18 See Ch 6.

19 See Ch 10.

5.38 The obligation to restrict access to broadcast television content would rest with the broadcaster. The ALRC does not envisage that existing restrictions on R 18+ or X 18+ content being broadcast on commercial television or subscription television services²⁰ would be altered under the new Act.

5.39 The obligation to restrict access to content on a website would lie primarily with the website owner, who controls how the content is made available to the public. However, an organisation or individual uploading content made and distributed on a commercial basis would also have an obligation to take reasonable steps to restrict access to R 18+ and X 18+ content.

5.40 In the case of a commercial content provider, such as a television production company or the online site of a television network, this obligation might include an obligation not to provide R 18+ and X 18+ content through a content platform that does not restrict access to adults.

Obligations in relation to Prohibited content

5.41 Under the Classification of Media Content Act, obligations in relation to Prohibited content would be broad in application and apply to all content providers, commercial and non-commercial, and to internet intermediaries such as internet access providers who do not otherwise have obligations to classify or restrict access to content.

5.42 For example, where Prohibited content is uploaded onto a website by an individual, that individual may commit an offence under the Act. The website owner would be under an obligation to take down the content when notified by the Regulator. Other internet intermediaries may have obligations to respond to notices from the Regulator with respect to the content. An internet access provider may have an obligation to filter the content, particularly where the website owner is located overseas.

Recommendation 5-4 The Classification of Media Content Act should provide that obligations to classify or restrict access to content apply to persons or organisations who sell, screen, provide online, or otherwise distribute content to the public ('content providers').

Obligations for online content

5.43 Some stakeholders expressed concern about imposing classification-related obligations in relation to non-commercial online content, and noted that the *Broadcasting Services Act* imposes obligations to assess online content only on 'commercial content service providers'.

20 *Broadcasting Services Act 1992* (Cth) sch 2 cls 7(1)(g), 10(1)(f), 10(1)(g).

5.44 Under the *Broadcasting Services Act*, a commercial content service provider is defined as a content service that ‘(a) is operated for profit or as part of a profit-making enterprise; and (b) is provided to the public but only on payment of a fee (whether periodical or otherwise)’.²¹

5.45 In the ALRC’s view, paragraph (b) of this definition is inappropriate as a limitation on obligations to classify or restrict access to online content, because the vast bulk of content on the internet is freely available to users. Where online content is provided on a commercial basis, this is typically funded through the sale of associated advertising space.

5.46 The OECD has observed that it is increasingly difficult to maintain a strong distinction between commercial content on the one hand, and user-created content (UCC) on the other.

Although conceptually useful it has become harder to maintain the ... UCC characteristic of creators not expecting remuneration or profit and creation being outside of professional routines. UCC may have begun as a grassroots movement not focused on monetary rewards, but monetisation of UCC has been a growing trend.

Established media and Internet businesses have increasingly acquired UCC platforms for commercial purposes. Some users are remunerated for their content and some become professionals after an initial phase of non-commercial activity. Some works are also created by professionals outside of their commercial activities (eg, professional video editors creating a film at home). The term UCC may thus cover content creation by those who are much more than just ‘users’.²²

5.47 At the same time, there are concerns about potential overreach, in terms of the types of online content that might become subject to classification-related obligations—for example, personal blogs and individual postings onto chat sites. One stakeholder commented that

most entities producing content are non-commercial (eg, private individuals), who should not need a lawyer and should not need to pay the Classification Board or an industry classifier before making content available online.²³

5.48 There are many dimensions to whether the size and degree of commerciality of an online content provider should determine whether content provided by it should be subject to content regulation.

5.49 First, there are questions of regulatory parity and competitive neutrality. If television-like services can be accessed from the new generation of ‘Smart TVs’ through platforms such as Google’s YouTube, or through the ‘catch-up TV’ content platforms such as Yahoo!7, then why should YouTube or a comparable service be exempt from content regulations while ‘catch-up TV’ services are not? Should Channel 7 be exempt from content regulation when providing content online, but not in

21 Ibid sch 7 cl 2.

22 Organisation for Economic Co-operation and Development, *Participative Web: User Created Content* (2007), 18.

23 J Trevaskis, *Submission CI 2493*.

the case of broadcast content, even if it is the same program, or additional related content (such as ‘behind-the-scenes’ material for a reality television program)?

5.50 Secondly, there are an increasingly diverse range of environments in which online content is accessed—at home, at school, on mobile devices—and changing community expectations about its accessibility, particularly to children. In some respects, the media environment is heading towards a ‘post-internet’ regime of convergent media, where the distinction between ‘smart devices’ such as personal computers and television, is blurring and all devices are enabling greater user interactivity.

5.51 Lilian Edwards has observed that there has been a growing expectation worldwide that governments can, and should, regulate access to some online content and that personal freedoms in the shared online space are not absolute:

By the 2000s, the cyber-libertarian tendency had retreated and it had become well established that nation states had both the right to regulate, and an interest in regulating, the Internet, and in particular, an interest in protecting children—as the Internet ceased to be the plaything of only academics, researchers and geeks, and became part of daily social and family life.²⁴

5.52 Such issues are by no means unique to the classification of media content. They arise in relation to matters as diverse as copyright protection, competition law, and the provision of local content. Historically, platform-specific regulations have tended to apply more stringent regulations to some media than to others. For example, content regulations have been applied most stringently to commercial free-to-air broadcasting services. This was justified in part by provisions associated with a licence to broadcast, and in part by the perceived degree of influence of these broadcasting services.

5.53 Both licence-based requirements and the ‘influence’ concept have been identified by the ACMA as ‘broken concepts’ in a convergent media environment:

When considered individually, each of [these] concepts retains some effectiveness within their defined boundaries. However, when considered collectively against enduring policy goals, they provide a confusing regulatory framework that is already struggling to accommodate new types of online content and services.²⁵

5.54 The Convergence Review Committee proposed that a ‘new content and communications regulatory policy framework’ be built around the concept of a ‘content service enterprise’.²⁶ The term is intended to be technology-neutral in its application and to capture those large media-related enterprises that would be subject to obligations relating to content standards, media diversity and Australian content.

24 L Edwards, ‘Pornography, Censorship and the Internet’ in L Edwards and C Waedle (eds), *Law and the Internet* (2009), 626.

25 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 82.

26 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 5.

5.55 In determining what would constitute a content service enterprise, the Convergence Review Committee recommends the use of ‘threshold criteria relating to the scale and nature of operations involved in supplying content services’. It states that these criteria might include:

- the viewer/user/subscriber base meeting a threshold
- the service originating in Australia or being intended for Australians
- the provider having the ability to exercise control over the content
- the operating revenue or commercial scale of the enterprise meeting a threshold.²⁷

5.56 In its *Digital Australians* report, the ACMA observed that Australians find the question of *who* produced the content—traditional media organisations or individuals—to be as significant a factor in shaping expectations about content regulation as the question of whether it is delivered online or through traditional media platforms. The report states that:

Most research participants distinguished offline or traditional media, such as newspapers, television and radio, from the internet or online content, but delivery platform was not the most important distinction that they made. The more important distinction was between *types* of content.

Content produced by traditional media organisations—whether for print or broadcast, and whether offline or online—was seen as professional content, produced for broad audiences.

Consumers appeared to bring their expectations of regulation from traditional, familiar media to similar content accessed online. Recognition of traditional media organisations by consumers was high. Similarly, branded content online was usually expected to meet the same or comparable standards as offline content. Whether professional content was broadcast or online, most consumers expected it to meet general community standards for taste and decency. For example, print, broadcast and online stories from traditional, reputable news organisations were expected to meet the same journalistic standards for accuracy and fairness.

Content produced by individuals and posted on the internet was seen as user-generated and there was very little expectation that it would adhere to any standards, apart from the need for it to be legal, and meet the terms and conditions of use of the site it was posted to.²⁸

5.57 In relation to the application of regulation, the Convergence Review Committee proposed that ‘obligations focus on the entity or enterprise that provides the service and the nature and scale of that service, rather than the mode of delivery’, observing that the *Digital Australians* report found ‘Australians expect branded online content to meet the same or comparable standards as offline content’.²⁹

27 Ibid, 5.

28 Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 3.

29 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 5.

5.58 At the same time, in considering the application of the concept of ‘Content Service Enterprises’, the Convergence Review Committee took the view that ‘emerging services, start-up businesses and individuals should not be captured by unnecessary requirements and obligations’. It nonetheless argued that ‘all content providers will still be subject to some requirements, such as those protecting children from harmful content’.³⁰

5.59 As discussed below, the ALRC shares the view that there is not a clear line between ‘big media’ on the one hand, and user-created content on the other, in terms of community expectations about appropriate safeguards in relation to the forms of online content that are available on an unrestricted basis. It is recognised, however, that the size and nature of the entity producing and distributing content online would be a factor to be considered in relation to obligations to classify or restrict access to content, as well as in relation to classification enforcement provisions.

5.60 If the concept of a ‘content service enterprise’ is adopted in future media regulation, it could help meet expectations that some classification-related obligations be applied on a basis that distinguishes content providers operating on a large-scale commercial basis from individuals and non-profit online content providers.

The new Act and online content providers

5.61 The intended application of the obligations under the Classification of Media Content Act in the online environment is complicated because providing content online involves a range of entities and activities. Some of these may need to be expressly excluded from obligations to classify or restrict access to content—essentially because they do not exercise control over media content, but are exclusively engaged with providing services which allow the content to be made available.

5.62 Existing broadcasting and telecommunications legislation uses a range of terms to describe online content and service providers of various kinds and for various purposes—as do other laws relating to media content, in areas such as copyright and defamation. The discussion below, and the associated recommendations, use the following terms:

- **Online content provider:** provides content that it makes available online through its own website or through an intermediary, such as a content platform.
- **Content platform:** provides third party content on the internet through its website. An example is the YouTube platform.
- **Application service provider:** facilitates access to content by indexing, filtering, formatting, but are not themselves content platforms. An example is a search engine, such as Google Search.
- **Host provider:** hosts websites on a computer server, connecting with the internet and providing storage capacities.

30 Ibid.

- **Internet access provider:** provides a service that enables users to access the internet—for example, by connecting the user to the internet via a telecommunications link or otherwise making websites accessible. This includes Telstra, Optus, iiNet, Internode and other providers of internet access.³¹

5.63 These terms are not necessarily intended to be adopted as legislative language and the same entity may fall into two or more of these categories. In particular, it is common for entities to be both online content providers and content platforms. For example, the website YouTube provides both third party content and content created for YouTube itself under commercial and contractual arrangements.

Existing online content obligations

5.64 As noted above, under the *Broadcasting Services Act*, ‘commercial content service providers’ have classification-related obligations in relation to online content. Such providers operate a content service ‘for profit or as part of a profit making enterprise’, which is ‘provided to the public but only on payment of a fee’.³²

5.65 Commercial content service providers have obligations to assess online content in accordance with the Internet Industry Code of Practice. Where a commercial content service provider, ‘acting reasonably’, considers that content is substantially likely to be classified as prohibited content or potential prohibited content,³³ it must ensure the content has been assessed before making the content available to end users. In forming a view as to whether content needs to be assessed, a commercial content service provider may have regard, among other things, to: the intended audience of the content service; how the content service is marketed; and the aims of the content service.³⁴

5.66 Schedule 7 of the *Broadcasting Services Act* states that a person does not provide a content service ‘merely because the person supplies a carriage service that enables content to be delivered or accessed’.³⁵ That is, internet access providers—referred to in the *Broadcasting Services Act* as ‘internet service providers’ (ISPs)—do not provide a content service and, therefore, do not have any responsibilities to assess content.

5.67 Following the investigation of complaints by the ACMA, ‘hosting services’, ‘live content services’ and ‘links services’ have obligations to respond to ACMA notices under sch 7 of the *Broadcasting Services Act*.³⁶ In addition, under sch 5 of the *Broadcasting Services Act*, ISPs must comply with ACMA ‘access-prevention notices’ in relation to content hosted outside Australia.³⁷ In practice, this obligation is met by

31 The term ‘internet access provider’ is used rather than internet service provider (ISP) because the ordinary meaning of the latter term may be understood to include the provision of any internet service, rather than providing access in a technical ‘carriage’ sense.

32 *Broadcasting Services Act 1992* (Cth) sch 7 cls 2, 5.

33 As defined under the *Broadcasting Services Act*: Ibid sch 7 cls 20, 21.

34 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008) cl 8.

35 *Broadcasting Services Act 1992* (Cth) sch 7 cl 5(1).

36 Ibid sch 7 pt 3 divs 3–5.

37 Ibid sch 5 cl 40.

ISPs participating in the ‘designated notification scheme’, under which ISPs are notified of prohibited content and must provide ‘family friendly’ filters.³⁸ As a result, the laws in question rarely need to be activated.

Obligations under the Act

Content providers and content platforms

5.68 In the online environment, the ALRC considers that content providers and content platforms should have obligations to classify or to restrict access to content. The definition of content provider for these purposes should cover those who provide content to the public, whether or not for profit or payment of a fee.

5.69 In particular, the definition should cover free content without advertising as well as subscription-based content and advertising supported content. The existing definition of a ‘commercial content service provider’ is problematic as it defines the site as commercial on the basis of how it receives revenue—that is, by direct payment by users for access to content, and not by providing free content to users and financing the service by selling advertising space.

5.70 A content provider should be defined to include those who upload media content onto the internet, including professional or commercial content providers, and those uploading user-created content. However, obligations to classify or restrict access to content should not apply to persons uploading content to someone else’s website, other than on a commercial basis. An internet user uploading to a blog or social networking site should have no obligations to formally classify their content. The website owner, however, would have obligations to take reasonable steps to restrict access to R 18+ or X 18+ content, and to respond to take-down notices from the Regulator.

5.71 A distinction may need to be made between content providers and content platforms. While both should have obligations, these should differ to recognise that while some content providers (and content platforms) are in a position to classify content before it is made available to the public, some content platforms should not be expected to do so.

5.72 For example, the Internet Industry Code of Practice makes special provision for content providers (‘commercial content service providers’) who make content available for viewing by end users ‘immediately or soon after it is contributed’—including that uploaded by other end users—where the content does not predominantly consist of ‘prohibited content’ or ‘potential prohibited content’ (as defined under the *Broadcasting Services Act*); and the content service is not promoted or marketed as making such content available.³⁹

38 Internet Industry Association, *Internet Industry Codes of Practice: Codes for Industry Co-regulation in Areas of Internet and Mobile Content* (2005) cl 19.

39 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008) cl 8.5(e).

5.73 In these circumstances, the commercial content service provider may comply with the obligation to assess content if it ‘takes reasonable steps’ to inform end users that are authorised to upload content as to the applicable restrictions on content and ensure that end users and others are made aware that they may report content; and act reasonably following receipt of a bona fide report to assess the particular content, or act to make it no longer available or placed behind a restricted access system.⁴⁰

5.74 Similar provisions under the Classification of Media Content Act might ensure that content ‘sharing’ websites are not subject to an obligation to pre-classify content. On the other hand, for example, an internet protocol television (IPTV) station providing a finite range of ‘channels’ should have obligations to classify or restrict access to its content before making it available.

Other service providers

5.75 The obligations of application service providers, host providers and internet access providers should be confined to obligations in relation to Prohibited content (as defined under the new Act), including responding to notices from the Regulator where particular enforcement action is required—such as the taking down of content, where the content platform or content provider is located overseas.

5.76 While the ALRC does not make recommendations on exactly how legislative provisions should be drafted to achieve these intended results, the following observations are made.

5.77 First, given that the provision of online content involves a range of entities and activities, it is necessary to clarify which of these are excluded from some obligations. In particular, the legislation needs to minimise impinging upon the principle, discussed in Chapter 4, that Australians should be able to read, hear, see and participate in media of their choice, which includes the right of individuals to participate in the media of their choice, and to be the producers and senders as well as the receivers of information and media content.

5.78 Secondly, obligations that relate to internet access providers concerning content need to be minimised, to enable them to operate with an appropriate degree of legal certainty. One starting point might be a provision, such as that in sch 7 of the *Broadcasting Services Act*, which provides that a person does not provide content ‘merely because the person supplies a carriage service that enables content to be delivered or accessed’.⁴¹ However, such a definition is narrower than required because it is directed at internet access providers, and would not extend, for example, to host providers or application service providers.

5.79 Another possible starting point might be the activities of ISPs set out in the *Copyright Act 1986* (Cth), which provides a ‘safe harbour’ from copyright infringement liability to ‘carriage service providers’ conducting certain activities.⁴²

40 Ibid cl 8.5(e)(iv).

41 *Broadcasting Services Act 1992* (Cth) sch 7 cl 5(1).

42 *Copyright Act 1986* (Cth) ss 116AC, 116AD, 116AE, 116AF.

That is, the Classification of Media Content Act might provide that an internet access provider does not become subject to classification-related obligations when simply acting as a conduit for internet activities, caching, storing or linking content on the internet.

5.80 Thirdly, it is necessary to distinguish between content platforms and host providers or similar entities that have a role in providing online content, but should not have any obligation to classify or restrict access to that content. One way to do so may be to focus on aspects of control over content.

5.81 An entity that hosts content provided by another content provider and has the right and ability to control how the content is uploaded, generated or displayed should have obligations to classify or restrict access to content. For example, an entity should have obligations when it exercises complete discretion over what kinds of content it will host, requires the hosted content to be displayed in a certain way (for example, with the content platform's brand) and arranges advertising associated with the content.

5.82 On the other hand, when an entity only hosts websites on a computer server, and imposes minimal obligations with regard to the kind of content being hosted, it could be excluded from obligations to classify or restrict access to content. Some entities, for example, 'host content that is uploaded by others, and play a minimal, if any, editorial or curatorial role in relation to the uploaded content hosted'.⁴³

Recommendation 5-5 The Classification of Media Content Act should provide that a 'content provider' includes non-commercial and commercial content providers. However, obligations to classify or restrict access to content would not generally apply to persons uploading content online other than on a commercial basis.

Recommendation 5-6 The Classification of Media Content Act should provide that a 'content provider' includes online content providers and content platforms that control how online content is uploaded, generated or displayed; but excludes other internet intermediaries, including application service providers, host providers and internet access providers.

Recommendation 5-7 The Classification of Media Content Act should provide that obligations in relation to Prohibited content apply to content providers and internet intermediaries, including application service providers, host providers and internet access providers.

5.83 Under the *Broadcasting Services Act*, ISPs are provided with protection from civil proceedings in respect of anything done by them in compliance with a code registered under sch 5, a standard determined by the ACMA, or an access-prevention

43 Google, *Submission CI 2512*.

notice.⁴⁴ Hosting service providers, live content service providers and links service providers are protected from civil proceedings in respect of anything done in compliance with rules relating to prohibited content.⁴⁵

5.84 Similar immunity should apply to content providers and internet intermediaries, including application service providers, host providers and internet access providers, in respect of anything done by them in compliance with obligations under the Classification of Media Content Act or industry codes approved by the Regulator.

Recommendation 5–8 The Classification of Media Content Act should provide content providers and internet intermediaries—including application service providers, host providers and internet access providers—with protection from civil proceedings in respect of anything done in compliance with the Act or industry codes approved by the Regulator.

Australian link

5.85 The current regime for the regulation of online content makes a distinction between content hosted outside Australia, regulated under sch 5 of the *Broadcasting Services Act*; and content hosted in Australia, regulated under sch 7.

5.86 Schedule 5 refers to internet content ‘hosted outside Australia’. In contrast, under sch 7, the ACMA may only take action in relation to content services that have an ‘Australian connection’. Schedule 7 provides that a content service has an Australian connection if, and only if, any of the content provided by the content service is hosted in Australia; or in the case of a live content service, the live content service is provided from Australia.⁴⁶

5.87 An ACMA research paper published in 2011 noted that the effectiveness of the distinction between local and overseas hosted content is ‘challenged by the recent industry practice of hosting content in the cloud so that its location inside or outside of Australia is not able to be determined’.⁴⁷ In this Inquiry, the ACMA also observed that

current distribution models for online content can effectively involve identical content accessed via the same URL being hosted in multiple locations, both in Australia and overseas. Both the take-down of content and ISP blocking are likely to be necessary if the comprehensive prevention of access to this content from within Australia is desired.⁴⁸

5.88 While Commonwealth legislation is normally to be construed as applying only to places, persons and other matters ‘in and of the Commonwealth’,⁴⁹ the

44 *Broadcasting Services Act 1992* (Cth) sch 5 cl 88.

45 *Ibid* sch 7 cl 111.

46 *Ibid* sch 7 cl 3.

47 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 81.

48 Australian Communications and Media Authority, *Submission CI 2489*.

49 *Acts Interpretation Act 1901* (Cth) s 21(1)(b).

Commonwealth Parliament has plenary power to make laws with extra-territorial operation.⁵⁰ In practice, however, Commonwealth regulatory statutes often include a requirement for an Australian link or connection.

5.89 For example, while the *Spam Act 2003* (Cth) states that, unless the contrary intention appears, ‘this Act extends to acts, omissions, matters and things outside Australia’,⁵¹ regulation is focused on commercial electronic messages that have an ‘Australian link’.⁵²

5.90 As discussed above, the ALRC anticipates that the Classification of Media Content Act would replace the current scheme for online content regulation under schs 5 and 7 of the *Broadcasting Services Act*. There seems no sensible rationale, in this context, to limit obligations to classify or restrict access to online content to content ‘hosted in Australia’.

5.91 The Classification of Media Content Act should provide that obligations to classify or restrict access to online content apply to any content with an appropriate Australian link including, but not limited to, content hosted in Australia.

5.92 For example, where an organisation carries on business or activities in Australia involving the provision of online content to Australian consumers, it should have obligations to classify or restrict access to content it controls, even where that content happens to be hosted overseas.

5.93 No such limitation on the extra-territorial operation of the Act should apply to obligations in relation to Prohibited content. The ability of the Regulator to take action to interdict the distribution of Prohibited content depends, among other things, on co-operation with overseas regulators and law enforcement agencies and should not be constrained by territorial limitations.

Recommendation 5–9 The Classification of Media Content Act should provide that obligations to classify or restrict access to online content apply to any content with an appropriate Australian link. This may include content:

- (a) hosted in Australia;
- (b) controlled by an Australian content provider; or
- (c) directed to an Australian audience.

50 *Statute of Westminster 1931* (UK) s 3.

51 *Spam Act 2003* (Cth) s 14.

52 *Spam Act 2003* (Cth) s 7. This section provides that, for the purposes of the Act, a commercial electronic message has an Australian link if, among other things, the message originates in Australia; is sent by an individual who is physically present in Australia or an organisation whose central management and control is in Australia; or the computer, server or device that is used to access the message is located in Australia.

The ABC and SBS

5.94 The Classification of Media Content Act is intended to cover content broadcast on free-to-air and subscription television. This raises questions about the application of the new Act to content provided by the ABC and SBS.

5.95 The ABC and SBS are national public broadcasters subject to special governance and accountability arrangements under the *Australian Broadcasting Corporation Act* and the *Special Broadcasting Service Act*.⁵³ The ABC and SBS are subject to obligations under the ABC and SBS statutory charters,⁵⁴ and codes of practice developed by their boards, rather than codes approved by ACMA under the *Broadcasting Services Act*.

5.96 The *Broadcasting Services Act* ‘essentially applies to the ABC and SBS only in relation to complaints escalation and spectrum and technical matters’.⁵⁵ Notably, the ABC and SBS are not subject to the requirement, imposed on commercial and community television broadcasters, that codes apply the film classification system provided by the *Classification Act*.⁵⁶

5.97 The ABC and SBS stated that a ‘strong implication in the Discussion Paper is that it is the ALRC’s intention that the new classification regime apply to the national broadcasters in the same way as it would apply to any other media content provider’.⁵⁷

5.98 The ABC and SBS submitted that such an approach would run counter to established public policy and that ‘the benefits of consolidating and harmonising Australia’s classification laws can be achieved without adversely affecting their independence if the established regulatory approach continues to be applied’.⁵⁸ That is, the ABC and SBS should be excluded from the Classification of Media Content Act and a ‘harmonised approach’ achieved by requiring the ABC and SBS, in developing their own classification standards, to have regard to the standards set for other content providers.⁵⁹

53 For example, the ABC and SBS are primarily accountable to their respective statutory boards, which are required to ‘maintain the independence and integrity’ of the corporations. The ABC and SBS are accountable to the Parliament as a whole through regular appearances at Senate estimates hearings, questions on notice and detailed reporting on a range of specified matters in their annual reports: see *Australian Broadcasting Corporation Act 1983* (Cth) ss 8(1)(b), 80; *Special Broadcasting Service Act 1991* (Cth) ss 10(1)(a), 73.

54 *Australian Broadcasting Corporation Act 1983* (Cth) s 6; *Special Broadcasting Service Act 1991* (Cth) s 10.

55 Joint Submission Australian Broadcasting Corporation and SBS, *Submission CI 2521*. Where a person has made a complaint to the ABC or SBS under a code of practice, and considers the response to be inadequate, a complaint may be made to the ACMA: *Broadcasting Services Act 1992* (Cth) s 150.

56 *Broadcasting Services Act 1992* (Cth) s 123.

57 Joint Submission Australian Broadcasting Corporation and SBS, *Submission CI 2521*.

58 *Ibid.*

59 *Ibid.*

5.99 In formulating its proposals, the ALRC did not intend to imply that changes should be made to the existing governance and accountability arrangements applying to the ABC and SBS. The special position of ABC and SBS as national public broadcasters is not under review in the context of this Inquiry, and the ALRC does not make specific recommendations in this regard.⁶⁰ For the sake of simplicity, however, the text of the Report does not generally differentiate between content provided by the ABC, SBS and other television broadcasters.

⁶⁰ The interim report of the Convergence Review recommended that the charters of the ABC and SBS should be updated to 'assist the public broadcasters by confirming current operations' and to provide certainty about the 'remit of public broadcasters': Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 15.

