7. Classification Decision Makers

Contents

Summary

7.1 In this chapter, the ALRC recommends that some classification decisions now made by the Classification Board (the Board), may instead be made by authorised industry classifiers, subject to review and regulatory oversight.

7.2 The independent Board should be retained and in addition to making classification decisions, its role should be expanded to include reviewing decisions, upon application. The Board should continue to have sole responsibility for classifying certain content including content that needs to be classified for the purpose of enforcing classification laws. On commencement of the new National Classification

Scheme, the ALRC recommends that, of the content that must be classified, the following content must be classified by the Board:

- feature films for Australian cinema release; and
- computer games likely to be MA 15+ or higher.

7.3 However, the Regulator should also be provided with the power to determine the media content that must be classified by the Board, so that this may be changed over time, in response to the evolving media content environment and community concerns.

7.4 Apart from the media content that must be classified by the Board, the ALRC recommends that all other media content may be classified by trained authorised industry classifiers, including feature films not for cinema release and television programs.

7.5 Content providers may also choose to use the Board, authorised industry classifiers or authorised classification instruments to voluntarily classify content, such as computer games likely to be classified G, PG and M, even though this content is not required to be classified.

7.6 The ALRC further recommends that the Regulator be able to determine that certain films, television programs or computer games, that have been classified under an authorised classification system are 'deemed' to have an equivalent Australian classification.

Who currently classifies content?

7.7 Responsibility for classification, content assessment and related regulatory activities is allocated across independent classification boards, government and industry, as summarised below. Content classification and media content regulation more broadly is also outlined in Chapter 2.

Films, computer games and publications

7.8 Films, computer games and certain publications are subject to direct government regulation, which involves mandatory classification by independent boards using statutory classification criteria and guidelines. Matters pertaining to the establishment of the boards and classification decision making are detailed in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*) which is administered by the Commonwealth Attorney-General's Department (the AGD) within the portfolio responsibility of the Minister for Home Affairs and the Minister for Justice.

The Classification Board and Classification Review Board

7.9 The Board and the Classification Review Board (the Review Board) are separate statutory bodies independent of government and each other. Members are recruited through a competitive merit selection process and, while formal qualifications are not specified, the *Classification Act* requires that members be broadly representative of the

community.[1] Membership turns over periodically as appointments are generally for a three-year fixed term, and no member can serve more than a total of seven years.

7.10 The Boards' classification decision-making processes are expected to reflect sound administrative law practices. The Boards are required under legislation to prepare annual reports[2] and their activities are subject to parliamentary scrutiny.

Authorised assessors

7.11 Authorised industry-based assessors play a significant role in classification under schemes that provide for the classification of certain computer games, certain films for sale or hire and advertising for certain unclassified films and computer games.[3]

7.12 Using the same classification tools as the Board, industry assessors may make classification and consumer advice recommendations which are submitted to the Board with an application for classification. Assessors provide details about the content against each of the classifiable elements plus other information that substantiates their classification recommendation. Under these schemes, applicants pay a reduced application fee, but the final classification decision rests with the Board and is recorded as a decision of the Board. The only exception to this is the advertising scheme, which is a fully industry self-assessed process, that does not involve the Board in the decision-making process at all.

7.13 The operation of these schemes is governed by provisions in the *Classification Act* and other legislative instruments that set out eligibility criteria, application conditions, training requirements and sanctions and safeguards to maintain the integrity of classification decisions and deal with misconduct by assessors.[4]

Other government decision makers

7.14 Although they do not make formal classification decisions, some government employees also 'assess' content pursuant to obligations outlined in other Commonwealth and state and territory legislation. These include employees of the AGD, who are delegated content assessment responsibilities under the *Classification Act*; the Australian Customs and Border Protection Service (Customs), which assess and intercept prohibited imports and exports at the border; the Australian Communications and Media Authority (the ACMA), which investigate complaints about online content; and some state and territory law enforcement officers, who may issue notices regarding the likely classification of material for the purpose of prosecutions.

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1 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 48, 74.
2 Ibid ss 67, 85.
3 Ibid ss 14, 14B, 17, 31.
4 Ibid ss 21AA, 21AB, 22D–J; *Classification (Authorised Television Series Assessor Scheme) Determination 2008*; *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* (Cth).

7.15 Government decision makers may receive Board approved classification training. They may also seek advice from the Board about content matters or refer content for classification as necessary.

Television content

7.16 Commercial television broadcast licensees, the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) and subscription television companies all engage classifiers to classify programs, films and, in some cases, other content such as promotions or advertising. Industry codes for programming are a legislative requirement. Each broadcaster or industry sector has its own code that, among other matters, also governs classification activities, including exemptions, classification guidelines, time-zone restrictions, marking requirements and complaint mechanisms.[5]

Online content

7.17 'Trained content assessors' are engaged by mobile and online content service providers to determine whether content should be provided behind a restricted access system in accordance with requirements under sch 7 of the *Broadcasting Service Act 1992* (Cth) (*Broadcasting Service Act)*. The circumstances under which content must be referred for assessment and the assessment process are set out under the Internet Industry Association Internet Industry Code of Practice, approved by and registered with the ACMA.[6]

7.18 Under sch 7 of the *Broadcasting Service Act*, mobile and online content service providers may also submit media content to the Board for classification. The ACMA may also refer online content to the Board for classification if it has been the subject of a complaint alleging that the media content is either 'prohibited content' or 'potential prohibited' content under the *Broadcasting Service Act*.

Determining who should classify content

7.19 In Chapter 6, the ALRC recommends that feature films, television programs, and computer games likely to be classified higher than MA 15+, that are both likely to have a significant Australian audience, and 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. While this is a narrowly defined segment of content, it is still not practical, efficient or necessary to require all of this content to be classified by one classification body.

7.20 The ALRC has applied a 'platform neutral' approach to the division of responsibility for content classification. That is, recommendations about who classifies what content do not turn on whether the content is broadcast, provided online or

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5 Codes of practice registered with the ACMA: *Commercial Television Industry Code of Practice 2010 ABC Code of Practice 2011*; *SBS Codes of Practice 2006*; *ASTRA Codes of Practice 2007 Subscription Broadcast Television; ASTRA Codes of Practice 2007 Subscription Narrowcast Television.*

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

provided as a physical hardcopy product. For example, the ALRC is not recommending that all physical products distributed or accessible offline must be classified by the Board while content broadcast or available online may be classified by industry. Nor is the ALRC proposing that certain forms of content must be classified by the Board, because it has a greater impact than other content.

7.21 The following section outlines the key factors that were considered in determining who should have responsibility for making classification decisions under a new National Classification Scheme. The ALRC recommends a significant shift in responsibility for classification decision-making to industry, but maintains that there remains an important role for an independent classification decision-making body.

Volume of content

7.22 As discussed in Chapter 6, the volume of media content available today inevitably restricts what practically can be classified. The volume of content that must be classified may also be too large for one entity to classify efficiently.

7.23 Submissions noted that, with the 'huge range of content being produced both online and offline, it is economically and practically unrealistic that a government body be charged with the classification of all content'.[7] The quantity of content necessitates industry involvement in classifying the content it publishes—if classification is the desirable outcome.[8] For example, one submission observed that:

> Where the volume of content is too large for a classification body to adequately address every article, suitable industry codes are more effective and practical.[9]

7.24 The Australian Home Entertainment Distribution Association (AHEDA) also suggested that DVD distributors should be allowed to classify children's content, as the 'amount of pre-school aged children's specific TV programming is immense and the cost to classify is great'.[10]

Efficiency, cost and administration

7.25 The AGD charges fees for Board classification decision-making on a cost-recovery basis. The Board model of classification is resource intensive and therefore also costly. Financial and administrative burdens may therefore be a reasonable consideration in determining what content should be classified by whom. As Telstra explained:

> the economics of the provision of online content are very different to that of publishing, film or television. In fact, given the costs of preparing a formal classification application and the scale of the classification fees charged by the Classification Board ($810–$2040 per assessment plus), it is likely that requiring

7 The Arts Law Centre of Australia, *Submission CI 1299*.
8 F Hudson, *Submission CI 402*.
9 D Bryar, *Submission CI 1278*.
10 Australian Home Entertainment Distribution Association, *Submission CI 1152*.

> large scale formal classification by the Classification Board would make the provision of most online content by Australian providers uneconomic.[11]

7.26 A benefit of industry classification is that it may generate cost savings and other efficiencies, such as reducing the time taken to classify products, and accounting for classification considerations in the content development and production process. This is particularly important for independent developers and small providers of niche products.

7.27 Submissions referred to the speed of classification and familiarity with content as factors that supported industry classification.[12] Given the volume of media content and the dynamic nature of online content, submissions observed that the Board would not necessarily be able to keep pace with certain digital content-generating industries.[13] It was also suggested that industry should classify content where there are scheduling constraints and critical deadlines for publishing particular content.[14]

7.28 Industry classification may have particular advantages in relation to media content that can be classified quickly, especially where that content is published in large volumes and its publication is subject to tight time frames. Efficiency of classification may therefore be another useful way to decide what content should be classified by industry.

Likely classification and nature of content

7.29 The features of particular content are also useful for distinguishing what the Board or industry should classify. For example, submissions suggested that 'low impact content' or material that is not likely to be classified in a legally-restricted category could be classified by industry.[15]

7.30 Other submissions argued that a varied range of content could be classified by industry. For example, the Australian Christian Lobby, stated that:

> media such as publications, music and sound recordings, websites, and so on could be self regulated when the content is likely to receive a rating below MA15+. Anything that is likely to be rated MA15+ or above should be referred to the Classification Board.[16]

7.31 AHEDA asserted that industry should classify all content, except for content likely to be classified R 18+ and X 18+, because such content is high in impact and is often controversial in nature.[17]

7.32 Some submissions suggested that, where the classification of content may be straightforward, it may not need to be classified by the Board, for example, children's

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11 Telstra, *Submission CI 1184*.
12 C McNeill, *Submission CI 1997*.
13 E Barker, *Submission CI 1781*; Australian Mobile Telecommunications Association, *Submission CI 1190*; D Henselin, *Submission CI 809*; P Murphy, *Submission CI 255*; C Foale, *Submission CI 206*.
14 D Bryar, *Submission CI 1278*.
15 R Palmer, *Submission CI 2296*; J McKay, *Submission CI 642*; G Stille, *Submission CI 423*.
16 Australian Christian Lobby, *Submission CI 2024*.
17 Australian Home Entertainment Distribution Association, *Submission CI 1152*.

content.[18] Other submissions supported industry classification of some G content, where an industry specialises in it and the producer's intention is clear and fair.[19] It was suggested that sexually explicit content was another type of content that would be easy for industry to classify, because it is provided by a sector that 'caters only towards adults'.[20]

Independent decision making

7.33 Given the support for industry classification, the need for an independent classification body at all may be open to question. Despite the limits of the Board to classify all content that may be subject to classification requirements under the ALRC model, some submissions asserted that 'it is imperative that a government agency, rather than industry bodies, devise and apply the classifications'.[21]

7.34 Submissions variously referred to the importance of a 'separate', 'impartial' classification body, while others, such as the Australian Council on Children and the Media (ACCM), remarked that 'classification is a highly technical process, and having one central body will ensure accuracy and consistency'.[22] John Dickie emphasised the need for an independent standard-setting body:

> There needs to be a base classification decision making body applying agreed upon criteria and with guidelines to assist in making the decision. In Australia that is most likely to be a government agency. That agency sets the standards and other agencies—government or industry—can take their cue from that.[23]

7.35 Some submissions highlighted the importance of unbiased decision making, particularly in relation to the classification of content where there may be profit or market advantages in under-classifying. FamilyVoice Australia observed, for example, that lower classifications generally lead to increased market share, 'which is why classification applicants sometimes appeal against the classification of a film for public exhibition because it is higher than the applicant would prefer'.[24]

7.36 Even if it might be pragmatic for industry to classify some media content, it is clear that a board or equivalent body, representative of the community with statutory independence from government, and financial independence from industry, remains highly valued.

Content to be classified by the Classification Board

7.37 Having regard to the factors discussed above, the ALRC recommends that industry classifiers be empowered to classify a larger range of media content. However, the ALRC has also identified a subset of content that should be classified by the Board.

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18 Ibid.
19 Confidential, *Submission CI 2037*.
20 J Bui, *Submission CI 873*.
21 Australian Council on Children and the Media, *Submission CI 1236*.
22 Ibid.
23 J Dickie, *Submission CI 582*.
24 FamilyVoice Australia, *Submission CI 85*.

7.38 Although the ALRC recommends that a narrow range of content be subject to mandatory classification requirements—and an even smaller segment of that content must be classified by the Board—the ALRC considers that the Board should have the power to classify any media content that is submitted for classification, on receipt of a valid application.

7.39 In addition, the Board should continue to be responsible for content that is submitted for classification for the purpose of enforcing classification laws, including those concerning prohibited content. This might include applications for classification submitted by the Regulator and law enforcement authorities, such as Customs or state and territory police.

7.40 As the benchmark decision maker, the ALRC considers that all Board classification decisions should carry over to the same content whether it is later distributed on DVD, provided as a digital download or screened on television—except where content is modified.[25]

Regulator to determine

7.41 In the interests of establishing a classification scheme that is responsive to community needs and better able to adapt to technological advances and new forms of media content, the ALRC recommends that the Regulator be provided with the power to determine what content must be classified by the Board. For certainty and clarity about the content that must be classified by the Board, the determination would take the form of a legislative instrument.

7.42 This approach recognises that the content that must be classified by the Board may be subject to change, especially in a technology-driven media content environment. It is therefore prudent to accommodate this fluidity rather than 'fix' requirements for Board classification in the new Act.

Exercise of the power

7.43 The new Act should set out the matters the Regulator should have regard to in determining what content must be classified by the Board. As discussed above, there are several notable considerations that are important for informing decisions about what content should be the responsibility of the Board to classify.

7.44 The Board's greatest value, relative to industry classifiers, lies in its role in providing an independent benchmark for classification standards and decisions. In line with the principle that communications and media services available to Australians should broadly reflect community standards, the independent Board, whose members are intended to be broadly representative of the Australian community, is suited to a benchmarking role.

7.45 Benchmarked standards are far more important under a scheme that allows for more content to be classified directly by industry. As an independent body, the Board's decisions should be objective and free of self-interest—it operates in the public

25 See Ch 8 for information about modifications.

interest. Hence there is a high level of confidence in the Board's decisions. Under the ALRC model, the benchmarking benefit is amplified as Board decisions must carry over to the same content subsequently delivered on other platforms.[26]

7.46 In the ALRC's view, the new scheme should take full advantage of these unique features of the Board. Therefore, the Board should have a role in classifying mainstream media content that has potential for significant reach across Australian audiences. This should also include content that might raise particular concerns in the community. For example, new forms of content that provide for significantly different or unusual viewer/player experiences may warrant scrutiny by the Board until their particular effects are better understood and public concerns have been allayed. The Regulator might also be guided by the content classified by independent bodies in other jurisdictions.

7.47 To maintain the experience expected of a benchmark decision maker, the Board should routinely make classification decisions across different forms of media content and the range of classification categories. However, there are practical limitations—including what constitutes a manageable volume of content that would allow the Board to make timely decisions at a reasonable cost.

7.48 The Regulator should also consider each industry's track record of classification decision-making and the quality of its classification processes. This should act as an incentive to industry to make sound classification decisions.

Recommendation 7–1 The Classification of Media Content Act should enable the Regulator to determine, of the content that must be classified, what content must be classified by the Classification Board. The determination should be set out in a legislative instrument.

Recommendation 7–2 The Classification of Media Content Act should provide that the Regulator, in determining the content that must be classified by the Classification Board, should have regard to matters including:

(a) the need for a classification benchmark, particularly for popular or new types of media content;

(b) the need for content to be classified by an independent decision maker;

(c) the classification of similar content in other jurisdictions;

(d) evidence of rigorous and reliable industry classification decision making;

(e) the capacity of the Classification Board to make timely classification decisions; and

(f) the cost to content providers of Classification Board decisions.

26 However, see discussion of modifications and additional content in Ch 8.

Feature films for cinema release

7.49 The ALRC considers that feature films for Australian cinema release provide a useful category of content that may be used to set an independent benchmark for classification decisions. These films have a high public profile and a large audience reach over time and across other media platforms—after their cinema release they may be downloaded online, sold on DVD, or screened on television. This is media content that, in all its forms, will ultimately be consumed by a significant proportion of the Australian population.

7.50 There is also a stronger consumer expectation of reliable and independent classification information for films screened in cinemas. This may be due, in part, to the costs incurred by people attending the cinema relative to other media content. This expectation may be reflected in the generally higher number of reviews of decisions[27] and complaints[28] made in relation to this content.

7.51 A consistent feature of classification systems in other jurisdictions, even where classification is voluntary, is the classification of films for cinema release by an entity that is 'independent' of industry. Organisations such as the Classification and Rating Administration in the United States, established by the Motion Picture Association of America and responsible for the classification of theatrical product, emphasises that its classifiers are parents who have no other connections to the film industry.[29]

7.52 The Motion Picture Distributors Association of Australia (MPDAA) reasoned that government regulation of the classification process provides a consistent, independent and compliant framework for theatrical film classification, concurring with the ALRC's view that these films provide a useful benchmark for classification decisions.[30] Another industry stakeholder, the National Association of Cinema Operators, expressed the view that the current policy for cinema release films should not change and that these films should continue to be classified by the Board.[31]

7.53 Singling out cinema release films is not about how they are accessed, or their impact relative to films provided in other formats, nor does the ALRC assume that major films will always be released first in cinemas.[32] Rather, cinema release films

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27 In 2009–10 five of the eight applications for review were for cinema release films. In 2010–11 there were only two reviews and both were for computer games: <http://www.classification.gov.au /www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationReviewBoardDecisions_ClassificationReviewBoardDecisions> at 16 January 2012.

28 In 2010–11 there were 80 complaints for 472 cinema release films classified. These films represent 8.5% of the Board's workload for commercial applications yet they account for 12% of the complaints received. While the complaints relate to only a small number of titles, they spanned the range of classifications including content classified G and PG. On the other hand only 85 complaints were received for films and television series released on DVD though 3957 titles were classified: Classification Board, *Annual Report 2010–11*, 53, 54.

29 See Appendix 3 for more information on classification and content regulation in other jurisdictions.

30 Motion Picture Distributors Association of Australia, *Submission CI 2513*.

31 National Association of Cinema Operators - Australasia, *Submission CI 2514*.

32 Australian Federation Against Copyright Theft, *Submission CI 2517*; Motion Picture Distributors Association of Australia, *Submission CI 2513*; Classification Board, *Submission CI 2485*; Australian Home Entertainment Distribution Association, *Submission CI 2478* argued that this proposal assumes that

provide a practical way to capture a finite, readily identifiable subset of content that has wide appeal, represents many entertainment genres and will likely have a significant reach across the wider Australia population, taking into account total distribution/views of these films additional to their cinema screenings.

7.54 Another option might be to require that all 'large budget' or 'likely to be popular' films (whether cinema release, screened online, broadcast on television or provided on DVD) go to the Board for classification. Some might suggest this is more consistent with the platform-neutral rule. However, defining a 'large budget' or 'likely to be popular' film for Board benchmarking purposes is arguably difficult and would create uncertainty for the Board, consumers and industry.

7.55 For these reasons, films that have a cinema release serve a useful independent benchmarking purpose and the ALRC recommends that, on commencement of the new scheme, they be classified by the Board.[33] Where a film's first release is on another platform and there is uncertainty about its cinema release, it may be pragmatic for the content provider to submit it to the Board for classification to avoid content being classified twice.[34]

Computer games likely to be MA 15+ or higher

7.56 In Chapter 6, the ALRC recommends that only computer games likely to be classified MA 15+ or higher must be classified. As a popular form of media content that is produced for both children and adults, computer games should also be included in the range of content for which the Board provides a benchmark decision.

7.57 Computer games with strong or high level content—particularly violence—have been the subject of extensive public debate and controversy,[35] although some of this controversy is likely to abate in light of the decision by the Standing Committee of Attorneys-General to introduce an R 18+ classification for computer games.

7.58 On balance, just as consumers might expect certain assurances about the classification of high profile, heavily promoted films, the ALRC considers that the profile of major release games and the ongoing concerns about violent computer games, justify Board classification.

7.59 Submissions from the computer games industry were generally opposed to Board classification of this subset of computer games. The Interactive Games and Entertainment Association (iGEA) argued that: the volume of games would be too great for the Board to cope with; that the games industry would be inequitably subject

cinema release is the first release platform and that this is inconsistent with growing trends to release films first on other platforms such as DVD or video-on-demand.

33 In Ch 6 the ALRC recommends that films screened at film festivals should be exempt from classification obligations.

34 Duplication of classification would occur if an industry classifier classifies the product first but it is subsequently released in cinemas, requiring it to be classified again by the Board.

35 Some sections of the community continue to express strong concerns about computer games. Censorship Ministers, at the Standing Committee of Attorneys-General meeting in December 2010, echoed these concerns by requesting separate classification guidelines for computer games that have regard to the concerns raised by Ministers generally and the interactive nature of computer games in particular. The proposed guidelines are available at <www.classification.gov.au>.

to high direct classification costs; and that if games at the MA 15+ classification are no longer legally restricted, they do not need to be classified by the Board.[36] In relation to computer game applications (apps), there was additional concern that many developers (including individuals and young people) would have limited capacity to apply and pay for Board classifications.[37]

7.60 The iGEA suggested that authorised industry classifiers, complemented by an efficient and reliable post-release audit and complaint handling system, would be a better way to manage this content.[38]

7.61 While post-classification audits might be one way to signal benchmarks, original classification decisions made by an independent Board provide for frequent, proactive and publicly visible benchmarks, which the ALRC considers of greater benefit in an industry-focused classification model.

7.62 The content that the Board must classify has been substantially narrowed under the ALRC's recommendations, providing greater capacity to deal with the larger volume of computer games. Classification bodies in other jurisdictions, such as the Entertainment Software Rating Board (ESRB) and Pan European Game Information (PEGI), also classify large volumes of computer games, the costs of which are recovered by fees to applicants for classification.

7.63 Furthermore, requirements to have certain content classified by the Board should not act as a 'barrier to Australia's participation in any international solution to classifying the massive amount of computer games that are delivered exclusively over the internet and on mobile devices'.[39]

7.64 Cooperative efforts, whether by industry or government, to establish harmonised international classification platforms that involve input from national classification bodies should be encouraged. In this regard, the ALRC particularly notes the ESRB and PEGI initiatives to develop innovative and streamlined approaches for classifying mobile games and apps in partnership with industry peak bodies and commercial entities.

7.65 The Regulator's power to determine what content must be classified by the Board provides the flexibility to amend the legislative instrument so that some computer games might in future be classified by alternative means. Furthermore, the ALRC recommends that the new scheme allow for some media content to be deemed to have the equivalent Australian classification, if it has been classified by a classification body or system, authorised for the purpose by the Regulator (see Recommendation 7–6). Over time, this should facilitate the availability of more classified content whilst reducing the administrative and cost burden on content providers.

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36 Interactive Games and Entertainment Association, *Submission CI 2470*.
37 Google, *Submission CI 2512*; Confidential, *Submission CI 2510*A; Confidential, *Submission CI 2506*.
38 Interactive Games and Entertainment Association, *Submission CI 2470*.
39 Ibid.

Recommendation 7–3 The Classification of Media Content Act should provide that, on commencement of the new National Classification Scheme, of the content that must be classified, the following content must be classified by the Classification Board:

(a) feature films for Australian cinema release; and

(b) computer games that are likely to be MA 15+ or higher.

Industry classification

7.66 The ALRC recommends that, apart from the media content that the Regulator determines must be classified by the Board, all other media content may be:

- classified by the Board; or
- classified by an authorised industry classifier;[40] or
- deemed to be classified because it has been classified under an authorised classification system.

7.67 Such media content will commonly include:[41]

- feature films not for cinema release, for example, films on DVD, digital downloads available on the internet, and those broadcast on television;
- television programs that are broadcast on television (including subscription television), provided via television networks online and hosted on websites such as YouTube;[42] and
- media content classified by the Board but later modified.

However, as discussed in Chapter 6, the ALRC recommends that this content should only be required to be classified if it is both likely to have a significant Australian audience and made and distributed on a commercial basis.

7.68 Any content that a content provider voluntarily chooses to have classified may also be classified by the Board or an authorised industry classifier—such as computer games likely to be classified G, PG and M.[43] Later in the chapter, the ALRC recommends developing classification instruments to facilitate efficient classification of content, such as content that would otherwise not need to be classified.

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40 Content providers should not be compelled to use authorised industry classifiers. It should be open to them to submit content to the Board accompanied by the relevant fee for classification if they so choose.

41 In Ch 10 it is recommended that content likely to be X 18+ does not need to be classified but must be restricted to adults. If the government determined that this content should be classified, then the ALRC recommends that it should be classified by authorised industry classifiers.

42 As discussed in Ch 6 the ALRC uses the phrase 'television program' in the absence of a popularly understood, media-neutral alternative phrase. It is intended to capture television programs that are broadcast, distributed online, on physical media, or otherwise.

43 Some major content providers might continue to classify content—even though it does not fall within the mandatory requirements—in response to consumer demand for classification information.

7.69 Under the ALRC's model, most content that must be classified may be classified by industry. This recognises industry's longstanding involvement in the classification of television content and current arrangements whereby industry assessors make classification recommendations to the Board in relation to films, television series and computer games.[44] Greater industry classification of content was widely supported—subject to appropriate government regulatory oversight.[45]

7.70 Of the content that must be classified under the ALRC model, industry will generally be responsible for content that is relatively straightforward to classify or for which industry already has experience in classifying or assessing. As Telstra remarked:

> giving classification responsibility for the most prominent and the most sensitive forms of content to the Classification Board would provide a reliable baseline of classification treatment for this content that could then be applied by authorised industry classifiers to less prominent and sensitive forms of content.[46]

7.71 Allowing industry to classify this media content should significantly reduce the cost and administrative burden of classification. The ALRC considers that the efficiency and ease of industry classification, assisted by their experience and understanding of audience expectations, and a market incentive to be responsive to consumer feedback, should motivate industry to comply with classification requirements and may encourage the classification of a greater volume of content.

7.72 Later in this chapter, the ALRC recommends checks and safeguards, including mechanisms for consumer complaints, audits by the Regulator and reviews by the Board, all of which are designed to manage industry classification activities.

Recommendation 7–4 The Classification of Media Content Act should provide that, other than media content that must be classified by the Classification Board, media content may be:

(a) classified by the Classification Board;

(b) classified by an authorised industry classifier; or

(c) deemed to be classified because it has been classified under an authorised classification system.

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44 The existing authorised assessor schemes would no longer be necessary under the ALRC recommendations for industry classification—as most of the content currently assessed under these schemes would be content able to be classified by industry classifiers.

45 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; Arts Law Centre of Australia, *Submission CI 2490*; National Association for the Visual Arts, *Submission CI 2471*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; E Steward, *Submission CI 1048*; C Foale, *Submission CI 206*.

46 Telstra, *Submission CI 2469*.

Authorisation

7.73 Public confidence in the classification process and classification decisions is founded upon decision makers consistently applying specified classification criteria, adhering to agreed standards, and employing sound decision-making practices.

7.74 To that end, industry classifiers should apply statutory classification criteria and categories.[47] The object is that all classification decisions—whether they are made by the Board or industry—will be made in the same way, using the same classification tools for the same classification outcome.

7.75 To ensure that all industry classifiers are classifying content consistently and properly applying the statutory classification criteria, industry classifiers should be authorised to classify content by the Regulator and should only be authorised if they have completed training approved by the Regulator.

7.76 Requiring the authorisation of industry classifiers provides the Regulator with the means to monitor the activities of an expanded and diverse group of classifiers—essential to its role in overseeing industry classification. The ALRC considers that such a requirement connects the classifiers to the broader regulatory framework and establishes a relationship that reinforces obligations to comply with classification requirements separate from and beyond those of industry alone.

7.77 Authorisation processes might also involve renewing authorisations periodically and undertaking refresher training—to ensure that classifiers stay up to date with changes in legislation, including the statutory classification criteria, and to properly maintain their classification skills and knowledge.

7.78 Authorised classifiers may be employed full-time by major content providers or they may be engaged by content providers on a classification task basis. Classifiers that are authorised and trained to meet the same minimum requirements and standards may have greater mobility and opportunities to work across media content industries.

Training

7.79 The AGD currently develops all classification course material (with input from the Board) and delivers classification training for industry clients that wish to participate in the authorised assessor schemes and organisations, such as television networks, that employ industry classifiers. The ALRC considers that these arrangements would serve as a useful model for the Regulator's training of industry classifiers.

7.80 Robust and comprehensive training of all industry classifiers 'to ensure that there is consistency and accuracy in classification decisions' was supported by stakeholders.[48] Similarly, submissions noted that it was appropriate for the training and authorisation framework to be administered by the Regulator.[49]

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47 See Ch 9.

48 For example, Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*.

49 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; N Goiran, *Submission CI 2482*; Telstra, *Submission CI 2469*.

7.81 In the ALRC's Discussion Paper, the ALRC asked whether classification training should only be provided by the Regulator, or whether it should become a part of the Australian Qualifications Framework.[50] The Discussion Paper noted that private providers may wish to become involved in accredited training programs, or that the vocational education and training sector may wish to offer approved short courses in media classification.

7.82 A number of submissions, including from industry, argued that training should be exclusively provided by the Regulator 'for the purpose of consistency and effective monitoring'.[51] For example, FamilyVoice Australia submitted:

> If it was made a part of the Australian Qualifications Framework this would mean that it could be offered by any provider subject to the normal accreditation and auditing under the AQF. With such a dispersal of the actual training providers it would remove the Regulator one step further from ensuring that all training adequately prepared classifiers to comply with the requirements of the National Classification Scheme. [52]

7.83 A key theme in industry submissions was that the training regime should involve input from 'experienced classifiers across a range of media content industries' and incorporate 'on-the-job' training.[53] The ALRC notes that classification bodies and Regulators in other jurisdictions provide classification training in-house, and as the Classification Board asserted:

> [its] benchmarking role takes on equal, if not greater, significance in the approval of training course content which will equip authorised industry assessors to classify media content that aligns with community expectations in a consistent way, but that is also responsive and adaptive to any movement in benchmarks.[54]

7.84 Some submissions from individuals expressed support for classification training becoming part of the Australian Qualifications Framework (AQF), some noting that it would enable more people to be 'educated about how media is classified'.[55] While the iGEA supported the general proposal, it suggested a cautious approach, as 'classification training should be low cost' and 'able to be undertaken within a reasonably short amount of time'.[56]

7.85 Other submissions observed that, even with the expansion of industry classification, there would still 'likely to be only limited employment opportunities for professional classifiers'.[57] Taking into account the number of classifiers and authorised

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50 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 7–2.

51 Free TV Australia, *Submission CI 2519*; FamilyVoice Australia, *Submission CI 2509*; Foxtel, *Submission CI 2497*; Classification Board, *Submission CI 2485*; N Goiran, *Submission CI 2482*.

52 FamilyVoice Australia, *Submission CI 2509*.

53 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; Australian Subscription Television and Radio Association, *Submission CI 2494*.

54 Classification Board, *Submission CI 2485*.

55 A Hightower, *Submission CI 2511*; D Henselin, *Submission CI 2473*; Watch On Censorship, *Submission CI 2472*; D Mitchell, *Submission CI 2461*; M Smith, *Submission CI 2456*.

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

57 R Williams, *Submission CI 2515*; Classification Board, *Submission CI 2485*.

assessors who are already working in media content classification, the ALRC notes the view that commercially provided AQF courses, may not be 'sufficiently robust in the long-term' and 'would likely be conducted infrequently and in small numbers'.[58]

7.86 Training should be conducted by professionals with appropriate qualifications. On balance, the ALRC considers it important that the Regulator, in monitoring industry classification decision-making, has continuous oversight by also developing and delivering classification training. This will help maintain a high level of public confidence in the quality of classification decision-making and the integrity of the classification scheme.

7.87 One body, the Regulator, should be responsible for the centralised development and delivery of classification training. To ensure that the training regime is robust and provides for skilled and knowledgeable industry classifiers, the ALRC suggests the new training framework include:

- a statutory requirement that provides for consistent, minimum classification standards, skills and knowledge for all authorised classifiers—by mandating that they complete the training program provided for by the Regulator;
- a comprehensively redesigned training program that provides for recognition of prior training and classification experience, supervised minimum hours of on-the-job classification and mentoring by experienced classifiers;
- requirements for minimum training qualifications for trainers delivering classification training;
- training developed in consultation with the Director of the Board;
- opportunities for industry classifiers to have input to training courses; and
- consideration of training time and cost.

7.88 While the Regulator should continue to have responsibility for delivering classification training, additional training demand—if it arises—could be met by external providers who should be accredited for the purpose. To this end, the ALRC suggests that the Regulator explore opportunities to accredit media content professionals or industry bodies that represent content providers with classification experience.

Recommendation 7–5 The Classification of Media Content Act should provide that industry classifiers must have completed training approved by the Regulator and be authorised by the Regulator to classify media content.

58 Classification Board, *Submission CI 2485*.

Authorised classification systems

7.89 The ALRC recommends that the Regulator should have the power to determine that films, television programs and computer games that have been classified under an authorised classification system are 'deemed' to have an equivalent Australian classification. For example, the Regulator might authorise the Pan-European Games Information system (PEGI), and determine that a computer game given a '7' PEGI classification will be deemed to be classified PG in Australia.

7.90 However, to maintain the integrity of Australia's classification scheme, the Regulator should only authorise robust and comprehensive classification processes that incorporate classification criteria comparable to those provided for under Australian law. Essentially, the Regulator must be satisfied that authorised classification systems deliver classification decisions comparable to the decisions that might be made if content were classified by an Australian classifier operating under the Australian classification scheme.

7.91 There are a number of advantages of recognising international classification systems. Most importantly, the significant growth in the volume of media content, often produced by individuals, suggests that some international cooperation is vital to ensuring that certain types of content will continue to be classified. The ALRC considers that an individual who creates a simple online computer game should not be expected to have his or her game classified under the national classification systems of every country in the world.

7.92 Similar approaches are used by New Zealand, in applying certain Australian and British classification decisions; and Canada, which references certain US classification decisions.[59] A number of submissions to this Inquiry supported the concept of recognising classification systems in other jurisdictions.[60] Classification systems developed by major global content providers might also potentially be recognised.[61]

7.93 Authorising other classification systems would assist industry to efficiently provide classification information to Australian consumers under Australian classification markings. It would also provide for more classified content—without requiring additional classification activity on the part of the content provider. For example, there is scope to use this approach to achieve classification outcomes for

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59 New Zealand 'cross-rates' films and computer games classified G, PG or M by the Australian Classification Board in the first instance or if the content has not been classified in Australia, they refer to decisions of the British Board of Film Classification, *Films, Videos, and Publications Classification Regulations 1994* (NZ), cls 4(1),(2). Cross-rated films must carry the corresponding New Zealand classification label but computer games need not—that is, they may retain the classification marking of the country from which the classification decision originated: <http://www.censorship.govt.nz/industry/industry-games.html> at 20 January 2012. Since 2005, a number of Canadian provinces including Manitoba, Ontario and British Columbia have legislated to adopt the classifications for computer games classified by the Entertainment Software Rating Board: See Entertainment Software Ratings Board, *Canadian Advisory Committee to Provide Advice on Video Games* (Press Release, 10 June 2005).

60 Interactive Games and Entertainment Association, *Submission CI 2470*; A Van Der Stock, *Submission CI 1398*; D Gormly, *Submission CI 643*; D Myles, *Submission CI 98*.

61 Internet Industry Association, *Submission CI 2528*; Google, *Submission CI 2512*.

content that industry might wish to have classified even though it may not be required to do so, for example, computer games with a likely classification of G, PG or M.

7.94 Where the Regulator considers that a particular item of media content has generated controversy in another jurisdiction or is likely to have a high profile on release, it would have the capacity to call it in for classification by the Board or request the content provider to classify the product, rather than allow it to be deemed. Content providers could be encouraged to make similar judgements of their own volition to minimise the risk of complaints or an application for review of the classification.

7.95 A legislative instrument should identify the authorised systems, the media content to which the provisions might apply and the corresponding Australian classifications. It could be crafted to be very specific, so that it might only apply to a certain type of content up to a particular classification (for example computer games likely to be classified MA 15+). It should also note that content may not be deemed to be Prohibited.

7.96 The Regulator's determination concerning what content is to be classified by the Board is intended to operate in parallel with the Regulator's determination about content that is deemed to be classified. The Regulator should not exercise its power to make a determination that would be inconsistent with the operation of another determination.

7.97 The Regulator's website should explain to consumers what content is deemed and how the system works including providing links to the websites of the authorised classification system. In this way, consumers can become familiar with how the content is classified originally and search individual decisions to obtain more details on the reasons for the classification.

Markings and consumer advice for deemed content

7.98 In Chapter 8, the ALRC recommends that content that must be classified should carry Australian classification markings. This would also apply to content that both must be classified and has been deemed to be classified. Decisions for deemed content should be registered on the Regulator's classification decisions database.

7.99 Content that must be classified and has been deemed to be classified should also carry consumer advice—where the authorised classification system provides consumer advice with classification decisions.

7.100 The obligation to use Australian markings for deemed media content should not, however, apply to content that is not required to be classified. This distinction may be important—as the Regulator should not be discouraged from authorising classification systems due to concerns about imposing statutory markings obligations on some content providers. However, it would be open to providers of this deemed content to apply the Australian markings if they choose to.

Authorised classification systems–an example

7.101 The following example demonstrates how the deeming recommendation might be implemented in practice.

7.102 The PEGI and the ESRB have been used because they are well established classification systems that operate across the major European and North American computer game markets.[62] Their classification bodies are established independently of industry and classification decisions are designed to reflect community standards. PEGI, in particular, is an example of a harmonised classification model that grew from a cooperative approach seeking to develop a classification system that was acceptable to European Union member states.[63]

7.103 Under the ALRC model, the Regulator would have the power to determine that the PEGI and the ESRB systems are authorised classification systems. The Regulator might further determine that a computer game that has been classified under either classification system is deemed to have the corresponding Australian classification as shown in the tables below.[64]

7.104 The Regulator might also determine that if a game has been given a classification under both the PEGI and ESRB systems, then the game will be deemed to have the highest corresponding Australian classification.

PEGI classification	Corresponding Australian classification
3	G
7	PG
12	M
16	MA 15+
18	R 18+

Table 1: PEGI classifications and possible corresponding Australian classifications

ESRB classification	Corresponding Australian classification
E (6)	G
E (10)	PG
T (13)	M
M (17)	MA 15+
AO (18)	R 18+

Table 2: ESRB classifications and possible corresponding Australian classifications

62 M McBride, *Submission CI 1928*; L Geyer, *Submission CI 1863*; S Schwietzke, *Submission CI 1740*.

63 'The fact that PEGI has been designed to meet varied cultures standard and attitudes across the participating countries and that society representatives such as consumers, parents and registered groups were involved in the set up of the PEGI system is of utmost importance', Viviane Reding, European Commissioner for Education and Culture, 'Inauguration of the PEGI system' (Official Launch and Inauguration Meeting of the PEGI Boards of Governance and Appeal, April 2003).

64 As explained earlier in the chapter, the Regulator may determine that deeming applies to a narrow and more specific segment of computer games (or films or television programs as the case may be).

Matters the Regulator must consider

7.105 The Classification of Media Content Act should set out the matters the Regulator should have regard to in determining whether another classification system should be authorised for the purpose of deeming.

7.106 It is important that consumers can be confident the system has been thoroughly assessed before being authorised. Content providers would also expect these other systems to be carefully assessed so the integrity and value of Australian classification decisions is not compromised.

7.107 While no two classification systems will be entirely aligned, the ALRC considers it important that elements of the National Classification Scheme be reflected in the authorised classification system including: independent decision-making; regard for community standards, particularly the need to protect children from harm; meaningful classification information; transparency of decisions and classification processes; availability and integrity of review mechanisms; efficient and accessible public complaints processes; comparable classification categories and criteria and endorsement by governments in other jurisdictions.

7.108 There may be concern about the lack of correlation between the classification categories and community standards that exist in Australia and other nations, given significant differences in cultural attitudes and social norms.[65] However, the ALRC considers that there is potential for consistency in classification outcomes and, by having regard to the factors outlined above, it should be possible to conclude that decisions made under particular systems were arrived at in a similar manner and for similar reasons to decisions made Australian classifiers applying Australian statutory classification criteria and standards.

Recommendation 7–6 The Classification of Media Content Act should enable the Regulator to determine, in a legislative instrument, that certain films, television programs and computer games with a classification made under an authorised classification system, are deemed to have an equivalent Australian classification.

Recommendation 7–7 The Classification of Media Content Act should provide that in determining whether a classification system is an authorised classification system, the Regulator should have regard to matters including:

(a) the comparability of classification decision-making processes, classification categories and criteria with the Australian classification scheme;

(b) the independence and composition of decision-making bodies;

65 For example, in relation to religion, violence, drug use and homosexuality.

(c) the endorsement or adoption by national classification regulatory regimes;

(d) the transparency of classification decision-making processes and classification criteria;

(e) complaints and review mechanisms;

(f) public reporting of classification activities; and

(g) research and development activities.

Authorised classification instruments

7.109 The ALRC recommends that a new classification scheme should allow for the development of simple, accessible, fast, cost-effective classification instruments approved for the purpose of classification by the Regulator. While the Regulator may develop instruments, there are opportunities for industry to be innovative in this area and develop classification instruments.

7.110 An instrument might take the form of a dynamic online questionnaire and declaration that seeks information about the content provider and specific details about the nature of the content, based on the statutory classification criteria and the broader classification process. Ideally the instruments would provide for an automated classification decision that would also be simultaneously notified to the Regulator or registered in the classification decisions database.

7.111 Online content assessment forms and online classification applications already feature as part of the classification process in some jurisdictions:

- The PEGI uses an online content assessment and declaration form which the publisher completes taking into account the possible presence of violence, sex and other sensitive visual or audio content. On this basis, PEGI allocates a provisional age rating that is subsequently verified by PEGI administrators against PEGI classification criteria before the publisher is issued with a licence authorising the use of the age-rating label and related content descriptors.[66]
- The ESRB requires publishers of online games only available for download directly through console and handheld storefronts to complete a form containing questions that address content across relevant categories. The responses to these questions determine the game's rating, which is issued to the publisher once a DVD reflecting all disclosed content is received by the ESRB.[67]

66 See PEGI's online content assessment and declaration form at <www.pegi.info/en/index/id/1184/media/pdf/235.pdf> at 15 August 2011.

67 For more information about the ESRB's process for classifying computer games, see <www.esrb.org/ ratings/ratings_process.jsp> at 2 August 2011.

- The British Board of Film Classification (BBFC) allows new online-only content to be submitted for classification through an online process under their 'Watch and Rate' service for which they guarantee a decision within 7 days of submitting the content.[68]

7.112 The above systems still incorporate some additional 'pre-release' classification activity by the relevant classification body, whereas the ALRC envisages classification instruments, similar to those recently announced by the ESRB and PEGI,[69] that generate stand-alone classification decisions that would not rely upon additional input or action by the Regulator, the Board or an industry classifier.

7.113 Both the CTIA-The Wireless Association Mobile Application Rating System with the ESRB and PEGI Express systems are fully automated web-based applications that deliver immediate classification decisions for mobile games and apps, based on the classification criteria used to classify computer games under their respective classification systems.[70]

7.114 Likewise, the instruments recommended by the ALRC should generate formal classification decisions that reflect the statutory classification criteria and categories, consistent with all other classification decisions made under the new scheme. The Regulator should only authorise instruments that incorporate the statutory classification criteria and classification categories.

7.115 One stakeholder expressed concern that authorised classification instruments might affect consistency in classification decision-making.[71] Foxtel also submitted that a simplistic 'tick the box' approach could not meaningfully account for central decision-making principles such as context and the subtleties in the presentation of classifiable elements.[72] In the ALRC's view, this should not be a barrier to developing innovative classification instruments to be used for a designated or limited class of content, particularly in light of developments in other jurisdictions that would confirm the viability of such tools.

7.116 To address these concerns, the Act might prescribe the content that may be classified using these instruments. For example it might prescribe that they only be used for content that is voluntarily classified, such as music with explicit lyrics, adult magazines, and G, PG and M computer games. This would encourage and facilitate the classification of content that is not required to be classified by law, without imposing a significant cost and administrative burden.

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68 For more information on the BBFC's Watch and Rate system, see <www.bbfc.co.uk/customers/watch-and-rate/> at 1 September 2011.

69 The CTIA–The Wireless Association Mobile Application Rating System with ESRB was announced on 29 November 2011. The PEGI Express system was launched on 31 August 2011.

70 More information about these system may be found at <www.ctia.org/media/press/body.cfm/prid/2147> at 24 December 2011 and <www.pegi.info/en/index/id/1068/nid/media/pdf/352.pdf> at 24 December 2011.

71 I Graham, *Submission CI 2507*.

72 Foxtel, *Submission CI 2497*.

7.117 These authorised instruments could also be used to assist content providers to determine whether their content is adult content for the purpose of meeting obligations to restrict access.[73]

7.118 Alternatively, the Act could enable the Regulator to determine what content may be classified using an authorised instrument. In which case, the Act should also prescribe the matters the Regulator must consider in determining what content might be classified using an instrument, such as the sophistication of the instrument and the need for particular types of content to be classified by trained classifiers.

Recommendation 7–8 The Classification of Media Content Act should enable the Regulator to develop and authorise classification decision-making instruments, such as online questionnaires.

Checks and safeguards

7.119 For some stakeholders, allowing industry to classify its own content raises concerns about achieving an acceptable balance between content providers' commercial interests and community needs and concerns.[74] For example, ACCM stated that:

> There is too much risk of a conflict of interest if industry classifies content. Such a system is currently in place for television, as the ACMA acts as a co regulator with TV stations. The system does not work because industry is under too much pressure to downgrade content to fit time zones. We can point to a number of instances where the industry was found to have broadcast inappropriately classified material.[75]

7.120 Moving to significantly greater classification of content by industry, calls for government oversight and appropriate checks and safeguards. The ALRC considers it important that the Regulator has adequate powers to monitor industry classification decision making and penalise serious breaches.

7.121 All industry classifiers—whether they classify for television networks, film distributors or other content providers—should be subject to the same Regulatory oversight. This is appropriate in a convergent media environment, where industry classifiers are doing the same job for major content providers that deliver content in multiple formats across different platforms.

7.122 The ALRC notes the opposition of the television sector to the perceived increase in regulatory oversight of their sector, specifically in relation to review and audit activities.[76] This recommendation does not imply that current television classification practices are necessarily inadequate. However, the same regulatory oversight is

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73 See Ch 10.

74 Collective Shout, *Submission CI 2450*; FamilyVoice Australia, *Submission CI 85*.

75 Australian Council on Children and the Media, *Submission CI 1236*.

76 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*.

recommended to achieve greater platform neutrality and to give consumers sufficient comfort and clarity regarding the way government oversees all industry classification activities.

7.123 The recommended checks and safeguards build upon the strengths of existing arrangements in relation to the current authorised assessor schemes provided for under the *Classification Act* and checks and safeguards incorporated under some existing industry codes.

Complaints

7.124 Similar to current arrangements, the ALRC recommends that complaints about the classification of content should be directed, in the first instance, to the content provider responsible for the classification decision. A complainant may lodge a complaint with the Regulator where that complainant considers the complaint has not been satisfactorily resolved. Under the ALRC's model, the Regulator would have powers to investigate valid complaints.[77]

7.125 Industry codes should include guidance on complaint-handling mechanisms. Guidance should cover awareness and accessibility of the complaints mechanism, response time frames, recording and reporting, processes for escalating serious complaints and revisiting classification decisions, where appropriate.

7.126 The Regulator should have the authority to investigate complaints about classification decisions and unclassified or unrestricted media content. In the course of investigating a complaint (especially more complex or serious complaints), the Regulator may liaise with the content provider to ascertain how the original complaint was initially addressed, to obtain reasons for the classification decision (if classified content) or to discuss options for resolving the complaint.

7.127 The Regulator may, in response to a valid complaint about media content, issue the content provider with a 'classify' notice or a 'restrict access' notice.[78]

7.128 The Regulator may also make an application to the Board to classify content or review the original classification decision, arising from a complaints investigation. It would be uncommon for the Regulator to take such action in response to an individual complaint alone, although it would be open for it to do so where an investigation exposed potentially serious breaches of classification laws.

7.129 Numerous and significantly serious complaints would generally trigger more substantial Regulator action, such as submitting applications to the Board for classification decisions or reviews of classification decisions.[79]

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77 The Regulator should have a broad discretion whether to investigate complaints: see Rec 14–2.
78 See Chs 6, 10.
79 Enforcement guidelines are discussed in Ch 16.

Reviews of classification decisions

7.130 A review of a classification decision involves the making of a new decision on the merits that replaces the original decision. Classification decisions for all media content that must be classified should be reviewable, including television program content. Reviews of television content are arguably more feasible and more relevant in a converged environment where broadcasters are increasingly hosting content online which extends audience reach and makes content available beyond a single screening—not unlike films, computer games and other classified content that may be subject to review.

7.131 Other content that has been voluntarily classified and content classified under an authorised classification system should also be subject to review.

Who should conduct reviews?

7.132 The ALRC recommends that the Board, rather than the Review Board, be responsible for reviewing classification decisions—that is, to make a new classification decision in response to an application for review. This means the Review Board would cease to operate.

7.133 This is intended to streamline the review process, simplify administrative arrangements and provide for potentially quicker review turn-around times. Most importantly this recommendation utilises efficiently the capacity of trained and experienced full-time Board classifiers.

7.134 Currently, the *Classification Act* provides for reviews of classification decisions. The Review Board makes a fresh decision on the merits after considering the material and hearing submissions by the applicant and other parties with an interest in the decision. This generally occurs in response to an application for review from the original applicant or the publisher of the media content.

7.135 A criticism of the current review arrangements is that the cost of reviews is too high.[80] Operations of the Review Board are expensive, as most Review Board members travel to Sydney from across Australia to attend hearings and high-level secretariat support is provided by the AGD for all Review Board activities. As Review Board members are part-time and not generally located in Sydney, organising reviews can also be logistically and administratively time-consuming.

7.136 One submission also questioned the reliability of Review Board decisions given the limited number of reviews annually and hence members' limited exposure to some types of content.[81] A lack of classification decision-making experience may have

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80 The Arts Law Centre of Australia, *Submission CI 1299*; Confidential, *Submission CI 1185*; J Dickie, *Submission CI 582*. The fee for review of a classification decision is $10,000—which only recovers part of the full cost of a review with the remainder funded by government: Attorney-General's Department, *Cost Recovery Impact Statement: Classification Fees*, September 2011–June 2013.

81 MLCS Management, *Submission CI 1241*.

implications for reviewing decisions of industry classifiers who are more regularly engaged in the classification of more media content. [82]

7.137 The ALRC recognises the value of a review mechanism and therefore recommends that the new classification scheme continue to provide for classification decisions to be appealed, but that the function should reside with the Board, rather than the Review Board.[83]

7.138 There was some opposition to the abolition of the Review Board, with submissions arguing that the Board would be unable to independently review its own decisions—the primary concerns being the potential for bias and conflict of interest.[84]

7.139 As the Arts Law Centre of Australia and the National Association for the Visual Arts both suggest the Federal Court process of appeal 'is a model which could be replicated by the Classification Board so as to ensure transparency and avoid the perceived bias attached to a self-review function'.[85] Under the *Federal Court of Australia Act 1976* (Cth), the first time a case is heard in the Federal Court, it is heard by a single judge only.[86] If a party to the case wants to appeal the Judge's decision, this appeal will be heard by a Full Court of the Federal Court,[87] which must consist of at least 3 Federal Court Judges.[88]

7.140 If a statute requires an organisation to take multiple roles (such as primary and reviewing decision maker), this will exclude the application of the bias rule to the extent that bias is perceived merely because of these multiple roles.[89] However, the bias rule will not necessarily be excluded if bias is apprehended for other reasons. For example, a Board member involved in a primary decision sits on the panel reviewing that decision may give rise to an apprehension of bias.

7.141 The new Act should therefore provide statutory requirements for the composition of review panels, including making explicit whether primary decision makers are to be allowed to sit on reviews. The MPDAA suggested that legislation prescribe that the majority of classifiers on the Review panel should not have been involved in the classification decision being appealed.[90] The ALRC further suggests that Board procedures should refer to the maximum size of panels for original classification decisions.

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82 Since 2007 to date, the Review Board has conducted between two and eight reviews annually: See Classification Review Board's Annual Reports from 2006–07 to 2010–11.

83 Decisions of the Board are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Judicial review ensures that the decision maker used the correct legal reasoning or followed the correct legal procedures–it is not the re-hearing of the merits of a particular case.

84 A Hightower, *Submission CI 2511*; FamilyVoice Australia, *Submission CI 2509*; I Graham, *Submission CI 2507*.

85 Arts Law Centre of Australia, *Submission CI 2490*; National Association for the Visual Arts, *Submission CI 2471*.

86 *Federal Court of Australia Act 1976* (Cth) s 20(1).

87 Ibid s 25(1).

88 Ibid s 14(2).

89 *Builders' Registration Board (Qld) v Rauber* (1983) 47 ALR 55, 65, 71–73.

90 Australian Federation Against Copyright Theft, *Submission CI 2517*; Motion Picture Distributors Association of Australia, *Submission CI 2513*.

7.142 The Board would only be reviewing its 'own' decisions in relation to the narrow segment of content that the ALRC recommends must always be classified by the Board. This would primarily affect content providers of feature films for cinema release and computer games likely to be classified MA 15+ and above, whose industry peak bodies indicated support for the ALRC's recommendation provided that the new Act addresses issues of perceived bias and conflict of interest.[91] In all other cases the Board would be reviewing an industry classifier's classification decision.

7.143 To maintain transparency and consistent with current practice, the ALRC recommends that Board should provide detailed reasons for each review decision and to do so within a legislatively specified time frame. Likewise, parties to a review including the original applicant for classification, should have the opportunity to make submissions in person to the Board, as part of the review hearing.

7.144 This review model is preferable to one that would see the Regulator being responsible for appeals of classification decisions, as suggested in some submissions.[92] Although the ALRC recommends that the Regulator is established as a separate agency that is arms-length from Government, it is still an agency of government—and therefore should not make classification decisions either in the first instance or on appeal. Crucially, the Regulator is not intended to be a classification body.

Who may apply for a review

7.145 The *Classification Act* provides that an application for review of a classification decision generally must be made within 30 days after the applicant received notice of the decision.[93] The Australian Government Minister responsible for the *Classification Act* may seek a review at any time. The Act also sets limits on the persons that may seek a review as follows:

- the Australian Government Minister responsible for the *Classification Act*;
- applicants for the classification of content and publishers of the content that was classified; and
- a 'person aggrieved' by the decision, as defined in the *Classification Act*.[94]

7.146 To provide industry with a level of certainty regarding classification decisions, without undermining access to a review mechanism, these limits should be retained. Likewise, to provide the broader community with access to the appeals process, the ALRC suggests retention of the provisions that allow the Minister responsible for classification to seek reviews of classification decisions. Although the ALRC is recommending a Commonwealth classification scheme, it would be appropriate to continue to provide State and Territory Governments with the opportunity to make

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91 Motion Picture Distributors Association of Australia, *Submission CI 2513*; Interactive Games and Entertainment Association, *Submission CI 2470*.

92 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*.

93 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 34.

94 A State or Territory Censorship Minister may also request that the Australian Government Minister apply for a review: Ibid ss 42(1), (2).

requests for classification reviews.[95] This may go some way to addressing concerns that the views of Australians in different parts of the country would not be adequately catered for under a Commonwealth classification scheme.[96]

7.147 The ALRC considers that these opportunities, subject to appropriate limitations, are important and necessary safeguards in a co-regulatory scheme that gives industry the greater share of classification responsibility.

Recommendation 7–9 The Classification of Media Content Act should provide that, in addition to classifying media content submitted for classification, the Classification Board is responsible for reviewing classification decisions, including its own, on application. Therefore the Classification Review Board would cease to operate.

Audits of industry classification decisions

7.148 As part of the quality-assurance process and monitoring of industry classification decision making, the Regulator should have the power to undertake post-classification audits of media content that must be classified and media content that must be restricted to adults. In conducting audits, the Regulator may draw on the classification experience of the Board as the independent benchmark decision maker.

7.149 Even among submissions that favoured industry classification, there was support for government checks of industry, including regular audits and random sampling of classification decisions.[97]

7.150 Audits would be the primary mechanism by which the Regulator proactively manages industry classifiers and classification activities, to maintain a high standard of decision-making. Audits would be the means for advising content providers and/or individual classifiers about any issues identified with the classification decision-making process and might prompt remedial action to assist classifiers to improve their job performance. This might involve liaising with the employing organisation and suggesting additional training or supervision. In some cases, audit outcomes might see content providers revisiting decisions as appropriate. Audits would also provide an evidence base of serious and repeated misconduct—in which case the Regulator would have options to impose sanctions, as discussed below.

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95 Likewise, the new scheme should provide for State and Territory Governments to be consulted before recommendations for appointments to the Board are made.

96 Victorian Government, *Submission CI 2526*; Attorney General of Western Australia, *Submission CI 2465*.

97 F Stark, *Submission CI 2283*; G Menhennitt, *Submission CI 2017*, I Cullinan, *Submission CI 1464*; D Burn, *Submission CI 1260*; D Judge, *Submission CI 175*. The television sector expressed opposition to any auditing of their decisions in response to the Discussion Paper (ALRC DP 77).

7.151 Classification bodies in other jurisdictions are increasingly using post-release audits to verify the accuracy of classification decisions—particularly where decisions are automated and dependent on information submitted by the content provider.[98]

7.152 To support the audit program the Regulator would need to establish procedures including notifying content providers of audit activity, requesting decision documentation and media content, time-frames for completing audits and advising audit outcomes. The audit processes of the ESRB and PEGI might offer some useful guidance in this regard.

Recommendation 7–10 The Classification of Media Content Act should enable the Regulator to conduct audits of industry classification decisions.

Call-in notices

7.153 The *Classification Act* provides for the Director of the Board to call in submittable publications, films or computer games where there are reasonable grounds to believe that such content is unclassified and not exempt from classification.[99] In the case of computer games, they may also be called in if the Director has reasonable grounds to believe that they contain contentious material.[100]

7.154 In the ALRC's view, the Regulator should have a similar power under the new Act, to call in content that must be classified or to which access should be restricted, including where it has reasonable grounds to believe that:

- the content should be restricted;
- the content is unclassified;
- the content has been incorrectly classified; or
- the content may be RC.[101]

7.155 Call-in notices may be issued for unclassified content (that should either be classified or access to which should be restricted) or classified content (for review of the classification decision). As stated earlier, any formal classification decision, whether made by the Board or industry and regardless of the media content, is reviewable.

7.156 The Regulator may have reasonable grounds to believe that call-in action is necessary and appropriate. This may arise from complaints investigations or programmed audit activity. Allowing the Regulator to call in media content for review,

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98 The CTIA–The Wireless Association Mobile Application Rating System with ESRB and the PEGI Express systems both incorporate processes for auditing content post-release.

99 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23, 23A, 24(1A).

100 Ibid s 24(1).

101 The ALRC intends that the Regulator's powers to call in content be limited to the content that has been classified or would ordinarily be required to be classified or restricted. However, any media content may be submitted to the Board for classification, upon application and payment of the relevant fee.

in exceptional circumstances where it is warranted, provides complainants and the wider public with an avenue for redress where a classification decision is particularly contentious or has been improperly made.

7.157 Call-in notices would supplement 'classify' notices and 'restrict access' notices. The important difference between call-in notices and these other notices is that a call-in notice requires the content provider to submit an application to the Board for classification of the content or review of the original classification decision. Whereas content providers may choose to get their content classified by the Board or by an authorised industry classifier in response to a 'classify' or 'restrict access' notice.[102]

Recommendation 7–11 The Classification of Media Content Act should enable the Regulator to call in:

(a) unclassified media content for classification by the Classification Board; and

(b) deemed content or content classified by authorised industry classifiers, for review of the classification decision by the Classification Board.

The call-in power should be confined to content that must be classified or to which access must be restricted.

Sanctions regime for industry classifiers

7.158 Sanctions are another means of protecting consumers and ensuring that the integrity of the entire classification scheme is maintained. Sanctions are intended to be a 'last resort' to prevent industry classifiers from continuing to make classification decisions where decisions are repeatedly misleading, incorrect or grossly inadequate.[103]

7.159 The ALRC recommends that the new Act provide for a regime of sanctions that might be applied against industry classifiers, who repeatedly make decisions that are 'misleading, incorrect or grossly inadequate'.[104] The range of sanctions should be similar to the range of sanctions in the current *Classification Act* and related legislative instruments that apply to authorised assessors.[105]

7.160 Sanctions should generally only be used if other informal action has not remedied the situation. For example, liaison between the Regulator and the classifier and/or the content provider to discuss the classification problems and allowing time for remedial action, such as re-training and additional supervision.

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102 See Chs 6, 10.

103 In Ch 16 the ALRC discusses the use of enforcement guidelines outlining the factors the Regulator should take into account and the principles it should apply in exercising its enforcement powers.

104 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 22E.

105 Ibid s 22E, 31(3); *Classification (Authorised Television Series Assessor Scheme) Determination 2008*; *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* (Cth).

7.161 In some circumstances, it may be more appropriate to 'address issues of non-compliance at the level of the corporation rather than the individual', in which case the Regulator should have the power to issue financial penalties to the company or organisation responsible for the classification decision-making.[106] As the Classification Board observed:

> It may be possible, for example, for an industry assessor to be placed under undue pressure by an employing company/classification applicant (whether they are an employee of that company or a consultant or contractor) to deliver a certain classification outcome, or for a company to 'shop around' industry assessors to get the classification outcome they desire.[107]

7.162 In order to provide industry classifiers with guidance on best practice, industry codes should include information on maintaining records of classification decisions and reasons for decisions, and internal quality assurance controls, including escalating contentious, borderline or difficult classification decisions to supervisors or managers.

7.163 In the interests of procedural fairness, decisions of the Regulator to impose sanctions against industry classifiers and/or the organisations responsible for classification decision-making should be reviewable by the Administrative Appeals Tribunal.

Recommendation 7–12 The Classification of Media Content Act should provide for civil and administrative penalties in relation to improper classification decision making. The Regulator should be enabled to:

(a) pursue civil penalty orders against content providers;

(b) issue barring notices to industry classifiers; and

(c) revoke the authorisation of industry classifiers.

Classification decisions database

7.164 The ALRC recommends that the Regulator administer a centralised database to record classification decisions made by the Board and authorised industry classifiers. Several submissions suggested that this database should include details such as the classification decision plus consumer advice, whether it is a Board or industry classification, the responsible organisation or classifier[108] and whether the content is original or modified.[109]

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106 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.

107 Classification Board, *Submission CI 2485*.

108 To protect classifiers' privacy, individuals' names need not be recorded but some form of unique identifier should be used.

109 FamilyVoice Australia, *Submission CI 2509*; I Graham, *Submission CI 2507*; Classification Board, *Submission CI 2485*.

7.165 The database will facilitate consumers' access to accurate and up-to-date classification information in a central location as well as assist consumers to identify where complaints should be directed in the first instance.[110]

7.166 Under the classification model recommended by the ALRC, industry will also need access to a central and reliable database to check whether content has already been classified. Free TV Australia suggested that:

> the existing Classification Database be expanded to become a central database administered by the Regulator, where all authorised industry classifiers could enter their decisions, which can then in turn be accessed by other authorised industry classifiers. The database would need to include adequate information to enable users to clearly discern whether any modifications had occurred, or whether the classified content was in its original form.[111]

7.167 Foxtel further submitted that classifiers should be required to enter their reasons for the classification—including key depictions or themes—to assist the subsequent classifier to understand what elements contributed to the classification, which is particularly important when the reasoning for a decision is relied upon to edit content.[112]

7.168 It is important that recording decisions on the database should be as simple and efficient as practically possible for all classifiers. Furthermore, the benefit that industry would derive from a centrally administered database, both in terms of its own classification activities and in providing classification information to its audience and consumers, might also justify its contributing financially to the administration of the database.

110 FamilyVoice Australia, *Submission CI 2509*.
111 Free TV Australia, *Submission CI 2519*.
112 Foxtel, *Submission CI 2497*.