7. Who Should Classify Content?

Contents

Summary

7.1 Any system that requires mandatory classification of content gives rise to questions about who should be responsible for making classification decisions. In this chapter, the ALRC proposes 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 ALRC proposes that the Board should continue to classify:

- feature-length films produced on a commercial basis for cinema release;
- computer games produced on a commercial basis and likely to be MA 15+ or higher;
- content that may be RC;
- content submitted by the Minister, the Regulator or another government agency; and
- content that needs to be classified for the purpose of enforcing classification laws.

7.3 The ALRC proposes that, apart from the media content that must be classified by the Board, all other media content may be classified by authorised industry classifiers, including:

- feature-length films not for cinema release, and television programs (for example, films and television programs on DVD, the internet, and television); and
- computer games likely now to be classified G, PG and M.[1]

Who currently classifies content?

7.4 Responsibility for classification, content assessment and other related regulatory activities is allocated across independent classification boards, government and industry, as described below.

Films, computer games and publications

7.5 Films, computer games and certain publications are subject to direct government regulation, which involves mandatory classification by independent boards using statutory 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*).

The Classification Board and Classification Review Board

7.6 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.[2] 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.

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1 New classification categories are proposed in Ch 9. A table summarising what content must be classified and by whom, and what must be restricted, is in Appendix 4.

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

7.7 The Boards' classification decision-making processes are expected to reflect sound administrative law practices. The Boards are required under legislation to prepare annual reports[3] and their activities are subject to parliamentary scrutiny.

Industry authorised assessors

7.8 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 unclassified films and computer games.[4]

7.9 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 at all.

7.10 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.[5]

Other government decision makers

7.11 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 Attorney-General's Department (the Department), who are delegated content assessment responsibilities; the Australian Customs and Border Protection Service (Customs), who assess and intercept prohibited imports and exports at the border; the Australian Communications and Media Authority (the ACMA), who 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.

7.12 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

7.13 Commercial television broadcast licensees, the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) and subscription

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3 Ibid s 67.

4 Ibid ss 14, 14B, 17.

5 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* .

television companies all engage classifiers to classify programs, films and, in some cases, other content such as promotions or advertising. Codes of practice concerning programming are a legislative requirement. Each respective broadcaster or industry sector has its own code[6] that governs classification activities, including exemptions, classification guidelines, time-zone restrictions, marking requirements and complaint mechanisms.

Online content

7.14 'Trained content assessors' are engaged by industry 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*. The circumstances under which content must be referred for assessment and the assessment process are set out under the internet industry content services code of practice, approved by and registered with the ACMA.[7]

7.15 Online and content service providers may submit media content to the Board for classification if they choose. 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.

How to determine who should classify content

7.16 In Chapter 6, the ALRC proposes that all feature-length films and television programs produced on a commercial basis, computer games produced on a commercial basis likely to be classified MA 15+ or above and all media content likely to be X 18+ or RC, must be classified before being sold, hired, screened or distributed in Australia.[8] The following section discusses the factors that might influence which segment of this content should be classified by the Board and which may be classified by industry.

Volume of content

7.17 As discussed in Chapter 6, the volume of media content available today inevitably restricts what can practically be classified. 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'.[9]

7.18 Submissions commented that the quantity of content is also a factor that influences the division of classification responsibilities, and that industry should

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6 Codes of practice registered with the ACMA: The *Commercial Television Industry Code of Practice 2010* the *ABC Code of Practice 2011*; the *SBS Codes of Practice 2006 (incorporating amendments as at August 2010)*; the *ASTRA Codes of Practice 2007 Subscription Broadcast Television;* and *ASTRA Codes of Practice 2007 Subscription Narrowcast Television*.

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

8 See Chapter 6 for a discussion of what content must be classified.

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

therefore be permitted to classify the content it publishes.[10] For example, Daniel Bryar argued 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. This is particularly true for the adult entertainment industry, both online and offline.[11]

7.19 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'.[12]

Cost and administrative burden

7.20 The Board recovers fees for making classification decisions 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 large scale formal classification by the Classification Board would make the provision of most online content by Australian providers uneconomic.[13]

7.21 Allowing for industry classification that reduces costs, and the regulatory burden, was considered particularly important for independent developers and publishers of niche products.

Likely classification category

7.22 The features of particular content may also be 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.[14]

7.23 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.[15]

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10 F Hudson, *Submission CI 402*, 8 July 2011.
11 D Bryar, *Submission CI 1278*, 12 July 2011.
12 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.
13 Telstra, *Submission CI 1184*, 15 July 2011.
14 R Palmer, *Submission CI 2296*, 15 July 2011.
15 Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.

7.24 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 impact and often controversial in nature.[16]

Straightforward content

7.25 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 content.[17] Other submissions supported industry classification of some G content, where an industry specialises in it and the producer's intention is clear and fair.[18] It was suggested that sexually explicit content was another type of content that it would be easy for industry to classify, because it is provided by a sector that 'caters only towards adults'.[19]

Efficiency of decision making

7.26 A key benefit of industry classification is that it is likely to generate cost savings and create other efficiencies, such as reducing the time it takes to classify products. Efficiency of classification may therefore be another useful way to decide what content should be classified by industry.

7.27 Submissions referred to speed of classification and familiarity with content as factors that supported industry classification.[20] 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 content-generating industries.[21] It was also suggested that industry should classify content where there are critical deadlines for publishing particular content.[22]

7.28 Industry classification may have particular advantages in relation to media content that can be accurately classified quickly, especially where that content is also published in large volumes and is subject to pressing time frames.

Independence

7.29 Given the apparent support for industry classification, some might question the need for an independent classification body at all. Despite the limits of the Board to classify all content that may be subject to classification requirements under a new system, some submissions asserted that 'it is imperative that a government agency, rather than industry bodies, devise and apply the classifications'.[23]

7.30 Submissions variously referred to the importance of a 'separate', 'impartial' classification body while others, such as the Australian Council on Children (ACCM)

16 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.
17 Ibid.
18 Confidential, *Submission CI 2037*, 15 July 2011.
19 J Bui, *Submission CI 873*, 11 July 2011.
20 C McNeill, *Submission CI 1997*, 15 July 2011.
21 E Barker, *Submission CI 1781*, 13 July 2011.
22 D Bryar, *Submission CI 1278*, 12 July 2011.
23 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

and the Media, also remarked that 'classification is a highly technical process, and having one central body will ensure accuracy and consistency'.[24] 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.[25]

7.31 Some submissions noted that classification becomes more justifiable as a feature of fair trading in relation to content produced primarily for profit. 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. Family Voice 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'.[26]

7.32 Independent classification decisions that are not influenced by commercial imperatives may be behind the suggestion in some submissions that films and computer games continue to be classified by the Board. Even if it might be pragmatic for industry to classify all media content, it is clear that a board or equivalent body with statutory independence from government and financial independence from industry, remains highly valued.

Content that must be classified by the Classification Board

7.33 While the ALRC proposes that most content that must be classified may be classified by authorised industry classifiers (or the Classification Board, if the content provider chooses), the ALRC also proposes that some content should continue to be only classified by the Classification Board.

7.34 The Classification Board's greatest value perhaps lies in its role in providing an expert benchmark for classification standards and classification 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 bench-marking role.

7.35 Benchmarked standards are far more important under a system that anticipates decision making by many different decision makers and where more content may be classified directly by industry. There is already a high level of public confidence in the Board's decisions, given its independence, depth of experience and expertise.

7.36 While post-classification audits might be one way to signal benchmarks, original classification decisions made by the Board provide frequent, proactive and publicly

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24 Ibid.
25 J Dickie, *Submission CI 582*, 11 July 2011.
26 FamilyVoice Australia, *Submission CI 85*, 3 July 2011.

visible benchmarks by an independent statutory authority. The benchmarking benefit is amplified as Board decisions must carry over to the same content subsequently delivered in any other media format on any other platform.[27]

7.37 As an independent expert body, the Board's decisions are perceived to be objective and free of self-interest. However, in order to maintain the level of expertise and experience expected of a benchmark decision maker, the Board needs to continue to routinely make classification decisions across media content that must be classified and is produced across the range of classification categories.

7.38 Industry should also have certainty and clarity regarding the content that must be submitted to the Board for classification. This is best achieved by identifying a discrete and distinct group of content from the mass of media content that must be classified, for which the Board will have statutory responsibility. This also means having regard to what constitutes a manageable volume of media content that would allow the Board to continue to deliver decisions in a timely manner.

Feature-length films for cinema release

7.39 The ALRC considers that feature-length films for cinema release provide a useful category of content that may be used to benchmark classification decisions. These films have a high public profile and a large audience reach over time and across other media platforms—they may be downloaded online, sold on DVD, or screened on television subsequent to their cinema release. Cinema release films also often spawn major franchises, including merchandise and other media content such as computer games. Ultimately, this is media content that, in all its forms, will be consumed by a significant proportion of the Australian population.

7.40 Furthermore, there appears to be stronger consumer expectation of reliable and independent classification information for films screened in cinemas. This is due, in part, to the costs incurred by people attending the cinema relative to other media content. This expectation may be reflected in the higher number of complaints and reviews of decisions for this content.

7.41 Films screened in cinemas generally account for the most classification reviews annually and the largest proportion of complaints relative to the number of classification decisions for this type of content.[28] In 2009–10, five of the eight applications for review were for cinema release films and there were 194 complaints for 422 cinema release films classified: these films represent 6% of Board classification decisions but they account for 18% of complaints received.[29] While the complaints relate to a small number of titles, they spanned the range of classifications including content classified G and PG and the complaint ratio is markedly different to

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27 Only media content, that is modified to the extent that the modified content is likely to have a different classification to the original content, must be classified anew. For example, this means that the 2D version of a 3D film for cinema release does not need to be classified if the 2D version is likely to have the same classification as the 3D version already classified by the Classification Board. Under such a scenario, both versions of the film would carry the original Classification Board classification.

28 See Classification Board's Annual Reports from 2005–06 to 2009–10.

29 Classification Board, *Annual Report 2009–10*, 45.

the 91 complaints received about films and television series sold on DVD compared with 4,361 titles classified.[30]

7.42 A consistent feature of classification systems in other jurisdictions, even where classification is voluntary and may be industry led, 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 US, 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.[31]

7.43 A number of industry stakeholders, including 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 Classification Board.[32]

Computer games likely to be MA 15+ or higher

7.44 In Chapter 6, the ALRC proposes 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 decision-making benchmark.

7.45 The ALRC also observes that computer games with strong or high level content have been the subject of extensive public debate and controversy.[33] Although some of this controversy is likely to abate in light of the decision by the July 2011 Standing Committee of Attorneys-General to introduce an R 18+ classification for computer games, the newness of this classification, as well as continued community concern about computer games, may generate ongoing expectations for closer scrutiny of this content. This is another justification for the classification of these categories of computer games by the Board.

Content that may be RC

7.46 Classification of potentially RC content is complex for several reasons. The nature of the content that lies at the boundaries of R 18+/RC and X 18+/RC classifications is such that it is often controversial, morally contentious and highly emotive. The RC classification is also the only classification that is associated with laws that result in outright bans on the sale, hire or distribution of media content. The

30 Ibid, 46.

31 Some classification schemes also use 'independent' bodies for the classification of other content such as DVDs or computer games, however, this is not always the case. For example, in Canada, each of the provinces is responsible for classification of films for theatrical release using various classification mechanisms while DVDs are 'classified' by averaging the decisions of all the provinces in relation to the theatrical release.

32 National Association of Cinema Operators - Australasia, *Submission CI 1155*, 15 July 2011.

33 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.

Board, as a body independent from government and industry, is the appropriate body to classify this content on the basis that it is often very complex and the risk of harm that may arise from a wrong decision is arguably greater than with other types of content.

7.47 The Board, as opposed to industry, also has the experience and expertise necessary to classify content that may be RC, which spans a wide range of content, including extreme content such as child sexual abuse material. The same expertise is important in relation to media content that is required to be classified in order to enforce classification laws or which the Australian Government Minister responsible for censorship, the Regulator or another government agency submits for classification—including that submitted by law enforcement authorities such as Customs or state and territory police.

Proposal 7–1 The Classification of Media Content Act should provide that the following content must be classified by the Classification Board:

(a) feature-length films produced on a commercial basis and for cinema release;

(b) computer games produced on a commercial basis and likely to be classified MA 15+ or higher;

(c) content that may be RC;

(d) content that needs to be classified for the purpose of enforcing classification laws; and

(e) content submitted for classification by the Minister, the Regulator or another government agency.

Content that may be classified by authorised industry classifiers

7.48 The ALRC proposes that, apart from the media content specified above that must be classified by the Board, all other media content—including the remaining content that must be classified and any content that a content provider chooses to have classified—may be classified by authorised industry classifiers.[34] Such media content will commonly include:

- feature-length films and television programs not for cinema release (for example, films on DVD, the internet, and television);
- media content classified by the Classification Board but later modified; and
- computer games likely to now be classified G, PG and M.[35]

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

35 New classification categories are proposed in Ch 9.

7.49 There may be a view that some feature-length films not for cinema release and television program content might sometimes raise concerns sufficient to justify classification by the Board (for example, content at the MA 15+ or R 18+ classification). However television has always been responsible for producing content and editing higher-level film content so that it may be accommodated at the MA 15+ classification. Moreover the new system proposes checks and safeguards, including mechanisms for consumer complaints, audits and reviews by the Board, all of which are designed to identify and manage content that has been erroneously classified by industry classifiers. These are discussed later in this chapter. Furthermore, the content ordinarily sold on DVD, downloaded from the internet or screened on television is similar—and, consistent with the objectives of platform neutrality—as far as possible the same content should be treated the same way.

7.50 The content that industry may classify represents the greater proportion of content that must be classified under the ALRC's proposals. It recognises industry's longstanding involvement in the classification of television content and existing arrangements whereby industry assessors make classification recommendations to the Board in relation to similar such content.[36]

7.51 This class of media content represents content for which industry is not likely to get the classification wrong (because it is relatively straightforward to classify or industry has experience in classifying or assessing similar content); and the level of harm that might arise if it was incorrectly classified (that is, eg, the difference in G and PG content is not so great that it would cause much alarm if a DVD was classified G instead of PG).

7.52 Allowing industry to classify this media content should significantly reduce the cost and administrative burden of classification. The efficiency and ease of industry classification compared to sending content to the Board also potentially motivates industry to comply with classification requirements and may encourage the classification of a greater volume of content.

7.53 While a key benefit of the new classification system is that media content is not required to be classified again simply because it is being released on a different platform, a content provider may choose to reclassify content that has been previously classified by another industry classifier. The ALRC does not consider it is appropriate or acceptable to compel a content provider to use the classification of another industry classifier in circumstances where they disagree with the original decision (for example, classified television series episodes may be reclassified when the series is distributed on DVD because the DVD distributor regards the original classifications were too low).

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36 The existing authorised assessor schemes would no longer be necessary under the ALRC's proposed model for industry classification—as most of this content would be the responsibility of industry to classify if they so choose.

Proposal 7–2 The Classification of Media Content Act should provide that for all media content that must be classified—other than the content that must be classified by the Classification Board—content may be classified by the Classification Board or an authorised industry classifier.

Content likely to be X 18+

7.54 If government determines that content classified X 18+ may be lawfully sold and distributed in some or all of Australia, the ALRC proposes, in Chapter 6, that this content must be classified. Although some might argue that this content could be marked X 18+ and restricted without also being classified, the ALRC argues that classifying the content should help content providers to ensure their content does not feature RC material, such as sexual violence.

7.55 Sexually explicit material is widely available and is being consumed by a large number of Australians. In 2001–02, research conducted by La Trobe University involving 20,000 Australians found that 25% had watched an X18+ film in the past 12 months.[37] The proliferation of adult and specialist sex retail shops would also indicate there is considerable demand for sexually explicit DVDs and publications. Moreover, the amount of content likely to be X 18+ available on the internet is enormous.

7.56 Currently, most sexually explicit adult content available in Australia is not classified. The Eros Association submitted that the number of X 18+ classified films has fallen from over 2,000 in the mid-1990s to less than 600 films a year at present—arguing that the high costs of classification by the Board and uncertainties about the legality of its distribution across Australia were major factors in this decline.[38]

7.57 In the ALRC's view, it is important that this content be classified. However, the sheer volume of this content means that, in practice, it is not possible for the Board to classify all of it. An alternative means of classification is needed, and classification must be efficient and inexpensive.

7.58 It is highly unlikely that international providers of sexually explicit content will have their content classified before distributing it online. However, allowing industry to classify X 18+ content—efficiently and inexpensively—removes existing barriers to classification of this content. It may mean, therefore, that responsible hosts and providers of adult content in Australia will have their content classified. Industry representatives such as the Eros Association assert that this indeed would occur.

7.59 On the other hand, if this content may only lawfully be classified by the Board, the current situation will likely prevail and most of it will not be classified at all.

7.60 It is important to note that industry classification of this content does not mean that the adult industry will be self-regulated. As proposed later in this chapter, industry

37 Eros Association, *Submission CI 1856*, 20 July 2011.
38 Ibid.

decisions would be monitored by the Regulator and audited and reviewed by the Board. Industry classifiers would be trained, and have to be authorised by the Regulator. Additionally, classifiers who erroneously classify sexually explicit content would have their authorisations revoked and strong penalties would apply for content that is wrongly classified.

7.61 Under codes of practice, industry bodies could be better utilised to support and encourage the classification of X 18+ content by its members. Industry bodies, the Regulator and other law enforcement agencies might also be expected to work cooperatively to identify and prevent the distribution of material that may be RC.

7.62 Finally, if much of the Board's current workload is shifted to industry, as proposed above, but the Board must classify all content likely to be X 18+ and all content that may be RC, then Board members will be spending most of their time viewing sexually explicit and content that may be RC—noting that RC content often includes highly disturbing and extreme content.

7.63 It is estimated that X 18+ content constitutes about 14% of the Board's current workload. Moreover, 44% of items actioned in relation to the ACMA's online content investigations in May 2011 comprised X 18+ content, while RC content accounted for 50%.[39] Content investigated by the ACMA is often referred to the Board for classification—which has seen its online referrals treble between 2008–09 and 2009–10. It is questionable whether resource commitments in this area are sustainable, particularly in light of the health and safety issues that arise for people at both the ACMA and the Classification Board from constant viewing of large amounts of this material. Given that much X 18+ content 'self classifies'—allowing industry to classify this content would reduce this exposure and mitigate some of the health and safety concerns.

7.64 The ALRC recognises that there are strongly held views on the nature of sexually explicit material and how to balance the rights of adults to access such material with questions of community standards and the potential for harm.[40] As part of its deliberations, the ALRC is undertaking a pilot study to assist with future research that might inform the content to be included in the RC category, which is discussed in Chapter 10. By its nature, such a study also will consider the relationship of the R 18+ and X 18+ categories to RC.

Question 7–1 Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier? In Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.

39 *ACMAsphere 65 – Investigations*, Online content complaints, May 2011.

40 See A McKee, C Lumby and Kath Albury *The Porn Report* (2008); and M Tankard Reist and Abigail Bray (eds) *Big Porn inc.: Exposing the Harms of the Global Pornography Industry* 2011.

New classification instruments

7.65 The ALRC considers that the proposed classification model should have the utility and flexibility to encourage content providers to classify more content over and above the content that must be classified by law. Therefore a new classification system should also include the option to use simple, accessible, cost-effective classification instruments—such as online, interactive questionnaires—that have been authorised for this purpose by the Regulator.

7.66 To be consistent with statutory requirements that must be met by classifiers, classification instruments should reflect the statutory classification criteria and categories.

7.67 An instrument might take the form of an 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. In future more sophisticated web-based applications might be possible.

7.68 Online content assessment forms and online classification applications already feature as part of some jurisdictions' classification process:

- The Pan European Games Information organisation (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.[41]
- The Entertainment Software Ratings Board (ESRB) in the US 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.[42]
- 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.[43]

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41 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.

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

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

7.69 These systems still incorporate additional classification activity by the relevant classification entity, whereas the ALRC envisages classification instruments that go further by generating stand-alone classification decisions that do not rely upon additional input or action by the Regulator, the Board or an industry classifier.

7.70 While the Regulator may develop instruments, there are opportunities for industry to innovate in this area and potentially develop different classification instruments that might be useful for classifying particular types of content for their own industry sector.

Proposal 7–3 The Classification of Media Content Act should provide that content providers may use an authorised classification instrument to classify media content, other than media content that must be classified.

Classification checks and safeguards

7.71 Allowing industry to classify its own content raises genuine concerns in relation to the balance between content providers' self-interest and community standards. Some submissions argued against further industry involvement in classification because under existing co-regulatory or self-regulatory arrangements inadequate enforcement of breaches and penalties is insufficient to act as a deterrent to media content providers oriented towards maximising profits.[44] For example ACCM stated:

> 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.[45]

7.72 The ALRC considers moving to significantly greater classification of content by industry requires meaningful government oversight to incorporate appropriate checks and balances to address such concerns—including complaint handling and review mechanisms that apply across all classification decision makers.

7.73 Industry classification will largely be managed under codes of practice administered by the Regulator—these elements of the proposed model are discussed in Chapters 11 and 12 respectively.

7.74 The proposed checks and safeguards for industry classification build upon the strengths of existing arrangements in relation to the current authorised assessor schemes and use of the Board's expertise in developing classification training and considering classification recommendations made by industry assessors. There are also elements that draw upon checks and safeguards incorporated under existing broadcasting codes of practice.

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44 For example, FamilyVoice Australia, *Submission CI 85*, 3 July 2011; Collective Shout, *Submission CI 2450*, 7 August 2011.

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

Authorisation of industry classifiers and instruments

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

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

7.77 Industry codes of practice should refer to obligations on classifiers relevant to the proper performance of classification duties including:

- requirements for renewal of industry classification authorisations;
- requirements for minimal periods of supervision following training; and
- requirements concerning frequency of refresher training.

7.78 The Regulator should also authorise industry-developed classification instruments as being suitable for use in making classification decisions for content available in Australia. The Regulator should only authorise instruments that incorporate the statutory classification criteria and classification categories—as minimum requirements that must be used by all other classification decision makers. The Regulator may determine that instruments need to integrate other elements of the classification process, such as providing for automatic lodgement of the classification decision with the Regulator.

Proposal 7–4 The Classification of Media Content Act should provide that an authorised industry classifier is a person who has been authorised to classify media content by the Regulator, having completed training approved by the Regulator.

Proposal 7–5 The Classification of Media Content Act should provide that the Regulator will develop or authorise classification instruments that may be used to make certain classification decisions.

Who provides classification training

7.79 The Department 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 companies, that employ industry classifiers. These training arrangements would serve as a useful model for the Regulator's training of industry classifiers.

7.80 The proposed expansion of industry classification will result in a considerable increase in demand for training. While the Regulator might continue to deliver classification training, particularly for the Board, additional demand may be best met by introducing a program to accredit external training providers.

7.81 A corollary of greater direct engagement of industry in classification decisions, overseen by a government regulator, is the need for a more formalised training framework for classifiers. Consistent and rigorous training that meets accredited training standards is essential in a co-regulatory environment, in order to secure a high level of public trust in the quality of all classification decisions.

7.82 The classification training currently provided by the Classification Branch of the Attorney-General's Department is not formally accredited and there is no award attached to such training that would allow for it to be a transferable qualification across media industries.

7.83 There have also been questions raised about inconsistent training requirements for industry assessors as compared with classifiers. Free TV Australia submitted:

> We note that the Classification Board conducts an intensive three-month program which includes mentorship and practical experience. In comparison, the training programs for certified industry assessors are very brief (half-day or one-day). Anecdotal evidence suggests that this contributes to inconsistencies in classification decision-making, undermining the effectiveness and integrity of the National Classification Scheme. The ALRC should consider recommending changes to the accreditation process to include consistent and rigorous training requirements, with classifiers required to undergo minimum periods of supervision following training.[46]

7.84 As industry classification expands, it is conceivable that private providers may wish to become involved in accredited training programs, or that universities or the vocational education and training sector may wish to offer approved short courses in media classification. In developing a consistent accredited training framework for media classifiers that is recognised across industries, a threshold question is whether such a qualification would be recognised within the Australian Qualifications Framework (AQF). If training is to be formally accredited through the AQF, this requires a formal statement of the context for, and application of, knowledge and skills. This could allow for different levels of qualification: for example, a lower-level qualification may be awarded to those making routine classification decisions, and a higher-level award for trainers or managers responsible for auditing the quality of training processes.

Question 7–2 Should classification training be provided only by the Regulator, or should it become a part of the Australian Qualifications Framework? If the latter, what may be the best roles for the Board, higher education institutions, and private providers, and who may be best placed to accredit and audit such courses?

46 Free TV Australia, *Submission CI 2452*, 5 September 2011.

Reviews of classification decisions

7.85 The ALRC considers that classification decisions for all media content that must be classified should be reviewable, including television program content. This would involve a 'strengthening' of the current regulatory arrangements. 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.

Who conducts reviews

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

7.87 A common criticism of the current review arrangements is that the cost of reviews is too high.[47] Operations of the Review Board are expensive, as Review Board members travel to Sydney from across Australia to attend Review Board hearings and high-level secretariat support is provided by the Department for all Review Board activities. As Review Board members are part-time and not located in Sydney, organising reviews can also be logistically and administratively time-consuming.

7.88 Some submissions 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.[48] Any lack of classification experience may have implications for reviewing decisions of industry classifiers who are more regularly engaged in the classification of more media content. [49]

7.89 The ALRC recognises the value of a review mechanism and therefore proposes that the new classification system continue to provide for classification decisions to be appealed, but that the function should reside with the Board itself. This means that the Review Board would cease to exist. This proposal is intended to streamline the review process, simplify administrative arrangements and create other efficiencies that potentially generate cost savings.

7.90 The Board would only be reviewing its 'own' decisions in relation to the content that must always be classified by the Board. In all other cases the Board would be reviewing an industry classifier's classification decision.

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47 The fee for review of a classification decision is $10,000. This only recovers part of the full cost of a review, stated to be $28,000 per review (of which the remainder is funded by government): Attorney-General's Department, *Cost Recovery Impact Statement: Classification Fees*, September 2011 – June 2013.

48 MLCS Management, *Submission CI 1241*, 16 July 2011.

49 Since 2007 to date, the Review Board has conducted between two and eight reviews annually.

7.91 There may be some concern about the Board's objectivity in relation to reviewing its own decisions and its lack of independence from the primary decision maker. A risk that may also arise in giving the Board the power to review its own decisions is that doing so may increase the chance of applicants or stakeholders reasonably apprehending a bias in decision making and seeking judicial review.

7.92 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.[50] However, the bias rule will not necessarily be excluded if bias is apprehended for other reasons. For example, if the statute does not specify which members of the Board may sit on reviews, and a Board member involved in a primary decision sits on the panel reviewing that decision, this may give rise to an apprehension of bias.

7.93 The new Classification of Media Content Act should provide statutory requirements for the composition of review panels, including making explicit whether primary decision makers are to be allowed to sit on reviews. In addition, in order to allow for review panels to be constituted as larger or completely different panels there should be legislative provisions prescribing the maximum size of panels for original classification decisions.

Who may apply for a review

7.94 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.[51] 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:

- applicants for the classification of content and publishers of the content that was classified;
- the Minister responsible for the *Classification Act* (either on his own initiative or if requested to do so by a State or Territory Minister responsible for censorship); and
- a 'person aggrieved' by the decision, as defined in the *Classification Act*.[52]

7.95 To provide industry with a level of certainty regarding classification decisions without undermining access to a review mechanism, these limits should be retained. In addition, the ALRC considers that the Regulator should be provided with powers to submit an application for review in response to serious complaints, or as a result of audit activity undertaken by the Board.

7.96 The current high review fee may operate to deter potentially vexatious or speculative applications that may compromise the review process or result in delays

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50 *Builders' Registration Board (Qld) v Rauber* (1983) 47 ALR 55, 65, 71–73.
51 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 34.
52 Ibid s 42.

that adversely affect the original applicant. In order to afford industry greater certainty—noting that increased industry classification may provide the impetus for more spurious applications for review—there may be merit in considering a narrowing of the definition of 'person aggrieved' by the decision. This would need to have regard to principles of natural justice and procedural fairness in relation to people who may be affected by the decision.

Proposal 7–6 The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:

(a) reviewing industry and Board classification decisions; and

(b) auditing industry classification decisions.

This means the Classification Review Board would cease to operate.

Audits of industry classification decisions

7.97 As part of the process of monitoring the accuracy of industry classification decisions, the Board should undertake routine post-classification audits of media content that must be classified. Audits should be the responsibility of the Board, rather than the new Regulator, because the Board is the independent benchmark decision maker and the audit process incorporates classification decision-making activity.

7.98 To ensure that industry classification is properly monitored and to better understand whether any problems might be industry or media content specific, audit activity should be conducted in relation to the types of media content, specific industry sectors and across industry classifiers that regularly classify content. There was support, even among submissions that supported industry classification, for industry to be subject to regular government checks.[53]

7.99 Audits are not necessarily directed to correcting decisions but rather would be designed to proactively manage industry classifiers, so that erroneous decisions and poor classification decision making can be prevented or minimised. Audits by the Board would provide a basis for the Regulator to monitor industry classifiers more closely where there is evidence of repeated and continuing problems. The Regulator would have options to impose sanctions to address serious and repeated misconduct, as discussed below.

Complaints processes

7.100 Similar to current arrangements concerning complaints about television program content, complaints would, in the first instance, be made directly to the organisation that made the classification decision. A complainant may lodge a complaint with the Regulator where that complainant considers the complaint has not been satisfactorily resolved. The Regulator would then have powers to investigate complaints and, where

53 G Menhennitt, *Submission CI 2017*, 15 July 2011.

necessary and appropriate, refer the content to the Board for a review of the classification decision.[54]

7.101 Codes of practice should include guidance on establishing complaint-handling mechanisms in relation to content that must be classified. 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 as a means to address complaints as appropriate.

Sanctions regime

7.102 The ALRC proposes that a regime of sanctions that might be applied against industry classifiers who repeatedly classify content wrongly should also be set out in legislation. This would be similar to the range of sanctions in the current *Classification Act* and related legislative instruments that apply under authorised assessor schemes.

7.103 These sanctions are another means of protecting consumers and ensuring that the integrity of the entire classification system is maintained. The sanctions are targeted at classifiers to ensure that if they are not classifying products properly and in accordance with the statutory classification criteria, they will not be able to continue to making classification decisions. The sanctions are intended to be applied if other informal actions, such as refresher training, have not remedied the situation.

7.104 In order to provide industry classifiers with guidance on best practice and to assist them to avoid making incorrect decisions, industry codes of practice should include information on maintaining records of classification decisions and summaries, advising decisions to the Regulator and internal quality assurance controls.

Proposal 7–7 The Classification of Media Content Act should provide that the Regulator has power to:

(a) revoke authorisations of industry classifiers;

(b) issue barring notices to industry classifiers; and

(c) call-in unclassified media content for classification or classified media content for review.

Industry bodies and their relationship with the Regulator

7.105 Links between industry peak bodies and government regulatory bodies regarding classification and content regulation would continue to be important as industry takes responsibility for more classification under the ALRC's proposed model.

54 The costs of reviews arising from an unresolved complaint concerning an industry classification decision would be expected to be covered by the content provider or publisher who sought the original classification.

7.106 Industry bodies would be central to rolling out the new industry classification system, including liaising with the Regulator on the development of practical and robust codes of practice, which are discussed in more detail in Chapter 11. The Regulator would expect peak bodies' support in promoting the new classification system and encouraging industry 'buy-in'.

7.107 In an ongoing capacity, industry bodies should assist the Regulator to reinforce industry classification requirements, by informing members about classification training options, disseminating information about authorised industry classifiers and collating industry classification reports that include decisions data and complaint statistics.

7.108 The proposed new classification system also opens up opportunities for government and industry to work together to improve classification processes and information provided to the public. This might involve collaborating on the development of classification instruments, increasing compliance, encouraging industry to classify content even if it is not required to be classified and potentially administering industry classification schemes in future.