6. Films, Television Programs and Computer Games

Contents

Summary

6.1 This chapter considers what media content should be required to be classified under the new National Classification Scheme. The chapter starts by considering distinguishing features of content that might be used to determine whether something must be classified. The ALRC concludes that whether something must be classified should no longer turn on the platform on which the content is accessed. Rather, it is more important to ask if content is made and distributed on a commercial basis and has a significant Australian audience.

6.2 The ALRC recommends that the following content should be required to be classified before it is sold, screened, provided online or otherwise distributed to the Australian public:

- feature films;
- television programs; and
- computer games likely to be classified MA 15+ or higher.

However, this content should only be required to be classified if it is both:

- made and distributed on a commercial basis; and
- likely to have a significant Australian audience.[1]

6.3 The classification of most other media content—for example, computer games likely to be G, PG and M, books, magazines, websites and music—should become or remain voluntary. However, industry bodies should develop codes that encourage the voluntary classification of some of this other content, such as lower-level computer games and adult magazines.

Determining what content should be classified

6.4 One of the main functions of classification law is to enable the provision of advice or information to consumers to help them choose entertainment for themselves and their families. This is of particular importance to parents and guardians. Most films and computer games that are classified in Australia receive advisory classifications (G, PG and M), to which no legal access restrictions apply.[2] However, classification laws are also intended to identify higher-level content, to warn adults and protect minors.

6.5 These goals might suggest that most content should be classified. However, for reasons discussed in this chapter, this is not practically possible or cost-effective, even if industry played a greater role in classification decision making. This section outlines some of the key matters that the ALRC considered when determining what content it recommends should be required to be classified.

Volume of content

6.6 There are over one trillion websites, hundreds of thousands of 'apps' are available to download to mobile phones and other devices, and every minute over 60 hours of video content are uploaded to YouTube (one hour of content per second).[3] Submissions to this Inquiry consistently pointed to the sheer volume of content that is now available, particularly online, and the impossibility of having Australian classifiers watch and formally classify all of it. Civil Liberties Australia, for example, submitted that the 'sheer volume of content available today simply makes mandatory classification impractical'.[4] Likewise, the Arts Law Centre submitted that it is:

> clearly impractical and too costly for the Government to classify all content being delivered via the internet. This inevitably must lead to the conclusion that there should be less formal regulation of content in Australia.[5]

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1 That is, an audience with an Australian audience of a significant size.

2 The annual reports of the Classification Board indicate that 71% of the films and computer games classified by the Classification Board between July 2005 and June 2010 were classified G, PG or M.

3 YouTube, *The Official YouTube blog* <http://youtube-global.blogspot.com/2012/01/holy-nyans-60-hours-per-minute-and-4.html> at 30 January 2012.

4 Civil Liberties Australia, *Submission CI 1143*.

5 The Arts Law Centre of Australia, *Submission CI 1299*.

6.7 The volume of content is one of the key reasons the ALRC recommends, in Chapter 7, a greater role for industry classifiers in the new scheme. If industry had a greater role in classification, it may be possible to classify more content. However, if classification is to remain a rigorous process—meaning that content is watched and assessed by trained classifiers applying formal criteria—it is still not possible to have all media content classified. To do so would impose a significant regulatory burden on content providers and create laws that would be difficult to enforce. As Telstra submitted,

> Ineffective or inconsistently enforced classification obligations aid nobody. End users are disadvantaged as ineffective classification obligations risk giving a false sense of security reducing self vigilance or creating confusion about remedies.[6]

6.8 An effective regulatory outcome must account for the volume of media content now available to Australians.

Cost and regulatory burden

6.9 Classification is a costly process, involving trained professionals viewing and assessing content against formal criteria. The fee for the Board to classify a 90 minute film is $730, and if the film is for public exhibition, the fee is $2,180. Even if industry classifiers can perform this work at a lower cost, there will still be a significant cost to be met by distributors, a cost which would likely be passed on to consumers. Requiring content to be classified, some submitted, would simply send the content outside Australia. John Denham, for example, submitted:

> Since Australia represents a tiny proportion of the world market, this proposal would act as a market restriction, preventing access to the Australian market for small developers, who will simply ignore the Australian market and move their operations overseas.[7]

6.10 Meeting classification costs may be particularly disadvantageous to sole traders and small-to-medium enterprises that form the backbone of an emergent digital media content sector.[8] Identical regulatory requirements, Telstra submitted, can have 'dramatically different compliance burdens'. For example,

> requiring formal *ex ante* classification of both high cost, professional film productions intended for mass market theatre distribution to low cost and amateur video productions intended for a niche online audience would have a dramatically different impact on each party.[9]

6.11 These obligations, Telstra submitted, can also 'inhibit innovation and discourage new entrants from developing new content'.[10]

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6 Telstra, *Submission CI 1184*.

7 J Denham, *Submission CI 2464*.

8 See Australian Mobile Telecommunications Association, *Submission to Senate Legal and Constitutional Affairs Reference Committee Inquiry into the Australian Film and Literature Classification Scheme* 2010. More generally on small-to-medium enterprises in the creative economy, see T Cutler, *Venturous Australia: Building Strength in Innovation* (2008).

9 Telstra, *Submission CI 1184*.

10 Ibid. See also Arts Law Centre of Australia, *Submission CI 2490*.

6.12 The cost to industry of classifying media content suggests the obligation to classify should be limited and focused. This is consistent with the principle that regulation should be kept to the minimum needed to achieve a clear public purpose.[11]

Platform neutrality

6.13 The convergence of media technologies has undermined many of the distinctions that underpin the current classification scheme, and suggests that the platform on which content is delivered should not determine whether the content should be classified.[12]

6.14 Currently, similar content may be subject to different regulatory requirements, classification processes and rules, depending on the medium, technology, platform or storage device used to access and deliver the content. For example, the same film may be subject to up to five different regulatory requirements, as it is shown in cinemas, sold or rented as a DVD, accessed through the internet, and broadcast on free-to-air or subscription television.

6.15 Some submissions observed that consumers simply do not recognise—or care about—the distinctions between platforms.[13] The Senate Legal and Constitutional Affairs Committee also noted this difficulty:

> Significantly, one of the shortcomings of the scheme is that it is not platform neutral. That is, it does not provide for a consistent classification decision-making framework in a converged media environment ... The committee recommends that, to the extent possible, the National Classification Scheme should apply equally to all content, regardless of the medium of delivery.[14]

6.16 Arguments for consistency or parity may also suggest there should be less regulation.[15] If it is prohibitively costly to regulate content delivered on one medium (for example, the internet), then it may be argued that the content should also not be regulated when delivered on other media (for example, DVDs).

6.17 The ALRC recommends that the laws concerning what must be classified in Australia should be platform neutral. That is, the obligation to classify content should be framed without reference to the media platform from which the content is accessed—for example, whether the content is broadcast, sold on DVD, screened in cinemas, or provided on mobile phones or online.

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11 See Ch 4, Principle 7.

12 In the Issues Paper, the ALRC asked whether the technology or platform used to access content should affect whether content should be classified, and, if so, why: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 3. Convergence is discussed further in Ch 3.

13 For example, MLCS Management, *Submission CI 1241*. See also Ch 4 of this Report.

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

15 See L Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33 *University of New South Wales Law Journal* 581, 594: 'The desire for similar outcomes for offline and online content regulation is, however, a contested ambition. If similar outcomes are impossible or can only be achieved with significant costs or negative side effects not encountered offline, then an attempt to achieve parity of outcome is undesirable'.

6.18 Excluding online content would quickly make classification policy irrelevant. However, if certain online content must be classified, then for practical reasons, the classification obligation must be narrowed in other ways.

European Union's Audiovisual Media Services Directive

6.19 The European Union has gone some way towards a more platform-neutral regulation of television-like content. The European Union's Audiovisual Media Services Directive (the AVMS Directive),[16] issued on 19 December 2007, extends television broadcasting regulations, including those concerning the protection of children, to audiovisual media services on the internet.[17]

6.20 The AVMS Directive applies to 'audiovisual media services'.[18] The intention of the drafters was to encompass all kinds of media content which are 'television-like', and to this end, 'audiovisual media services' are defined broadly. Article 1 of the AVMS Directive states that 'audiovisual media services' are services 'under the editorial responsibility of a media service provider' which have the principal purpose of providing programs 'to inform, entertain or educate the general public.'[19]

6.21 'Programs' are further defined as 'a set of moving images with or without sound ... whose form and content is comparable to the form and content of television broadcasting' and include 'feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama'.[20] Certain categories of audiovisual media are excluded from regulation, namely user-generated videos and private websites,[21] electronic versions of newspapers and magazines,[22] and games of chance, online games and search engines.[23]

Community expectations

6.22 Community expectation, though difficult to gauge, may also be a useful guide to what must be classified. Submissions to this inquiry suggest that the Australian community expect classification information for feature films, television programs and computer games—though perhaps because this is the content they are accustomed to seeing classified. Many Australian content providers have given their customers or viewers classification information for this content for many years.

16 European Parliament, *Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services*, Directive 2010/13/EU (2010) (AVMS Directive).
17 The AVMS Directive amends the original 1989 Television Without Frontiers Directive, which regulated television broadcasting in Europe after the development of satellite television in the 1980s.
18 European Parliament, *AVMS Directive*, art 1.
19 Ibid, art 1(a)(i).
20 Ibid, art 1(b).
21 Ibid, recital 21.
22 Ibid, recital 28.
23 Ibid, recital 22.

6.23 Although some have called for the classification of 'everything', there appears to be only a limited community expectation that books, magazines, websites, podcasts, user-generated film clips, and other online content be formally classified.[24]

Films, television programs and computer games

6.24 The ALRC recommends that the Classification of Media Content Act (the new Act) should provide that the following content, subject to some exemptions, should be required to be classified before it is sold, screened, provided online or otherwise distributed to the Australian public:

- feature films;
- television programs; and
- computer games likely to be classified MA 15+ or higher.

6.25 However, the new Act should also provide that this content is only required to be classified if it is both:

- made and distributed on a commercial basis; and
- likely to have a significant Australian audience.

6.26 This rule is platform-neutral—which means it applies to films, television programs and computer games that are broadcast and distributed online, as well as those shown in cinemas and sold on DVD and other media.

6.27 The ALRC also recommends that the new Act should define 'feature film' and 'television program' and include illustrative examples. Examples of television programs would include situation comedies, documentaries, children's programs, drama and factual content.[25]

6.28 This is the content the ALRC recommends should be required to be classified. However, as discussed below, content providers should be encouraged to voluntarily classify other media content.

Feature films

6.29 Feature films have been classified in Australia since the 1950s, and they are classified in many other countries, even where there is no legal obligation to do so. Consumers appear to demand classification information for films more than they demand it for other content such as books, magazines and websites. This may be because moving images can have a greater impact on viewers than still images and text.

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24 See, for example, Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 3, 4.

25 Exemptions are discussed later in this chapter.

6.30 The ALRC recommends that feature films should continue to be required to be classified, if they are made and distributed on a commercial basis and likely to have a significant Australian audience.

Cinematic compositions

6.31 Existing classification laws do not limit the films that must be classified to 'feature films'. Rather, all unclassified 'films' (other than exempt films) must be classified, and film is defined broadly to include:

> a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer generated image, can be produced (together with its sound track).[26]

6.32 If these laws were applied to online content, they would apply to millions of online film clips—and perhaps even websites. The ALRC recommends that a narrower range of film be required to be classified. In defining 'feature film', drafters of the new Act may draw upon the definition of 'work' in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), which provides that a 'work' includes:

> a cinematic composition that appears to be:
>
> (i) self-contained; and
>
> (ii) produced for viewing as a discrete entity.[27]

Duration

6.33 The duration of a film may also be a useful way of targeting the films for which Australians seek classification information. The new Act should not place a classification obligation on providers of short film-like content, commonly user-generated and distributed on video-sharing websites, which cannot feasibly be classified and for which Australians do not seem to expect classification information. The ALRC proposes that the new Act should provide that only feature films of a minimum duration, perhaps one hour, must be classified.[28]

Television programs

6.34 Television programs, other than exempt programs, are now classified before they are broadcast in Australia. The ALRC recommends that they continue to be classified, but regardless of whether they are broadcast, or distributed online, on physical media such as DVD, or otherwise (and only if they are made and distributed on a commercial basis and likely to have a significant Australian audience). As noted throughout this Report, if classification obligations do not apply to certain online content—such as television content delivered through Internet Protocol television (IPTV)—then this obligation will become increasingly less effective and relevant. The

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26 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5.

27 Ibid.

28 Though again, only if they are made and distributed on a commercial basis and likely to have a significant Australian audience.

ALRC uses the phrase 'television program' in the absence of a popularly understood, media-neutral alternative phrase.

6.35 Free TV Australia (Free TV) expressed concern that referring to television content may be unfair, even if the intent is to create a platform-neutral law:

> The 'television program' definition, combined with the platform-neutral approach, means that in practice, the only online content that will require classification is content produced by Free TV members and similar established Australian content providers. ... The result is in an unfair regulatory impost on Free TV members and other traditional television content providers. ... Jurisdictional issues will mean that Australian businesses are the only ones who can be subject to enforcement and compliance activities. ...
>
> In an online environment, Free TV members are just like any other content provider—they are not licensed, or using spectrum, and the content in question is nonlinear 'pull' content, as opposed to traditional linear broadcasting.[29]

6.36 Free TV's preferred solution to this problem is 'to remove online content from the scope of must classify and make it a voluntary classification category, with a requirement to classify high level material likely to be MA 15+ or greater'.[30]

6.37 However, in the ALRC's view, removing online content from the scope of the laws concerning what must be classified would mean that, in time, much of the content that Australians now receive classification information about, would no longer be classified. Many of the films now sold on DVD with classification information, would be sold online without classification information. This would also leave Australia with platform-specific classification laws that will quickly become obsolete.

6.38 The ALRC does not propose that established Australian content providers, such as television networks, should have a greater regulatory burden than other content providers—unless, as discussed further below, the content they provide has a significant Australian audience, and the content others provide does not.

Computer games

6.39 Australians continue to value classification information for computer games. Along with films and television programs, computer games are among the content for which distributors in many parts of the world are expected to provide classification information.

6.40 The obligation to classify and mark computer games has been clearly applied to console and PC-based games sold in Australia since the 1990s. In the ALRC's view, many computer games distributed online, or able to be played online, should also be classified. However, if online and mobile games were required to be classified, then the scope of computer games that must be classified will need to be otherwise narrowed. There are many thousands of small games, often played online or on mobile devices

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29 Free TV Australia, *Submission CI 2519*.

30 Ibid. Free TV draws a distinction between providing content through linear, 'push' technology (traditional broadcast television), and providing content on platforms from which users deliberately choose to download the content—'pull'.

and developed by small developers or individuals, which should not be subject to a costly classification obligation.

6.41 In the *Classification Act*, 'computer game' is defined in part to mean:

> a computer program and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game.[31]

6.42 This definition—and the obligation to classify computer games in state and territory classification enforcement legislation—would capture not only console games, but online games and computer game 'apps'.[32] The ALRC recommends that the obligation to classify computer games in the new Act should also be platform neutral, and apply to online and offline games. However, the obligation to classify computer games might usefully be drafted to apply only to computer game 'works', as this term is defined in the *Classification Act*—that is, to computer games 'produced for playing as a discrete entity'.[33]

6.43 The obligation to classify computer games in the new Act should also only apply to *games*. This should go without saying, but the definition of computer game in the *Classification Act* is arguably quite broad, so much so that accounting software, for example, must be explicitly exempted from the definition.[34]

Likely to be MA 15+ or higher

6.44 The need to warn consumers and protect children might suggest that it is more important for content providers to give classification information about high-level content.[35] This idea is reflected in existing laws that provide that only 'submittable publications'—which includes publications not suitable for minors, such as sexually explicit magazines—must be classified before they are sold in Australia.[36]

6.45 It may be that some content does not need to be classified at all, because it is likely to have only a negligible impact on any viewer. A former Director of the Board, John Dickie, suggested that 'there is a large amount of material—publications, instructional films, low level computer games and puzzles—which really do not have to be classified'.[37] The Interactive Games and Entertainment Association (iGEA) submitted that 'small online content products' should only require classification if they 'have the potential to be classified within a restricted category'.[38]

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31 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5A(1).

32 Apps and other computer programs that are not 'played' or 'interactive games' would presumably not meet this definition of computer game.

33 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5.

34 Ibid s 5B(2).

35 In the Issues Paper, the ALRC asked whether the potential impact of content should affect whether it should be classified: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 5.

36 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 19.

37 J Dickie, *Submission CI 582*.

38 Interactive Games and Entertainment Association, *Submission CI 1101*.

6.46 Rather than exempt all of these games from the classification obligation, including higher-level games, or introduce a category of 'small online content product' or 'small and simple computer game', the ALRC proposes that only those games likely to have one of the higher classifications should be classified.

6.47 In the Discussion Paper, the ALRC proposed that only computer games likely to be MA 15+ or higher must be classified.[39] This is a platform-neutral law, which means it would apply to online computer games, often not classified in Australia. However, it also means that most of the games that are now sold in stores in Australia would no longer be required to be classified, and would therefore only be classified if distributors chose to have them classified.

6.48 The Arts Law Centre supported the proposal, and submitted that, 'given the large number of games created and made available in Australia each year',

> it is sensible to focus the efforts of a government classifier on contentious content and require the classification of contentious content only. Such an approach removes cost and legal burden from small game developers and individuals and imposes it only where necessary, specifically for games that include contentious or adult content.[40]

6.49 Telstra also supported the ALRC's proposal, noting that

> while large numbers of mobile and tablet games and apps are now being produced by small providers, very few contain content that would be likely to pose any concern for consumers. Targeting this classification obligation on the relatively small sub-set of content that contains content that is likely to be of concern is a cost effective approach to addressing this issue.[41]

6.50 Civil Liberties Australia, however, argued that it was more important to provide classification information for lower-level games, to help parents and guardians choose content for children.[42] FamilyVoice Australia submitted that parents are 'just as concerned to know which games are suitable for children of a particular age as they are to have this information about feature films and television programs':

> Indeed given the interactive nature of computer games and their potential to influence behaviour this information is perhaps even more important for computer games than more passive forms of media.[43]

6.51 Similarly, the Board submitted that 'parents and guardians actively seek out sound, reliable and consistent classification information ... particularly when they are looking to purchase or provide to children.' The Board also stressed that it cannot be assumed that lower-level content is easy or straightforward to classify:

> G/PG material is arguably the material on which parents and caregivers place most emphasis in terms of reliable, independent, expert classification information.[44]

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39 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–2. A game 'likely to be MA 15+ or higher' is an unclassified game that, if it were to be classified, would be likely to be classified MA 15+ or higher.

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

41 Telstra, *Submission CI 2469*.

42 Civil Liberties Australia, *Submission CI 2466*.

43 FamilyVoice Australia, *Submission CI 2509*.

44 Classification Board, *Submission CI 2485*.

6.52 The Australian Children's Commissioners and Guardians expressed its concerns about M computer games, and submitted that the proposal 'may limit the ability of the public to make informed choices about their computer game purchases'.[45]

6.53 In the ALRC's view, only computer games likely to be classified MA 15+ or higher should be required to be classified (and, as discussed below, only if they are made and distributed on a commercial basis and likely to have a significant Australian audience). These are the games that parents and guardians arguably most need to be warned about—the games with strong or high levels of violence, coarse language and other impactful content.[46] Classifying such games is not primarily for the benefit of 15 year olds, or the parents of 15 year olds, but rather for the benefit of younger minors and their parents, who should be warned that MA 15+ and R 18+ games can have strong or high level violence, coarse language and other content, and are considered not suitable for persons under 15 and 18 respectively. Mandating that such warnings, through classification information, be provided is consistent with the ALRC's principles for reform concerning protecting children from material likely to harm or disturb them.[47]

6.54 Content providers may also choose to classify other lower-level computer games voluntarily. The iGEA expressed its support for voluntary classification for most games, submitting that its members 'understand the value of ensuring that consumers are provided with classification information regardless of whether it is a legal requirement'.[48] In the United States computer games are classified voluntarily in response to market demand; large retail outlets such as Walmart will reportedly only stock computer games that have been classified by the Entertainment Software Ratings Board. As discussed later in this chapter, industry codes might facilitate this voluntary classification of lower-level computer games in Australia.

Made and distributed on a commercial basis

6.55 The ALRC recommends that only films, television programs and computer games that are made and distributed on a commercial basis should be required to be classified before being distributed in Australia.[49] This means that usually only persons carrying on a business producing or distributing media content would be subject to the obligation to have content classified.

6.56 Classifying content comes at a considerable cost, particularly when done by an independent statutory body. Large organisations and companies, such as television networks and the major distributors of films and computer games, will often have the

45 Australian Children's Commissioners and Guardians, *Submission CI 2499*.

46 Of the computer games classified by the Classification Board between July 2005 and June 2010, only 8% were classified MA 15+ or RC. See annual reports of the Board for this period. This statistic does not account for the many online games not submitted to the Board for classification.

47 See Ch 4, Principles 3 and 4.

48 Interactive Games and Entertainment Association, *Submission CI 2470*.

49 In the Discussion Paper, the ALRC proposed that certain content should only be required to be classified if it is produced on a commercial basis: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposals 6–1 and 6–2.

resources to ensure their material is classified and, under a new scheme, may also be able to employ their own classifiers for some content.[50] Smaller content providers, individuals, and producers of user-generated content, however, may not be able to bear the cost of having their content classified. Civil Liberties Australia submitted that:

> It is unfair to hold an individual or small group to the same standards as a corporation that has the time and resources to advertise and comprehensively research issues ... When profit motive is the dominant factor in producing content, classification becomes more justifiable as a feature of fair trading.[51]

6.57 However, many submissions argued that market position or reach should not have a bearing on whether content should be classified. The iGEA said that classification laws should be capable of being applied to 'all content producers, regardless of their size or market position'.[52] FamilyVoice Australia stated that there was no reason to limit the classification obligation to content produced commercially:

> This firstly ensures that material that exceeds community standards is not classified and is not able to be sold, broadcast or exhibited. Secondly, it enables access to material not suitable for children, or for children below a certain age, to be legally restricted. Thirdly, it provides a very useful advisory service that enables individuals to select what they wish to view and assists parents to monitor and control the media their children access.[53]

6.58 A number of submissions noted the difficulty of distinguishing content produced on a commercial basis from other content. The Board, for example, submitted:

> 'Commercial' could encompass a wide variety of revenue-raising business models, from traditional pay-per-view (rental/hire/purchase/download), to those that operate for a profit and charge a fee (eg subscription fees, bundled service fees) or rely on advertising revenue (where content may be free to view but carries paid advertising).[54]

6.59 Some pointed out that many YouTube clips are very popular, and amateur content providers have been known to earn a considerable income from their content. Free TV submitted:

> YouTube earns money from advertising, even though the producers of the content often receive no financial benefits. Some YouTube 'vloggers' receive financial benefits from their content, even though their material may not initially be produced on a commercial basis. Such content will often have millions of views worldwide, more than the highest rating programs on commercial free-to-air television, or even the population of Australia.[55]

6.60 In the ALRC's view, it is important to narrow the scope of the content that must be classified to content made and distributed on a commercial basis. This may be difficult to define, but again, the volume of media content that is now available dictates

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50 In Ch 7 the ALRC recommends the introduction of authorised industry classifiers.
51 Civil Liberties Australia, *Submission CI 1143*.
52 Interactive Games and Entertainment Association, *Submission CI 1101*.
53 FamilyVoice Australia, *Submission CI 2509*; See also J Trevaskis.
54 Classification Board, *Submission CI 2485*.
55 Free TV Australia, *Submission CI 2519*. See also A Hightower, *Submission CI 2511*.

that only certain content can reasonably be expected to be classified. Without such a limitation, the obligation would apply too broadly.

6.61 Also, crucially, content is being provided by individuals and small enterprises who may often be unable to pay for their content to be classified by the Board or an authorised industry classifier. The ALRC agrees that classification information is a useful service, but it is also a costly service, and not all content providers should be expected to provide it.

6.62 There also appears to be a greater community expectation for classification information for commercial content. A 2011 report from the Australian Communications and Media Authority states that participants considered that, ideally, 'professionally produced content available online should provide guidance about what that content contains'.

> Participants believed the classification and ratings information that applied to broadcast television should also apply to on-demand television. They also considered that classification and ratings should apply to movies and games available online, given that all professionally produced mass-consumed content should be subject to community standards. Furthermore, as parents were less likely to have a comparative reference for movies and games than for television shows, it was felt to be almost more important that classification and ratings apply to these products.[56]

6.63 A large amount of content is user-generated and not made on a commercial basis, but is distributed on a platform that operates on a commercial basis—for example, a television station or a video-sharing website with advertisements. The ALRC recommends that only media content that is both made *and* distributed on a commercial basis should be required to be classified. This is the content for which Australians appear to expect classification information, and it is also the content provided by persons most likely to be able to provide the classification information.[57]

6.64 Whether content is made and distributed on a commercial basis may be drafted with reference to whether the content is made and distributed by persons 'carrying on a business', an idea reflected in some Australian statutes. The concept of 'carrying on a business' under the *Income Tax Assessment Act 1997* (Cth) allows the Australian Tax Office (ATO) to distinguish between 'hopeful amateurs' and commercial operations, and is relevant to assessable income, entitlement to an Australian Business Number, and GST registration.[58]

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56 Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 54.

57 This limitation is not applied to the recommendations in Ch 10 concerning content that should be restricted to adults. Reasonable steps should be taken to restrict access to adult content, whether or not the content is commercial content.

58 See Australian Taxation Office, *Am I in Business?* <www.ato.gov.au/content/66884.htm> at 23 January 2012.

Significant Australian audience

6.65 The ALRC recommends that only certain content likely to have a significant Australian audience should be required to be classified—that is, an Australian audience of a significant size.

6.66 Without such a limitation, the classification obligation will apply to too much content. A platform-neutral rule that requires television programs to be classified, for example, would mean that the thousands of television shows now broadcast internationally, but perhaps available to be watched in Australia on the internet, would have to be classified. Again, the volume of media content that is now available, combined with the impracticality of having it all classified, suggests that only some content should be required to be classified. It appears appropriate to require the most popular content to be classified—that is, content that has or is likely to have a significant Australian audience.

6.67 A similar intention may be found in the AVMS Directive, which states:

> For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public.[59]

6.68 Some submissions said that audiences seeking out more 'niche' media content also need classification information. Free TV said that viewers 'have a right to expect the same acceptable community standards with respect to any material they access'.[60]

6.69 It is also difficult, some submissions noted, to predict the size and composition of an audience—especially for online content.[61] Telstra commented that:

> Recent experience shows that the size and audience composition of differing types of content has changed dramatically in relatively short periods of time ... This rapid pace of change creates the risk that classification distinctions based on the potential size and composition of audience could quickly become outdated leading to inconsistencies and perverse outcomes.[62]

6.70 Another submission stated that internet content can 'become popular or fade in popularity within days, depending on which channels it is promoted in'.[63]

6.71 However, many submissions noted that classification of content creates an economic burden on smaller producers. Some said that content produced by small producers, or for a niche audience, should therefore be exempted from any requirement to be classified, and independent and niche developers should not be caught up in red tape. The Australian Independent Record Labels Association argued that music for 'a

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59 *AVMS Directive*, recital 21.
60 Free TV Australia, *Submission CI 1214*.
61 See, eg, Telstra, *Submission CI 1184*; Australian Council on Children and the Media, *Submission CI 1236*.
62 Telstra, *Submission CI 1184*.
63 Endless Technology Pty Ltd, *Submission CI 1786*.

small audience should not be subject to costly or resource dependent classification systems'.[64]

6.72 The ALRC maintains that a platform-neutral rule defining what content must be classified should be limited to content with a significant Australian audience, otherwise it will catch the many millions of films, games and programs now available on the internet that may be watched by only a small proportion of the Australian population—if by any Australians at all.

6.73 The legislation should define more precisely what will amount to a significant Australian audience. Determining audience size will sometimes be difficult. The popularity of some platforms may indicate whether content will have a significant audience; films broadcast on Australian television and shown in Australian cinemas, for example, will for some years no doubt continue to reach a significant Australian audience.

6.74 Some content providers may not know whether their content is likely to have a significant Australian audience, and may even be surprised if their content 'goes viral'. Such content providers may choose to classify the content anyway, or monitor the popularity of the content, or await a 'classify notice' from the Regulator. The ALRC appreciates that laws should ideally be certain in their application, but some reference to the likely size of the Australian audience may be the only reasonable way to create a platform-neutral law that will apply to relevant content on the internet, without imposing a costly classification obligation on persons, including international content providers, who do not intend to deliver content to a significant Australian audience.

6.75 In enforcing this classification obligation, the Regulator should not be required to prove that a particular piece of content had, or was likely to have, a significant Australian audience. Rather, the Regulator should be able to issue classify notices, discussed later in this chapter, in respect of content with a significant Australian audience. If a content provider then argues that their content does not have a significant Australian audience, and the Regulator changes its view, the Regulator might withdraw its classify notice. However, if the notice stands, and is not complied with, then in enforcing the obligation, that notice should be taken to be conclusive proof that the content has a significant Australian audience.

6.76 Limiting the content that must be classified to content that is likely to have a significant Australian audience may mean that some content that would currently be classified before being broadcast or sold on DVD, for example, may no longer need to be classified, because the Australian audience is likely to be very small.[65] However, if a commercial television program is expected to be watched by a large number of Australians on the internet, and another obscure commercial television program is

64 Australian Independent Record Labels Association, *Submission CI 2058*.

65 In practice, many films with smaller audiences, such as many non-English films sold on DVD in speciality retail outlets, are not classified now anyway, even though the law provides that they should be. Whether such 'niche' non-English language films should be classified under the ALRC's model may depend largely on the likely size of their Australian audience.

expected to be watched by only a few Australians when broadcast, then in the ALRC's view, it is more important for the first program to be classified than the second.

Sold, screened, provided online, or otherwise distributed

6.77 Existing laws generally provide that certain content must be classified before it is sold, hired, distributed, publicly exhibited or broadcast—rather than merely possessed or lent to friends and family. In New South Wales, for example, it is not an offence to possess an unclassified film, or to give a copy of an unclassified film to a friend, but it is an offence to 'sell or publicly exhibit' an unclassified film.[66] Publicly exhibit means exhibit 'in a public place' or 'so that it can be seen from a public place'.[67] 'Sell' is defined to mean:

> sell or exchange or let on hire, and includes offer or display for sale or exchange or hire, agree to sell, exchange or hire and cause or permit to be sold or exchanged or hired, whether by retail or wholesale.[68]

6.78 The ALRC does not favour any extension of the obligation to classify content to persons who merely possess content or who lend or show content to family and friends. The ALRC recommends that the new Act provide that only content that is sold, screened (including broadcast), provided online (and through peer-to-peer networks), or otherwise distributed will be required to be classified.

Recommendation 6–1 The Classification of Media Content Act should provide that feature films and television programs that are:

(a) likely to have a significant Australian audience, and

(b) made and distributed on a commercial basis,

should be classified before content providers sell, screen, provide online, or otherwise distribute them to the Australian public. The Act should provide for platform-neutral definitions of 'feature film' and 'television program' and illustrative examples. Examples of television programs may include situation comedies, documentaries, children's programs, drama and factual content.

Recommendation 6–2 The Classification of Media Content Act should provide that computer games that are:

(a) likely to be classified MA 15+ or higher; and

(b) likely to have a significant Australian audience; and

(c) made and distributed on a commercial basis,

66 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 6.
67 Ibid s 4.
68 Ibid s 4.

should be classified before content providers sell, screen, provide online, or otherwise distribute them to the Australian public.

The Act should provide for platform-neutral definitions of 'computer game' and illustrative examples.

Exemptions

6.79 Certain content should continue to be exempt from requirements to be classified. The new Act should contain a definition of 'exempt content' drawn from the existing exemptions in the *Classification Act*, the *Broadcasting Services Act 1992* (Cth), and television codes. This exempt content would include, for example:

- news and current affairs programs;
- sporting events;
- recordings of live performances; and
- educational computer games.

6.80 Some of this content may not be caught by the ALRC's proposed definition of content that must be classified. For example, films and computer games 'for training, instruction or reference' are perhaps unlikely to have a significant Australian audience. The content may therefore not need to be explicitly exempted, but the new Act could keep these exemptions in any event, for the sake of clarity.

6.81 Although in the ALRC's model, this content would not need to be classified, it should still be restricted to adults if it is likely to be R 18+ or X 18+.[69] This safeguard should largely obviate the need to exclude higher level content from the definition of exempt content.[70] A recording of a live performance that is likely to be R 18+, for example, would still need to be restricted to adults, even though it may not need to be classified.

6.82 If access restrictions on adult content are in place (see Chapter 10), then more content can be exempted from classification requirements. In the ALRC's view, the definition of exempt content in the new Act should be expanded to capture films and computer games shown at:

- film and computer game festivals; and
- art galleries and other cultural institutions.[71]

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69 See Ch 10.

70 The *Classification Act* now provides that films and computer games are not exempt if they are likely to be classified M or higher: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5B(3).

71 For example, National Film and Sound Archive of Australia, *Submission CI 1198*.

6.83 This should replace the formal, and reportedly cumbersome, exemption arrangement, under which film festivals and cultural institutions currently apply to the Director of the Board to have content exempted from classification requirements.[72]

6.84 The National Association for the Visual Arts (NAVA) submitted that it 'strongly supports' the exemption for content shown at festivals, art galleries and other cultural institutions. 'This is a positive move towards supporting Australia's innovative and creative practitioners and their rights to freedom of expression'.[73]

6.85 The Arts Law Centre supported the proposal in the Discussion Paper, pointing to the role played by film festivals, art galleries and other cultural institutions in 'creating a space to show unconventional and challenging content'.[74] The Arts Law Centre also said that an explicit exemption would recognise the 'already widespread self-regulation by galleries and cultural institutions notifying visitors of content so that individuals may decide for themselves and their children whether or not to view it'.[75] Similarly, the Australia Council for the Arts also submitted that in the 'vast majority of cases our galleries and cultural institutions already present films responsibly, with appropriate measures in place to inform the public about work that contains potentially offensive material'.[76]

6.86 However, NAVA also noted that 'artistic work is no longer only made available to the public within gallery spaces but is exhibited in a wider range of contexts and locations'—including on the internet. NAVA therefore recommended that 'the work of all professional artists should be exempt, regardless of the context in which it is brought to the public'.[77] The ALRC sees no need for such a blanket exemption for artists. Many popular films, computer games and television programs that Australians would expect to be classified are no doubt made by artists, and should not be exempted from classification laws on this ground. Distinguishing between artists and other content producers would also be difficult to apply in practice.

Recommendation 6–3 The Classification of Media Content Act should provide a definition of 'exempt content' that captures all media content that is exempt from the laws relating to what must be classified. The definition of exempt content should capture the traditional exemptions, such as for news and current affairs programs. The definition should also provide that films and computer games shown at film festivals, art galleries and other cultural institutions are exempt. Providers of this content should not be exempt from obligations to take reasonable steps to restrict access to adult content.

72 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 51.
73 National Association for the Visual Arts, *Submission CI 2471*.
74 Arts Law Centre of Australia, *Submission CI 2490*.
75 Ibid.
76 Australia Council for the Arts, *Submission CI 2508*.
77 National Association for the Visual Arts, *Submission CI 2471*.

Voluntary classification

6.87 Although the ALRC proposes that only a limited range of content must be classified, content providers may choose to have other content classified to meet consumer demand for classification information. The idea of voluntary classification was popular in submissions to this inquiry. The iGEA, for example, submitted that the computer game industry is familiar with and supports voluntary classification schemes, and that it 'welcomes the opportunity to develop codes of practice to encourage computer game providers to classify and mark content in accordance with approved and agreed industry standards'.[78]

6.88 Similarly, Telstra said that media content providers have 'substantial incentives' to classify content, including 'brand preservation' and 'customer satisfaction':

> Telstra believes that many providers would avail themselves of voluntary classification processes. This would be particularly likely to occur if the costs of these voluntary classification processes can be minimised, for example through the new forms of standardised classification instruments [proposed by the ALRC].[79]

6.89 The Arts Law Centre said that 'given the incredibly huge range of content being produced both online and offline, the government must rely and work with industry to develop suitable codes and guidelines to allow self-classification and regulation'.[80]

6.90 Consumers may demand more classification information for particular types of content. For example, although the ALRC proposes that only computer games likely to be MA 15+ or higher must be classified, distributors of popular games may choose to classify lower level games, because parents and guardians value this information. Content providers will be more likely to choose to meet this consumer demand for classification information if, as is recommended in Chapter 7, this content may be classified by an authorised industry classifier or using an authorised classification instrument.

6.91 Music is another type of content for which there are calls for further classification information. FamilyVoice Australia, for example, provided examples of music with explicit, violent and degrading lyrics, and recommended that 'music with lyrics which is likely to be classified MA 15+ or higher should be required to be classified'.[81]

6.92 However, the Australia Council for the Arts suggested a cautious approach to music classification. There is an enormous volume of music, it said, and 'numerous providers of music, including online music stores, subscription streaming services, and social media'.

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78 Interactive Games and Entertainment Association, *Submission CI 2470*.
79 Telstra, *Submission CI 2469*. See also Pirate Party Australia, *Submission CI 1588*.
80 Arts Law Centre of Australia, *Submission CI 2490*.
81 FamilyVoice Australia, *Submission CI 2509*.

> To implement the classification scheme's categories for online music in a way that provides effective advice will require cooperation that spans multiple industries, territories and international jurisdictions.[82]

6.93 The ALRC suggests that the Australian Recording Industry Association (ARIA) and the Australian Music Retailers Association (AMRA) consider adapting their industry code so that it provides that music distributors, online and offline, should classify music with a strong impact using the classification categories and criteria of the National Classification Scheme. Music with a strong impact would be music likely to be MA 15+ or R 18+ under the National Classification Scheme, or Level 1, 2 or 3 under the existing ARIA/AMRA code. This would mean using the statutory classification markings of the National Classification Scheme, which are perhaps more widely understood and recognised by Australians than the Level 1, 2 and 3 markings. This would also harmonise music classification with the classification of other media in Australia.

6.94 Voluntary codes should be approved by the Regulator, to help prevent content distributors in any particular industry from using the classifications or markings inconsistently or improperly, or in a way that undermines the classification scheme. Accordingly, the ALRC recommends the new Act provide the Regulator with the power to approve voluntary codes. The ALRC also suggests that the Regulator should actively encourage the development of suitable voluntary codes.[83]

Recommendation 6–4 The Classification of Media Content Act should enable the Regulator to approve industry codes that provide for the voluntary classification and marking of content that is not required to be classified. The Regulator should encourage the development of such codes for:

(a) computer games likely to be classified below MA 15+;

(b) magazines likely to be classified R 18+ or X 18+; and

(c) music with a strong impact.

Classify notices

6.95 Where the Regulator becomes aware of unclassified content that the new Act mandates must be classified, the Regulator should have the power to issue a notice to the content provider, requiring the content provider to have the content classified. This is similar to the existing power of the Director of the Board to call in content for classification. However, the ALRC recommends that the Regulator, rather than the Director of the Board, have this power to require classification.[84] This notice also

82 Australia Council for the Arts, *Submission CI 2508*.
83 Codes and co-regulation are discussed more broadly in Ch 13.
84 The powers of the Regulator are discussed in Ch 14.

differs from a call-in notice in that a person may comply with the notice by either engaging an authorised industry classifier or the Board to classify the content.[85]

6.96 Those who routinely provide content that must be classified—for example, cinema-release film distributors and television broadcasters—should have their content classified without receiving a notice. However, if they fail to do so, the Regulator should have the power to issue a classify notice for a category of content, rather than simply one piece of content, provided the content provider can be reasonably expected to identify the content that falls within the category identified in the notice.

6.97 The Regulator should only have the power to issue these classify notices for content that must be classified, and should exercise this power having regard to its enforcement guidelines.[86] Civil, criminal and administrative penalties in relation to classification obligations are discussed in Chapter 16.

Recommendation 6–5 The Classification of Media Content Act should enable the Regulator to issue a 'classify notice' to a content provider who provides unclassified content that the Act mandates must be classified. Such notices may relate to a specific piece of content, or for a category or class of content.

85 However, there will still be a role for call in notices: see Ch 7.
86 See Ch 16.