# 6. What Content Should be Classified?

## Contents



## Summary


6.1 This chapter considers what content should be classified under the proposed National Classification Scheme. It starts by considering distinguishing features of content that might be used to determine whether something must be classified. The ALRC then proposes that the following content (subject to some exemptions) must be classified before it is sold, hired, screened or distributed in Australia:

- feature-length films produced on a commercial basis;
- television programs produced on a commercial basis;
- computer games produced on a commercial basis and likely to be MA 15+ or higher;

- all media content likely to be X 18+ (ie, sexually explicit adult content); and
- all media content that may be RC (Refused Classification).

6.2 The classification of most other media content—for example, books, magazines, websites, music and computer games now likely to be G, PG and M[1]—should become or remain voluntary. However, the ALRC proposes that industry bodies should develop codes of practice that encourage the voluntary classification of some of this other content, such as lower-level computer games, using the categories, criteria, and markings of the National Classification Scheme. In Chapter 8, the ALRC proposes that access must be restricted to all media content that is likely to be R 18+, including content that is not required to be classified.

6.3 In this chapter, the ALRC also proposes that media content should be classified before: enforcement agencies require someone to stop distributing content (whether on the internet or otherwise); enforcement agencies prosecute someone for distributing content; and before the content is added to any proposed list of content that must be filtered by internet service providers (ISPs).

6.4 In Chapter 7, the ALRC proposes that much of the content required to be classified may be classified by authorised industry classifiers, subject to review by the Classification Board, but some content must continue to be classified by the Classification Board.[2]

## How to determine what should be classified

6.5 Determining what should be classified might be expected to follow from the primary purposes of regulating content. If the purpose of classification is to give Australians information about content they might choose to view, hear or play, and to protect people from harmful or distressing material, then this might suggest that most content—and certainly as much potentially harmful content as possible—should be classified. However, even if it were thought useful for everything to be classified—to provide Australians with as much information as possible—this is unlikely to be practically possible or cost-effective. Any new or reformed classification scheme must therefore consider which types of content should be classified or regulated.

6.6 There are a number of possible ways of thinking about content for the purpose of deciding which content should be classified. In the Issues Paper, the ALRC asked a number of questions related to how to determine what content should be classified or regulated. This section will briefly summarise submissions in response to these questions.

6.7 However, two preliminary points should be noted, one concerning the meaning of 'classify' and the other concerning restricting access without classifying content. First, when this chapter asks whether something should be classified, it does not

1 New classification categories are proposed in Ch 9.

2 A table summarising what content must be classified and by whom, and what must be restricted, is in Appendix 4.

necessarily mean classified by the Classification Board. In Chapter 7, the ALRC proposes that some content may be classified by authorised industry classifiers.

6.8 Secondly, limiting access to certain content may not need to depend on a formal classification decision. If the purpose of classifying some content is to warn potential viewers and to restrict access to adults, and the provider of the content does both, then there may be no need to classify the content. In Chapter 8, the ALRC proposes that all media content that is likely to be R 18+ must be restricted to adults, even though this chapter proposes that only some of this content must be classified.

## Volume of content

6.9 There are over one trillion websites, hundreds of thousands of 'apps' are available to download to mobile phones, and every minute over 48 hours of video content is uploaded to YouTube.[3] Submissions to this Inquiry consistently noted the sheer volume of content that is now available, particularly online content, and the impossibility of having Australian classifiers watch and formally classify it all. The Arts Law Centre, for example, submitted:

> 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.[4]

6.10 As Civil Liberties Australia remarked, if 'the content is freely available, then the requirement for classification becomes absurd and hard to justify':

> The sheer volume of content available today simply makes mandatory classification impractical.[5]

6.11 A number of submissions suggested that the practical reality, or feasibility, of requiring content to be classified should therefore influence what content, and how much content, should be classified. According to Telstra, the feasibility of those laws being complied with and enforced was also a relevant consideration:

> 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]

6.12 If industry had a greater role in classification, as proposed in Chapter 7, it may be possible to classify more content.

## Cost and regulatory burden

6.13 The more regulation, the greater the likely cost to industry and to the public. Excessive regulation might also be particularly disadvantageous to sole traders and small-to-medium enterprises who form the backbone of an emergent digital media

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3 The Official YouTube blog, 25 May 2011, <http://youtube-global.blogspot.com/2011/05/thanks-youtube-community-for-two-big.html> at 15 August 2011.

4 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

5 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

6 Telstra, *Submission CI 1184*, 15 July 2011.

content sector.[7] The high cost of classifying and regulating certain content might call for increased industry involvement in classification or for some content to be excluded completely from the regulatory regime, provided that the other overall objectives of the National Classification Scheme can be met.

6.14 There is also a need for cost-effective solutions for the large number of start-up businesses, sole traders and small-to-medium enterprises engaged in the emergent digital content industries. As Telstra submitted,

> Identical regulatory requirements can have dramatically different compliance burdens when applied in differing contexts. 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.[8]

6.15 These obligations, Telstra submitted, can also 'inhibit innovation and discourage new entrants from developing new content'.[9]

## Media platform

6.16 The convergence of media technologies has arguably undermined some of the distinctions between media that underpin the current classification scheme, and may suggest that the platform on which content is delivered should not determine whether the content should be classified.[10]

6.17 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 different regulation, depending on whether it is shown in a cinema, sold or rented as a DVD, accessed through the internet, and broadcast on free-to-air or subscription television. Film media and print media are also treated differently. Each has separate guidelines and although most films must be classified to be sold, only some publications must be classified (sexually explicit magazines, for the most part).

6.18 Some argue that the media used to deliver content is not relevant to the question of whether the content should be classified. A child may be no less distressed watching a violent film downloaded from the internet than watching a film hired from a DVD store. Such reasoning may lie behind the submissions to this Inquiry that called for the classification of 'everything'.

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7 See Australian Mobile Telecommunications Association, *Submission to Parliament of Australia Senate Legal and Constitutional Affairs Reference Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2010. More generally on small-to-medium enterprises in the creative economy, see T Cutler, *Venturous Australia: Building Strength in Innovation* (2008) Department of Innovation, Industry, Science and Research.

8 Telstra, *Submission CI 1184*, 15 July 2011.

9 Ibid.

10 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.

6.19 More broadly, some submitted that consumers simply do not recognise—or care about—the distinctions between platforms.[11] 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.[12]

6.20 However, the same factors might be used to argue for less regulation. If it is prohibitively costly to regulate content delivered by 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). The argument for consistency or parity could therefore lead to less regulation.[13]

6.21 The proposals later in this chapter regarding what must be classified are largely platform-neutral.

## Likely classification

6.22 The need to protect children from harmful or distressing content, and to warn all consumers about potentially distressing content, might suggest that it is more important to regulate content that is likely to have a high classification.[14] This is reflected in the current regulation of online content, which targets material that is or would be restricted offline, and in government proposals to introduce ISP-level filtering of content classified RC. This idea is also reflected in laws that provide that only 'submittable publications'—publications not suitable for minors (such as sexually explicit magazines), or likely to be RC—must be classified before they are sold or distributed in Australia.[15]

6.23 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 Classification Board, John Dickie, suggested that 'there is a large amount of material—

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11 For example, MLCS Management, *Submission CI 1241*, 16 July 2011.

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

13 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'.

14 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. Some questioned whether the 'potential impact' was the right test, noting that it was too subjective: see, eg, Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.

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

publications, instructional films, low level computer games and puzzles—which really do not have to be classified'.[16]

6.24 The Interactive Games and Entertainment Association (iGEA) said that 'the potential impact of Small Online Content Products would affect whether such products should be classified'.[17] For other content, however, iGEA would prefer the content to be classified, regardless of its potential impact, to 'ensure that the community is well informed of the suitability of content across the full range of impact levels'.[18]

6.25 A number of ALRC proposals in this chapter and in Chapter 8 turn on the likely classification of content, that is, the classification something would likely be given if it were classified.

## Complaints

6.26 Another way of distinguishing content for the purpose of deciding whether it needs to be classified is whether the content has been the subject of a complaint or has otherwise been singled out by regulators.[19]

6.27 The classification of online content largely relies on complaints: online content will often only be classified if someone has lodged a complaint with the ACMA. On the other hand, submittable publications, films and computer games must usually be classified whether or not anyone has complained about their content.[20]

6.28 However, complaints may be a useful way to identify and target the content that should be classified. The NSW Council of Churches suggested that while 'the intent should be to classify all content', the 'volume of content and the public resources available for monitoring' may require such an approach.[21] The Arts Law Centre of Australia considered that 'there is a good argument that self-regulation coupled with a complaints based system may be the most effective way to proceed into the future':

> This would require content providers to self-regulate and to provide a mechanism for members of the public to be able to make complaints about the extreme and offensive content.[22]

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16 J Dickie, *Submission CI 582*, 11 July 2011.

17 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

18 Ibid.

19 In the Issues Paper, the ALRC asked whether some content should only be required to be classified if the content has been the subject of a complaint: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 4. It should be noted that a complaint may highlight the need for a piece of content to be classified or restricted, or it may highlight the need for a classification decision to be reviewed. The review of classification decisions made by the Classification Board and by industry classifiers is discussed in Ch 7.

20 The Director of the Classification Board may, upon receiving a complaint about unclassified offline content, issue a notice 'calling in' the content for classification. See, eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46–48.

21 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.

22 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

6.29 Telstra likewise submitted that end-user complaints are 'a useful gating mechanism for targeting classification exercises':

> such a complaint driven process empowers users to influence the content that they consume and target the compliance costs of the classification scheme to areas of genuine end user concern.[23]

6.30 However, if complaints were the *only* factor that determined whether something should be classified, then only a very small proportion of content would ever be classified. The Australian Council on Children and the Media submitted that complaint-based systems

> rely on a public who, having seen content that is inappropriate, knowing where to lodge a complaint, takes the trouble to do so, and then perseveres through to the end result. All this takes too much time, especially for busy parents.[24]

6.31 Some said that a complaints-based system does not work.[25] If something is not classified unless there is a complaint then, by the time there is a complaint, it will often be 'too late'.[26] However, others were concerned that complaints could be used by a small minority to seek the censorship of material that most Australians would not wish to have censored. If there were a complaints-based system, it was noted, 'efforts must be made to dissuade frivolous and malicious complaints'.[27]

## Major producers and distributors

6.32 Classification laws could also be directed at content distributed by companies and corporations and exclude content distributed by individuals, such as 'user-generated content'.[28] Classifying content comes at a considerable cost, particularly when done by an independent statutory body. Large organisations and companies, such as the major distributors of publications, films and computer games, may have the resources to ensure their material is classified and, under a new scheme, may also be able to employ their own classifiers for some content. The Australian Independent Record Labels Association, for example, submitted that 'costs associated with classification can only be reasonably borne by record labels with a history and potential of mass market reach'.[29]

6.33 Some submissions noted that smaller producers of content may not be able to bear the cost of having their content classified, and so should be exempted from classification laws. Civil Liberties Australia, for example, argued that:

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23 Telstra, *Submission CI 1184*, 15 July 2011.

24 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

25 See, eg, Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011; Australian Family Association of WA, *Submission CI 918*, 12 July 2011.

26 For example, Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

27 A Hightower and Others, *Submission CI 2159*, 15 July 2011.

28 In the Issues Paper, the ALRC asked whether the size or market position of particular content producers and distributors, or the potential mass market reach of the material, should affect whether content should be classified: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 6.

29 Australian Independent Record Labels Association, *Submission CI 2058*, 15 July 2011.

> 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.[30]

6.34 However, a large number of submissions argued that market position or reach should have no bearing on whether content should be classified. One submission called this an 'an entirely subjective and impractical measure'.[31] The NSW Council of Churches emphasised that:

> The goal should always be to maintain classification standards that reflect accepted community standards and not to make special allowances for so-called special audiences or market segments.[32]

6.35 The iGEA also said the classification laws should be capable of being applied to 'all content producers, regardless of their size or market position and regardless of the size and composition of the audience for the content'.[33]

6.36 Some submissions expressed concern over whether there was any acceptable standard by which market position or reach could be judged as sufficiently large to warrant classification. Telstra thought it was unclear what benchmark the 'size' of producers or distributors could be usefully measured against.[34]

6.37 The ALRC proposes that certain content should only be required to be classified if it is produced on a commercial basis: see Proposals 6–1 and 6–2.

## Size and composition of the audience

6.38 If content will only be seen by a small audience of adults, then there may be less demand for classification information. The more people are likely to see a piece of content, the greater the likely demand for classification information. If children are likely to see the content, then the need for classification information may also grow. Such arguments might justify expecting popular television channels to classify content they broadcast, but not overseas television channels that may also be watched on the internet.

6.39 In the Issues Paper, the ALRC asked whether the potential size and composition of the audience should affect whether content should be classified.[35] Many submissions argued that classification should be based on content rather than audience, and that small audiences also need classification information. Free TV Australia said that viewers 'have a right to expect the same acceptable community standards with respect to any material they access'.[36]

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30 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
31 A Hightower and Others, *Submission CI 2159*, 15 July 2011.
32 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.
33 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.
34 Telstra, *Submission CI 1184*, 15 July 2011.
35 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 9.
36 Free TV Australia, *Submission CI 1214*, 15 July 2011.

6.40 It is also difficult, some submissions noted, to predict the size and composition of an audience—especially for online content.[37] 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.[38]

6.41 Another stakeholder submitted that internet content can 'become popular or fade in popularity within days, depending on which channels it is promoted in'.[39]

6.42 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 said that music for 'a small audience should not be subject to costly or resource dependent classification systems'.[40]

6.43 Some submissions argued that the composition of the audience (though not necessarily its size) should influence whether or not classification is necessary. The Arts Law Centre of Australia, for example, submitted that persons who attend galleries to view artworks are 'a discrete section of the community'—they are 'knowledgeable about the material they are going to view and attend by choice'. There should therefore be 'an explicit exemption to classification for works of art exhibited in a gallery space'.[41]

### *Children's content*

6.44 Many parents and guardians rely on classification information to guide their choice of entertainment for young children. Children may also be more likely to be distressed or even harmed by content they view.[42] In light of these and other concerns, some call for the classification of 'everything'. The Australian Christian Lobby submitted that content 'designed for children should be subject to classification across all media.'[43] Similarly, Media Standards Australia argued that:

> All material should be checked by the Classification Board, and some should be refused classification. Content designed for children should definitely and automatically be classified across all media, as well as content which will be available to children within their viewing or listening hours.[44]

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37 See, eg, Telstra, *Submission CI 1184*, 15 July 2011; Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

38 Telstra, *Submission CI 1184*, 15 July 2011.

39 Endless Technology Pty Ltd, *Submission CI 1786*, 13 July 2011.

40 Australian Independent Record Labels Association, *Submission CI 2058*, 15 July 2011.

41 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

42 In the Issues Paper, the ALRC asked whether content designed for children should be classified across all media: Issues Paper, Question 5.

43 Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.

44 Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011.

6.45 Civil Liberties Australia described the protection of minors as the 'crux of classification today':

> Adults are deemed capable of making decisions for themselves and held responsible for the decisions they do make. Parents, however, want to have some control over the messages their children receive and seek some help to ensure that the content their children are exposed to is age-appropriate ... There is therefore greater need to have content classified when it is specifically directed at children.[45]

6.46 Others have said the real risk is children's access to content that is not designed for children—adult content, such as violent films and pornography. The Australian Council on Children and the Media noted children have access to a lot of content that is not 'designed for them'. The classification system should, therefore, be 'based on what children have access to rather than the intent of the material's producer'.[46]

6.47 However, as noted above, it is arguably not possible to mandate that all media content must be classified. It may not even be possible to require all media content designed for children to be classified. However, as Telstra submitted, content producers and distributors might voluntarily submit their material for classification as child friendly.

> Parents would benefit from such a system by being able to direct their children to content with an appropriate classification rather than content that has not been classified at all, and content providers and distributors would benefit by being able to market their content as child friendly on the basis of an independent benchmark.[47]

## Public or private

6.48 Many submissions stated that whether content is publicly or privately available should not affect whether it should be classified.[48] Many stressed the importance of maintaining a focus on content itself, rather than the platform from which that content may be accessed. The organisation Bravehearts, for example, submitted that:

> Whether or not the content is accessed in the public or private sphere should not impact on whether or not content should be classified ... [Such] conditions will only create loopholes that may be exploited.[49]

6.49 A smaller number of submissions suggested that content selectively viewed from home should not be subject to the same restrictions as content displayed in a public forum. Civil Liberties Australia submitted that 'the fact that content is accessed in public or at home should absolutely affect whether it should be classified':

> Public spaces are all about community, and therefore community standards should apply. In private spaces, by contrast, community standards are irrelevant.[50]

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45 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
46 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.
47 Telstra, *Submission CI 1184*, 15 July 2011.
48 In the Issues Paper, the ALRC asked whether the fact that content is accessed in public or at home should affect whether it should be classified: Issues Paper, Question 10.
49 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.
50 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

6.50 Whether stricter restrictions should be placed on media shown in public—such as outdoor advertising—is discussed further in Chapter 8.

## Feature-length films, television programs and computer games

6.51 Providing advice or information to consumers, in particular parents and guardians, to inform their entertainment choices is arguably the primary function of classification law.[51] The fact that most films and computer games that are classified by the Classification Board receive advisory classifications to which no legal restrictions apply (now G, PG and M), highlights that providing advice is central to classification policy.[52]

6.52 From the user's perspective, there may in time be little or no difference between content on ABC television or Channel 10, and content on YouTube or an overseas internet television channel. Why, then, require the ABC and Channel 10 to classify much of their content, but not YouTube? Why impose the cost of classification only on Australian publishers, television stations and other content providers?

6.53 Despite the impossibility of classifying all media content, a few reasons remain for continuing to require some content to be classified.

6.54 First, as noted above, the Australian community appears to expect classification information for feature-length films, television programs and computer games. This is a useful and valued service that many Australian content providers have given their customers for many years. However, although some have called for the classification of everything, there appears to be only a limited community expectation that books, magazines, websites and other online content be formally classified. As many have stressed, there is simply too much media content, even if it were desirable to classify it all. Requiring most content to be classified, even using industry classifiers, would also place a significant cost and regulatory burden on those who provide the content.

6.55 Secondly, the content traditionally classified in Australia, and that the ALRC considers should continue to be classified, has a large Australian audience. Feature-length films and television programs, and computer games in particular, are likely to be watched by a significant Australian audience. Short clips on the internet may also be watched by a large number of people, but the quantity of such clips may mean that any one clip is rarely watched by as many Australians as the more developed, commercial content traditionally shown on television channels and in cinemas and available to buy on DVDs or download from the internet.

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51 There are no legal restrictions on material classified G, PG and M—these are 'advisory' classifications. The other classifications—MA 15+, R 18+, X 18+, RC, Category 1 Restricted, and Category 2 Restricted—are restricted classifications, meaning that legal restrictions apply to their sale and distribution. New classification categories are proposed in Ch 9.

52 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 either G, PG or M.

6.56 The ALRC proposes that while most content does not need to be classified, the new Act should provide that the following content must be classified before it is sold, hired, screened or distributed in Australia—whether delivered online or offline:

- feature-length films produced on a commercial basis;
- television programs produced on a commercial basis; and
- computer games produced on a commercial basis and likely to be classified MA 15+ or higher.[53]

6.57 Other content—for example, websites, books and audio books, music, radio content, podcasts, artworks, advertising—usually should not need to be classified, unless it is likely to be X 18+ or RC.[54] In Chapter 8, the ALRC also proposes that access to any content that is likely to be R 18+ should be restricted to adults.

## What is a feature-length film or television program?

6.58 The description 'feature-length films and television programs produced on a commercial basis' is intended to capture only the content Australians now most expect to be classified—the films traditionally shown in cinemas and sold on DVDs and television programs traditionally broadcast on television and often repackaged for sale on other media. This content is now also available on the internet, which is why the ALRC proposes that the definition in the proposed Classification of Media Content Act should not be platform-specific.

6.59 This is the content that is traditionally classified in Australia. A more precise definition in the proposed Act should, however, clarify that other content does not need to be classified. In particular, this definition is not intended to capture other film-like internet content such as user-generated videos.

6.60 Television programs, other than exempt programs, are already classified before they are broadcast in Australia. This proposal should not greatly affect the number of television programs classified before broadcast on Australian television. Overseas television programs made available on the internet before they are broadcast in Australia should also be classified under this proposal. The ALRC uses the phrase 'television program' in the absence of a popularly understood, media-neutral alternative phrase.

## Why only computer games likely to be MA 15+ or higher?

6.61 The ALRC proposes that only computer games likely to be classified MA 15+ or higher must be classified. These are the games that parents and guardians arguably most need to be warned about—the games with strong or high levels of violence,

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53 Later in this chapter, the ALRC proposes that some content be exempt from this requirement. In Ch 7, the ALRC proposes that most of this content should be able to be classified by an authorised industry classifier or the Classification Board.

54 In Ch 8, the ALRC proposes that access must be restricted to all media content that has been, or is likely to be, classified R 18+ or X 18+.

coarse language and other content.[55] This is consistent with the ALRC's principles for reform concerning protecting children from material likely to harm or disturb them and providing consumers with classification information.[56]

6.62 Content providers may choose to classify other lower-level computer games voluntarily. There are arguably too many games developed and released each year, and developed by too diverse a range of persons, to formally classify before they are sold or distributed in Australia. Hundreds of thousands of small games, often played online or on mobile devices and developed by small developers or individuals, are now available for sale. The iGEA submitted:

> Small Online Content Products should only require classification if such products have the potential to be classified within a restricted category.[57]

6.63 Rather than exempt all of these games from the classification obligation, 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 a higher classification should be classified.

6.64 In the United States and the United Kingdom, computer games are classified voluntarily in response to market demand for classification information. Industry codes of practice in Australia might facilitate this voluntary classification, so that the statutory classification categories, criteria and markings proposed in Chapter 9 are used for all classified computer games in Australia.

## Exempt films, television programs and computer games

6.65 The proposed Classification of Media Content Act should provide that 'exempt content' is content exempt from the laws that provide that certain content must be classified, but not from the laws proposed in Chapter 8 that require restrictions on adult content. The Act should contain a definition of 'exempt content' drawn from the existing exemptions in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*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
- films for training, instruction or reference.

6.66 Although this content should not need to be classified, it should still be restricted to adults if it is likely to be R 18+. In other words, this content should not be exempt

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55 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 Classification Board for this period. This statistic does not account for the many online games not submitted to the Classification Board for classification.

56 Ch 4, Principles 3 and 4.

57 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

from the rule in Proposal 8–1. This safeguard should largely obviate the need to exclude higher level content from the definition of exempt content.[58] The 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. The definition of exempt content should, however, exclude content likely to be X 18+ or RC.[59] The ALRC proposes below that this content should be classified.

6.67 The safeguard proposed in Proposal 8–1 (that all media content likely to be R 18+ must be restricted to adults) also means that more content can be 'exempt content' in the new Act. 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 festivals; and
- art galleries and other cultural institutions.[60]

6.68 This should replace the formal—and reportedly cumbersome—exemption arrangement, under which film festivals and cultural institutions currently apply to the Director of the Classification Board to have content exempted from classification laws.[61]

**Proposal 6–1** The Classification of Media Content Act should provide that feature-length films and television programs produced on a commercial basis must be classified before they are sold, hired, screened or distributed in Australia. The Act should provide examples of this content. Some content will be exempt: see Proposal 6–3.

**Proposal 6–2** The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA 15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6–3.

**Proposal 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 (Proposals 6–1 and 6–2). 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. This content should not be exempt from the proposed law that provides that all content likely to be R 18+ must be restricted to adults: see Proposal 8–1.

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58 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).

59 Under Proposal 6–4, all media content likely to be X 18+ must be classified.

60 For example, the National Film and Sound Archive.

61 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 51.

## All content likely to be X 18+

6.69 The X 18+ classification is an adults-only classification for films with 'real depictions of actual sexual intercourse and other sexual activity between consenting adults'.[62] In Chapter 9, the ALRC proposes that any media content, rather than only films, may be classified X 18+. This does not mean the ALRC proposes that this content should be legal to sell or distribute; the ALRC review does not address this question.[63] However, if the Australian Government determines that the sale and distribution of some or all X 18+ content should be legal, then the ALRC proposes that media content that is likely to be classified X 18+ must be classified and then appropriately marked and restricted to adults. This media content may include not only films and computer games, but also magazines and websites.[64]

6.70 The primary benefit of classifying this content may be to warn potential viewers that the content is sexually explicit. However, classifying this content also serves to help prevent RC content—much of which is sexually explicit—from being sold and classified as X 18+ content.[65] If publishers of adult content must have trained classifiers review their content against criteria that prohibits certain depictions (for example, of sexual violence), then they may be less likely to sell films with RC content.

6.71 Despite this, some might argue that if access to the content is restricted to adults, there is no need to have the content classified at all. Sexually explicit adult content could arguably be treated in the same way as the ALRC proposes that most R 18+ content be treated: if access is restricted to adults and the content is properly marked, the content should not need to be classified. Laws designed to prohibit RC content, some might say, should target RC content, not X 18+ content.

6.72 This argument might also be supported by the observation that many providers of adult content, particularly those outside Australia, will simply not comply with a law requiring them to classify their content. Unclassified adult content is rife on the internet and sold in sex shops throughout the country; many providers of this content do not comply with existing Australian laws and may be no more likely to comply with these proposed laws. In any event, the sheer quantity of sexually explicit adult content on the internet also means that it is highly unlikely that even law-abiding publishers would arrange to classify all of this content before distributing it in Australia.

6.73 Nevertheless, the ALRC proposes that, if the sale of some X 18+ content is legal in Australia, the content should be required to be classified before it is sold, hired, screened or distributed, either online or offline. Even if it is highly unlikely that most adult content will be classified, by insisting that it should be, the law makes clear Australia's standard on what may be acceptable to display in sexually explicit content.

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

63 Currently, it is illegal to sell X 18+ films in the Australian states, but not in most parts of the territories. It is not illegal, however, to sell magazines classified Category 1 Restricted or Category 2 Restricted (the publications classifications equivalent to the X 18+ film classification).

64 In Ch 7, the ALRC discusses who should classify content likely to be X 18+.

65 The scope of the RC category is discussed in Ch 10.

**Proposal 6–4** If the Australian Government determines that X 18+ content should be legal in all states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.

## All content likely to be RC

6.74 Another reason to classify media content is to determine whether something should be banned entirely—perhaps prohibited to sell or even possess; perhaps to be taken down from the internet; perhaps to be filtered or blocked from the internet.

6.75 It is currently illegal to sell, hire, exhibit and distribute content that has been classified RC or would, if it were classified, be classified RC.[66] In Western Australia, it is also illegal to possess or copy RC content and in prescribed areas of the Northern Territory it is illegal to possess or supply RC content.[67] The Australian Government has also announced a policy that would require internet service providers to block or filter certain content on an RC content list.[68]

6.76 This chapter does not review these laws that ban certain content, but if such laws remain, or are introduced, then relevant offences may turn in part on the classification of content. If someone is to be convicted of an offence for selling RC content, for example, it is important that the content be classified.[69] Accordingly, the ALRC proposes that the new Regulator must apply for the classification of media content that is likely to be RC before taking enforcement action in relation to that content.[70]

6.77 Content providers should also apply for the classification of any content they intend to publish that may be RC. Ideally, content providers should assess content before they publish it, but of course many provide such a large quantity of content that this is clearly impractical. These content providers should have mechanisms that allow users to flag content that may be R 18+, X 18+ or RC.

**Proposal 6–5** The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.

**Proposal 6–6** The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:

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66 The scope of the RC category is discussed in Ch 10.

67 *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) ss 62, 81, 89. *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 102, 103.

68 See Chs 8, 10.

69 In Ch 7, the ALRC proposes this classification decision should only be made by the Classification Board.

70 The role of the Regulator is discussed in Ch 12.

(a) charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;

(b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or

(c) adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).

## Modifications—when content should be reclassified

6.78 If content that must be classified, and that has been classified, has changed significantly, the content should be reclassified. This idea is reflected in s 21 of the *Classification Act*, which provides that, subject to some exceptions, 'if a classified film or a classified computer game is modified, it becomes unclassified when the modification is made'. A common modification to a film is to add 'extras', such as interviews with actors. These extras often appear on a DVD disc, which is why a film on DVD must usually be classified again, even though a version without the extras was classified before being screened in cinemas.

6.79 Section 21(2) of the *Classification Act* prescribes a list of changes that do not amount to a modification of a film or a computer game.[71] This prescriptive modification rule has been the subject of many complaints from industry. Some claim that it is too narrow, and results in content being unnecessarily classified many times over, at considerable expense to distributors. A prescriptive, statutory modification rule is also unlikely to keep pace with technology, and does not adequately account for the fact that much online content is dynamic and changes constantly.

6.80 The ALRC considers that the proposed Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. However, the Act should also define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'. Neither the Act nor industry codes need to prescribe specific types of modifications that would or would not be likely to change the classification of content. Whether something has been modified should depend on the content itself, not on the type of modification.

### Changing platforms

6.81 Under a scheme with this modification policy, changing platforms alone should not usually amount to a modification of that content. Accordingly, if a content provider has content classified for one media format (for example, television), then it or another content provider may use that classification decision for the same content published on

71 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 21.

another media format (for example, DVD or the internet), so long as the change in media format has not changed the content so significantly that the modified content is likely to have a different classification to the original content. Alternatively, the second content provider may have the content classified again, unless the content was classified by the Classification Board.

6.82 This proposal also means that the classification decisions of the Classification Board should usually be used by all subsequent providers of the classified content. For example, if the Classification Board classifies a film for cinema release, and a year later a television station broadcasts the same film, then the television station must use the classification given to the film by the Classification Board—unless the film has been changed such that the modified film is likely to have a different classification from the original film. If the film has not changed, the television station may not give it a new classification.

## 3D content

6.83 Currently, the Classification Board treats a 3D version of a film as a different film from the 2D version of the film, so that both versions are classified by the Classification Board before being exhibited in Australia. Film distributors have criticised this, arguing that it is wasteful and unnecessary to classify what is essentially the same film twice. Distributors argue that the two versions always receive the same classification, and that any theoretical possibility that one version will have a higher impact than the other may be met by applying the classification of the 3D version to the 2D version.

6.84 The ALRC agrees that it should not be necessary to classify both the 2D and 3D versions of a film—or any other type of content—unless one version of the content is likely to have a different classification from the other version. Whether one version of a piece of content is likely to have a different classification from another version should depend on the specific piece of content, rather than the abstract question of whether one type of modification tends to alter impact.

6.85 The definition of 'modify', proposed below, places upon content providers, such as film distributors, the obligation to consider whether a version of their classified content should be classified afresh. As with other obligations placed upon content providers under the new scheme, this obligation would be monitored and enforced by the Regulator.

## Computer game 'mods' and expansion packs

6.86 If an expansion pack or computer game 'mod' is unlikely to change the classification of the original game, and the expansion pack or mod cannot be used without the original game, then the expansion pack or mod could carry the same classification as the original game.

6.87 However, if an expansion pack or computer game mod increases the impact of a computer game, such that the modified game is likely to have a different classification, then the expansion pack or mod may need to be classified. For example, if an original game were classified M, and the expansion pack were likely to make the game

MA 15+, then the expansion pack should be classified. Similarly, if the original game were classified MA 15+, and an expansion pack were likely to make the game R 18+, then again, the expansion pack must be classified.

6.88 This is further complicated when a mod is released by someone other than the developer of the original game. If a mod developed by a third party were to increase the classification of game, and in such a way that the game became likely to be classified MA 15+ or higher, then arguably providers of that third-party mod should be responsible for ensuring the mod is properly classified.

6.89 An expansion pack may not require the original game and may be sold separately to the original game. However, in the ALRC's view, this does not sufficiently justify treating the expansion pack as a different game to the original game. The original game and the expansion pack may be essentially the same game. It may therefore be more efficient to treat the expansion pack as a modification of the original game, rather than a new game.

6.90 In the ALRC's view, the rule proposed below regarding modified content should adequately ensure that computer games that are changed in such a way as to increase their likely classification are treated appropriately. In the new Act, it may prove unnecessary to have a definition of 'add-on' along the lines of the existing definition in the *Classification Act*.

6.91 This is consistent with the recommendation of the iGEA that add-on content (which it defines as 'content that is additional to the core game such as expansion packs and in-game micro-transactions') should only be required to be classified:

> if the potential impact of the Add-On Content is higher than the impact of the computer game to which the Add-On Content will be applied. In circumstances where the Add-On Content has the same or lower level of impact, such Add-On Content would inherit the classification of the computer game to which the Add-On Content will be applied.[72]

**Proposal 6–7** The Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. The Act should define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'.

## Voluntary classification

6.92 Although the ALRC only proposes that a limited range of content must be classified, content providers may choose to have their content classified to meet market demand for classification information or perhaps to avoid direct government regulation. Films and computer games are classified voluntarily in the United States

72 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

and the United Kingdom. The idea of voluntary classification was very popular in submissions to this inquiry. Some noted that content providers may have an interest in classifying their content. The Pirate Party Australia, for example, submitted that:

> the voluntary frameworks already in force on various content distribution networks like the Apple App Store and YouTube already provide consumers with both accurate information about content and a means to register complaints about inappropriate content. These distribution networks are managed by single entities who have a commercial interest in providing users with accurate information about content and voluntarily classify their content accordingly.[73]

6.93 Content providers will be more likely to choose to meet this consumer demand for classification information if, as is proposed in Chapter 7, this content may be classified by an authorised industry classifier or a person using an authorised classification instrument.

6.94 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.

6.95 Music is another type of content for which some people call for further classification information. 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. This may be music that would be likely to be classified 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 existing ARIA/AMRA Level 1, 2 and 3 markings, and have the additional benefit of giving advice on the appropriate age of persons listening to the content. This outcome would also harmonise music classification with the classification of other classified media in Australia.

**Proposal 6–8** Industry bodies should develop codes of practice that encourage providers of certain content that is not required to be classified, to classify and mark content using the categories, criteria, and markings of the National Classification Scheme. This content may include computer games likely to be classified below MA 15+ and music with explicit lyrics.

73 Pirate Party Australia, *Submission CI 1588*, 15 July 2011.