8. Markings, Advertising, Display and Restricting Access

Contents

Summary

8.1 This chapter proposes that access to all media content—online and offline—that is likely to be R 18+ must be restricted to adults. Content providers should restrict access so that minors are protected from high-level content, even if it is not possible to have all of the content formally classified. The ALRC also proposes that access to content classified R 18+, or X 18+ where it is legal to distribute, must also be restricted to adults.

8.2 The chapter then reviews methods of restricting access, including prohibitions on sale and hire to minors, restricted access systems, parental locks on televisions, home filters, internet service provider (ISP) level filters, and broadcasting time-zone restrictions. The ALRC proposes that methods of restricting access to online and offline content should be set out in industry codes, approved and enforced by the Regulator. For content that must be classified and has been classified, content providers should have to display a suitable classification marking.

8.3 The new scheme should also provide for a principled rule that ensures advertisements for classified content—such as advertisements for films, television programs and computer games—are suitable for their audience. In assessing suitability, industry must have regard to the likely audience of the advertisement, the impact of

content in the advertisement, and the classification or likely classification of the advertised content. The chapter concludes by considering whether the public display of some media content should be prohibited.

Restricting access to content likely to be classified R 18+

8.4 Access to adult content, where it is legal to distribute at all, must be restricted to adults under Australia's current classification laws. Films classified R 18+ must not be sold or hired to minors.[1] Some books, such as the Bret Easton Ellis novel *American Psycho*,[2] have also been given a restricted classification and may only be sold in a sealed wrapper and to adults. Online content hosted in Australia that has been classified R 18+, or is substantially likely to be classified R 18+, should only be accessible behind a restricted access system.[3]

8.5 The ALRC proposes that under a new classification scheme, certain films, computer games and television programs[4] must continue to be classified, and if classified R 18+, access should be restricted to adults. However, most media content will not fall into the proposed definitions of content that must be classified. How will the new scheme treat all the other adult content, for example, content on websites and in magazines and books? Will children be protected from this other adult content?

8.6 The ALRC proposes that access to all media content likely to be R 18+ must be restricted to adults, but that unless it is content that must be classified (see Chapter 6), this content should not be required to be classified. This media content includes online and offline content, including: websites, magazines, books and audio books, music, radio content, podcasts, artworks, advertising, and user-generated content. The community appears not to expect advisory classification information for this content but, in the ALRC's view, access should be restricted to adult content.

8.7 Under the *Guidelines for the Classification of Films and Computer Games*, R 18+ films may have a 'high' impact and 'may be offensive to sections of the adult community'. The Guidelines provide:

- There are virtually no restrictions on the treatment of themes;
- Violence is permitted. Sexual violence may be implied, if justified by context;
- Sexual activity may be realistically simulated. The general rule is 'simulation, yes—the real thing, no';
- There are virtually no restrictions on language;

1 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 9(2).

2 In 1991, this book was classified Restricted Category 1, which means it must only be sold to adults and in a plastic wrapping with the appropriate marking.

3 *Broadcasting Services Act 1992* (Cth) sch 7, cls 20, 21. Restricting access to sexually explicit adult content is discussed further below.

4 See Ch 6.

- Drug use is permitted;
- Nudity is permitted.[5]

8.8 Relatively little content is likely to hit this high threshold. Less than 5% of films classified by the Classification Board are classified R 18+.[6]

8.9 In Chapter 6, the ALRC proposes that obligations to classify content, other than X 18+ and RC content, should only apply to content produced on a commercial basis. However, access to content likely to be R 18+ or higher should be restricted whether or not the content is produced on a commercial basis.

8.10 Many responsible content providers already endeavour to prevent minors from accessing adult content. Online content providers such as YouTube might require persons to confirm their age or sign in before accessing some content. Other organisations might not prevent access, but might warn patrons that content may not be suitable for children. Some Australian art galleries, for example, use signage for this purpose. Under the ALRC's proposal, if a content provider is unsure whether their content is likely to be R 18+, they may choose to have the content classified.[7] Responsible content providers might also employ other mechanisms, such as user flags, to highlight potentially offensive content.

Must content be formally pre-assessed?

8.11 Ideally, content providers should assess content before they publish it, to determine its likely classification, but this will often be impractical or impossible for providers or hosts of large quantities of content, much of which is dynamic and user-created. Requiring pre-assessment would be almost as onerous as requiring the content to be classified, which as discussed in Chapter 6 is impractical and prohibitively costly. Accordingly, the ALRC does not propose that content-providers should be expected in all cases to assess content to determine whether it is likely to be R 18+, although responsible content providers should also have mechanisms that allow users to flag certain content that may be R 18+, X 18+ or RC.

8.12 This differs from the current provisions in sch 7 of the *Broadcasting Services Act 1992* (Cth) (*Broadcasting Services Act*) and related industry codes, which provide that commercial content likely to be classified MA 15+ or R 18+ must be assessed by trained content assessors.[8] The ALRC proposes that providers of content that is likely to be R 18+ should not need to be trained to determine the likely classification of content. If access to the content is restricted, the objectives of the law—particularly the protection of minors from adult content—are met.

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

6 See annual reports of the Classification Board, 2005–06 to 2010–11.

7 The content might be classified by an accredited industry classifier, the Classification Board or a person using an authorised classification instrument: see Ch 7.

8 *Broadcasting Services Act 1992* (Cth) sch 7 cl 81(1)(d).

Restrict or classify notices

8.13 The ALRC considers that if the Regulator, perhaps after receiving a complaint, considers that a piece of content is likely to be R 18+, the Regulator should issue a notice to the content provider requiring it to restrict access to the content or have the content classified. This notice might be called a 'restrict or classify notice'. The proposed Classification of Media Content Act should not provide an offence for simply publishing R 18+ content without restricting access (a law that hosts of large quantities of user-created content may be unable to comply with), but rather should provide for an offence of failing to comply with a 'restrict or classify notice'.

8.14 This proposal should be broadly consistent with those provisions in sch 7 of the *Broadcasting Services Act* that provide that certain 'prohibited' content online must be subject to a restricted access system, and if it is not, the ACMA may issue various notices. The ALRC proposes that the new Classification of Media Content Act apply a similar rule to both online and offline content.

Proposal 8–1 The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.

Restricting access to content classified R 18+ and X 18+

8.15 Chapter 6 proposes that under the new scheme, a limited range of content must be classified. One of the purposes of classifying content is to determine whether the content should be restricted to adults, so that minors may be protected from distress or harm. Accordingly, the ALRC proposes that the Classification of Media Content Act should provide that access to all content that has been classified R 18+ or X 18+ (where X 18+ content is legal to distribute at all) must be restricted to adults. Later in this chapter, the ALRC proposes that methods of restricting access should be set out in industry codes of practice, approved and enforced by the Regulator.

Proposal 8–2 The Classification of Media Content Act should provide that access to all media content that has been classified R 18+ or X 18+ must be restricted to adults.

Removing mandatory access restrictions on MA 15+ content

8.16 The ALRC proposes that mandatory access restrictions should no longer apply to content that has been, or is likely to be, classified MA 15+. Currently, MA 15+ is a classification to which certain restrictions apply, but restrictions vary considerably between platforms and jurisdictions. For example:

- MA 15+ television programs may only be shown on free-to-air television after 9pm, but may be shown on subscription television at any time;

- MA 15+ films and computer games on media discs may not be sold or hired to persons under 15, unless the minor is accompanied by a parent or guardian;
- MA 15+ content online does not need to be restricted at all, unless it is commercial content; and
- cinemas must not permit persons under 15 to watch an MA 15+ film unless the minor is with a parent or guardian (precise restrictions vary between states).

8.17 Preventing persons under the age of 15 from seeing MA 15+ films and playing MA 15+ games is problematic offline and almost completely impossible online. The existing laws that endeavour to restrict online access to MA 15+ content are widely seen as ineffective and unenforceable.[9] The classification symbol and warnings may serve a useful purpose as consumer advice, but there is little or no further practical benefit in legal access restrictions for this content. Furthermore, restricting access at the R 18+ level, rather than the MA 15+ level, is more consistent with international norms concerning the regulation of online content, as the focus is on restricting access to adults.

8.18 This is not to say that MA 15+ content is suitable for persons under 15. Many violent films and computer games are now classified MA 15+, including some horror films. In the ALRC's view, some content providers should continue to refuse to sell or admit young unaccompanied minors to these films and computer games, even if they are not required by law to do so. There are also arguments for maintaining the existing prohibitions on broadcasting MA 15+ content on television during the day and early evenings. This matter is discussed further below, but such time-zone restrictions are not necessarily inconsistent with the following proposal. Voluntary restrictions on MA 15+ content may be set out in industry codes of practice.

Proposal 8–3 The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA 15+ or likely to be classified MA 15+.

Methods of restricting access

8.19 In this Discussion Paper, the ALRC proposes that access to certain content—classified and unclassified—should continue to be restricted to adults.[10] This paper also assumes that certain content will continue to be prohibited even to adults (although what this content should be is discussed in Chapter 10). This section considers methods of restricting access, online and offline. The ALRC proposes that while the Classification of Media Content Act should provide for minimum requirements for restricting access, the details of these methods should be prescribed in industry codes, approved and enforced by the Regulator.

9 For example, I Graham, *Submission CI 1244*, 17 July 2011.
10 Proposals 8–1 to 8–3.

Restricting access online

8.20 Many submissions suggested that restricting access online is very costly and almost impossible in practice.[11] Civil Liberties Australia submitted:

> there are simply no effective methods to control access to online content anything like the manner sought by most advocates. What is possible is to restrict access to some small subset of particular copies of restricted online content, and then only in particular controlled environments. The real question is whether the costs of such limited controls are worth the relatively minor, and largely symbolic, benefits.[12]

8.21 The Australian Independent Record Labels Association agreed that high impact music 'should not be available to minors for purchase online' but submitted that labelling guidelines would be sufficient as it is not 'practicable to deny consumer access to content, offensive or not, through firewalls, passwords, blacklists or any other means'.[13]

8.22 The Australian Recording Industry Association and the Australian Music Retailers Association also pointed to the 'inherent difficulties in controlling access to online content', difficulties replicated in relation to illegal file sharing. Access to physical products can be restricted, but 'the issue of controlling access to online content is fraught and will require cooperation that spans multiple industries, territories and international jurisdictions'.[14]

8.23 Some submissions opposed any mandatory regulation of internet content. One person, reflecting a common sentiment in submissions, argued that there 'should be no restricted access to online content':

> Online content cannot be completely enforced or policed. Parents should take responsibility for their child's online presence. Adults should be able to control their own access to online content.[15]

Restricted access systems

8.24 Restricted access systems or access control systems have been used to try to prevent minors from accessing certain content online. Schedule 7 of the *Broadcasting Services Act* provides that certain content online must only be provided behind a restricted access system.[16] Under the *Restricted Access System Declaration 2007*, for R 18+ content, an access-control system must:

- require an application for access to the content; and

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11 In the Issues Paper, the ALRC asked what were the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme. The ALRC also asked how children's access to potentially inappropriate content can be better controlled online. Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011) (Issues Paper), Questions 12, 13.

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

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

14 The Australian Recording Industry Association Ltd and Australian Music Retailers' Association, *Submission CI 1237*, 15 July 2011.

15 Double Loop, *Submission CI 1124*, 12 July 2011.

16 *Broadcasting Services Act 1992* (Cth) sch 7 cl 14.

- require proof of age that the applicant is over 18 years of age; and
- include a risk analysis of the kind of proof of age submitted; and
- verify the proof of age by applying the risk analysis; and
- provide warnings as to the nature of the content; and
- provide safety information for parents and guardians on how to control access to the content; and
- limit access to the content by the use of a PIN or some other means; and
- include relevant quality assurance measures; and
- retain records of age verification for a period of 2 years after which the records are to be destroyed.[17]

8.25 Few submissions directly referred to the merits of these restricted access systems, but some of the broader concerns about the effectiveness of controlling access to online content are clearly relevant.

8.26 The NSW Council of Civil Liberties has in the past expressed its concern that 'the proposed methods of restricted access systems (PIN, passwords, etc) are ineffective, intrusive and encourage identity theft'.[18] Verifying a person's age using a credit card is perhaps undermined by the fact that minors may be able to buy prepaid credit cards from supermarkets.

8.27 However, some content providers report that they have successfully used restricted access systems. Telstra submitted that to access some of its website content, customers must provide their credit card details, which 'constitutes verification that they are at least 18 years of age and allows them to access age-restricted content'.[19]

Home filters and parental locks

8.28 Many submissions indicated that the best means of controlling access is to provide filtering software and parental control, which could be used voluntarily. This was thought particularly useful to help control children's access to inappropriate content. Dr Gregor Urbas and Tristan Kelly, for example, submitted:

> Dynamic filters may be of some use to users, including parents, who wish to voluntarily filter material. In particular, PC-based filters provide parents with the best option to control and monitor their children's browsing habits.[20]

8.29 Another submission commented that 'optional filters on client-side computers are a more efficient way of controlling online access, without blocking any adult's

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17 Australian Communications and Media Authority, *Explanatory Statement, Restricted Access Systems Declaration 2007*.

18 New South Wales Council for Civil Liberties, *Submission on the ACMA Restricted Access System Declaration* (2007), 3.

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

20 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

right to view what they wish to'.[21] The Arts Law Centre of Australia likewise submitted that resources should be dedicated to

> providing [filtering] software to those who would like it and educating the community about the best ways to take responsibility for themselves and their children.[22]

8.30 Many submissions emphasised the parent's role in controlling what children could see online. SBS submitted that 'consumer education (including media literacy education in school curricula)' and 'the availability of tools such as parental locks and filtering software in conjunction with a consistent classification marking scheme should be relied on to control access to content'.[23]

8.31 Parental locks may also be used to block certain television content. Free TV Australia noted that most digital televisions and digital set-top-boxes have a parental lock function.

> Parental Locks allow you to block programs based on their classification (for example, G, PG, M or MA), or in some cases block whole channels, via the use of a PIN (personal identification number). Once the function is activated, only those with access to the PIN can view the blocked programming or channel.[24]

Education

8.32 Many submissions observed that the education of parents and consumers is one of the most important means of regulating access to online content. The Australian Mobile Telecommunications Association, for example, submitted that the most effective method of controlling access to online content:

> lies in empowering and educating consumers so that they can exercise their own controls over the content they choose to access and/or restrict their children from accessing online.[25]

8.33 The NSW Council of Churches submitted that children's access to potentially inappropriate content may be better controlled online by 'funding effective education strategies including advertisements, parental education and child education including in all public schools'.[26] Likewise, the child protection association, Bravehearts, submitted that 'Online safety should be part of the personal safety curriculum taught to children in schools':

> Components of cyber-safety curriculum should include: Unwanted contact; Inappropriate content; Safe behaviour online and protecting personal identity information; Cyberbullying.[27]

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21 S Gillespie, *Submission CI 191*, 7 July 2011.
22 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.
23 SBS, *Submission CI 1833*, 22 July 2011.
24 Free TV Australia, *How does the Parental Lock work?* <http://www.freetv.com.au/content_common/pg-how-does-the-parental-lock-work.seo> at 9 September 2011.
25 Australian Mobile Telecommunications Association, *Submission CI 1190*, 15 July 2011.
26 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.
27 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

Mandatory and voluntary ISP-level filtering

8.34 The Australian Government proposes to require internet service providers to filter or block RC content that is included on a list—popularly called a 'blacklist'—maintained by the ACMA.[28] The Government has said the 'RC content list' will be compiled in two ways:

> - overseas-hosted content that is the subject of a complaint from the public made to ... ACMA and
> - incorporation of international lists of overseas-hosted child sexual abuse material from highly reputable overseas agencies following a detailed assessment of the processes used by those agencies to compile their lists.[29]

8.35 Submissions were divided on the merits of this policy. The Australian Christian Lobby was among those who supported mandatory ISP-level filtering, though it submitted that 'all pornography should be filtered at the ISP level with the option for adults to contact their ISP and request access to that material'.[30] Similarly, the National Civic Council submitted that mandatory filtering of the internet at the ISP level is the most effective method of controlling access to restricted online content as:

> ISP filtering empowers parents to more easily monitor and regulate the content to which their children are exposed across a range of devices.[31]

8.36 Based on its own technical evaluation, which tested a blacklist of up to 10,000 URLs, Telstra submitted that:

> blocking of URLs on a blacklist is feasible and practical to implement at 100% accuracy (not under or over blocking), without noticeably impacting on network performance or customer experience provided it is limited to a defined number of URLs.[32]

8.37 Telstra stated that it would voluntarily block sites on a blacklist of child abuse websites compiled by the ACMA, but would like the Australian Government to 'legislate its approach to ensure that it applies across the industry, is clearly spelt out and is enforceable by law'.[33]

8.38 Other submissions argued that such filters were not effective. Urbas and Kelly submitted that 'ISP filters can be easily circumvented through proxy servers or virtual private networks'.[34] Another submission criticised the policy as being 'fundamentally flawed, unbelievably cost-inefficient and a staggeringly autocratic move' and characterised it as 'both philosophically and practically hopeless'.[35] The views of some

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28 The RC classification is discussed in Ch 10.
29 Department of Broadband, Communications and the Digital Economy, *Mandatory Internet Service Provider (ISP) Filtering: Measures to Increase Accountability and Transparency for Refused Classification Material (Consultation Paper)* (2009) 2.
30 Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.
31 National Civic Council, *Submission CI 2226*, 15 July 2011.
32 Telstra, *Submission CI 1184*, 15 July 2011.
33 Ibid.
34 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.
35 S Walker, *Submission CI 2133*, 15 July 2011.

critics of mandatory ISP-level filtering are also discussed further above, in relation to the broader question of whether online content can or should be restricted at all, and in Chapter 10.

An integrated approach

8.39 Telstra submitted that 'there is no silver bullet' to make the internet safe. Instead, a holistic response must include:

> user-based PC filtering, the creation of safer learning and social networking environments, appropriate supervision and involvement by parents and teachers, education, law enforcement and international cooperation. ... ISP level blocking of a blacklist of RC sites could also usefully form one element of such a multi-faceted approach to this issue.[36]

8.40 Bravehearts also proposed that an integrated approach was needed:

> This includes not only the ISP filter, but the resourcing and expansion of Federal and State Police online investigation units, education and awareness campaigns, research, as well as the continuation of the Consultative Working Group on Cyber-Safety (made up of government, industry and NGO's, including Bravehearts Inc) and the adjunct Youth Advisory Group.[37]

Restricting access offline

8.41 The sale and display of sexually explicit adult magazines has been the subject of criticism and debate in recent years.[38] Access to other offline adult content, such as R 18+ films in cinemas, and even content that is entirely illegal to sell in Australian states, such as X 18+ DVDs, has received less attention. State and territory laws provide that it is an offence to sell or hire adult films and publications to minors. There are also laws relating to how this content—particularly sexually explicit magazines—may be packaged and displayed.[39] The Senate Legal and Constitutional Affairs References Committee recommended that where adult publications and R 18+ films are sold in general retail outlets, they 'should only be available in a separate, secure area which cannot be accessed by children'.[40]

8.42 Some submissions expressed surprise that there is concern about the offline sale and display of this content at all, considering how widely and freely much of the content may be found online, where digital offerings are 'cheaper, more varied and subject to fewer restrictions'.[41] Civil Liberties Australia, for example, submitted that it 'is hardly clear that this should be a pressing concern':

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

37 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

38 See questions asked to the Classification Board by members of the Senate Legal and Constitutional Affairs Committee in *Senate Estimates Review* (20 October 2008, 25 May 2009 and 18 October 2010).

39 Enforcement laws are discussed in Ch 14.

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

41 A Hightower and Others, *Submission CI 2159*, 15 July 2011. In the Issues Paper, the ALRC asked how access to restricted offline content, such as sexually explicit magazines, can be better controlled: Question 14.

> The magazine industry is dying and most sexually explicit content is now accessed online. This 'problem' will almost certainly go away by itself over the next few years anyway. ... As for other offline content, it is unclear what more can be done. Australians seem generally happy in this regard.[42]

8.43 The Pirate Party Australia submitted:

> The current system of sealed magazines and restricted premises is adequate to regulate sexually explicit content offline. Legal, unclassified material should be restricted, not banned.[43]

8.44 Others submitted that greater restrictions should be imposed. Bravehearts submitted that restricted offline material, such as sexually explicit magazines and DVDs, should be 'out of sight and out of reach of children'.[44] Media Standards Australia stated that:

> All material with an R 18+ classification should be in an isolated, restricted area, and removed from all other material. This includes magazines and videos. ... Children should not be confronted by adult content images as they browse shelves in a store, whether it be for computer games, DVDs, books or magazines.[45]

8.45 Another submission suggested that the display and sale of content, such as sexually explicit magazines, should be prohibited entirely in 'physical environments to which children have access'.[46]

8.46 Restricting access to sexually explicit adult content offline may be achieved more consistently and effectively under the ALRC's proposed National Classification Scheme. Perhaps most importantly, the ALRC proposes that all of this content should be marked with the one, commonly-understood classification marking—X 18+.[47] If the content is legal to sell in Australia at all, the rules regarding where it may be sold and how it should be packaged and displayed should be simplified and uniform, and provided for under the one piece of Commonwealth legislation, rather than under multiple state, territory and Commonwealth laws.[48] Furthermore, one Regulator will be responsible for monitoring compliance and enforcing classification laws.[49]

Television time-zone restrictions

8.47 Free-to-air television broadcasters are currently subject to time-zone restrictions, which means that, for example, they may only broadcast films classified:

- MA 15+ after 9pm, and
- M after 8:30pm, and between noon and 3pm on school days.[50]

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42 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
43 Pirate Party Australia, *Submission CI 1588*, 15 July 2011.
44 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.
45 Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011.
46 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.
47 See Ch 7.
48 See Ch 14.
49 See Ch 12.
50 *Broadcasting Services Act 1992* (Cth) s 123 and related codes of practice.

8.48 The same limitations are not imposed on subscription broadcast and narrowcast television, or for online content such as television streamed on the internet (IPTV). Converging media environments, discussed in Chapter 3, may suggest to some that time-zone restrictions on free-to-air television are obsolete. Content at the MA 15+ level may, in practice, now be watched at any time of day in any Australian home with subscription television or an internet connection.

8.49 Free TV Australia submitted that time-zone restrictions on free-to-air television may no longer be relevant or effective for a number of reasons, including that:

- time-zones were developed 'in an analogue world, prior to the emergence of pay TV, the Internet, IPTV and video on demand';
- the same type of content is readily available on other platforms at any time of day;
- time-zones may be 'contrary to the strong trend in media consumption towards viewers accessing what they want, when they want', using time-shift programming and 'on demand' content services;
- parental locks give users greater control over content; and
- regulation should not 'place an unjustifiably higher burden on some content platforms'.[51]

8.50 Free TV Australia also submitted that market dynamics dictate that:

> when material is restricted on one medium, it merely redistributes to other, less regulated media. This leads to the inequitable outcome of having disproportionate financial impact on the more regulated platform while at the same time resulting in no overall decrease in the public's exposure to the content.[52]

8.51 However, the logic of convergence may lead to policy outcomes for which Australia may not be ready. Convergence might suggest, for example, that the existing prohibitions on the broadcasting of R 18+ content, and perhaps even X 18+ content, are anachronistic. However, a community expectation that television channels are safe, particularly for children, at certain times of the day, may suggest that time-zone restrictions are still relevant. More popular content providers may also have a greater responsibility for providing classification information and restricting access to adult content.

8.52 In the ALRC's view, if time-zone restrictions on free-to-air television were to be removed, at the very least, a comprehensive public education campaign about how to use parental locks would be necessary.[53]

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51 Free TV Australia, *Submission CI 1214*, 15 July 2011.

52 Ibid.

53 The ALRC notes that the Convergence Review is also seeking community feedback on the continuing relevance of time-zone restrictions on television content.

Industry codes or legislation

8.53 The ALRC proposes that methods of restricting access to R 18+ and X 18+ content should be set out in industry codes, rather than in the Classification of Media Content Act. As submissions have highlighted, methods of restricting access have a number of commercial and technical complexities. New technologies to restrict access without compromising privacy or safety may also be developed in time. For these reasons, methods of restricting access are best placed in codes developed by industry, approved by the Regulator, and regularly reviewed and updated to account for developments in technology.

Proposal 8–4 The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. These codes might be developed for different types of content and industries, but might usefully cover:

(a) how to restrict online content to adults, for example by using restricted access technologies;

(b) the promotion and distribution of parental locks and user-based computer filters; and

(c) how and where to advertise, package and display hardcopy adult content.

Question 8–1 Should Australian content providers—particularly broadcast television—continue to be subject to time-zone restrictions that prohibit screening certain media content at particular times of the day? For example, should free-to-air television continue to be prohibited from broadcasting MA 15+ content before 9pm?

Markings for content that must be classified

8.54 The primary purpose of requiring some content to be classified is to provide people with information or warnings to help guide their choice of entertainment. Classification markings and consumer advice are the primary methods of communicating that information.[54]

8.55 Currently, classification symbols or markings must usually be displayed on packaging and advertisements for submittable publications, films and computer games.[55] Where and how these markings must be displayed is determined by

54 The classifications themselves (eg, PG, R 18+) are discussed in Ch 7. This section relates to when and how the markings for those classifications should be displayed. Proposed classification markings appear in Appendix 3.

55 For example, 'A person must not sell a film unless the determined markings relevant to the classification of the film, and any consumer advice applicable to the film, are displayed on the container, wrapping or casing of the film': *Classification (Publications, Films and Computer Games) Enforcement Act 1995*

legislative instruments.[56] The objective of the *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) is to 'ensure that consumers have ready access to clear classification information to inform their choices about films and computer games'.[57] The legislative instruments prescribe how the markings must be shown in some detail.

8.56 For classified television content, the markings requirements are prescribed in industry codes, approved by the ACMA. For example, the code for commercial free-to-air television provides that for any program required to be classified:

> an appropriate classification symbol of at least 32 television lines in height, in a readily legible typeface, must be displayed for at least 3 seconds at the following times: as close as practicable to the program's start; as soon as practicable after each break; ... in any promotion for the program.[58]

8.57 The ALRC agrees that it is important that the packaging of classified content and advertising for classified content should display classification markings, and that these markings should be as clear and consistent as possible. Content providers should not be free to mark their product in whichever way they please.

8.58 However, content and advertising is now delivered in so many different ways—on various platforms or devices and through various websites, applications and computer programs—that markings rules may be better placed in industry codes. Such codes can be more flexible and informed by industry and recent technology developments. Accordingly, the ALRC proposes that the Classification of Media Content Act contain a high-level principled rule concerning the display of classification markings. The detail of how and where such markings should be displayed—where this detail is necessary—should be in industry codes.

Proposal 8–5 The Classification of Media Content Act should provide that, for media content that must be classified and has been classified, content providers must display a suitable classification marking. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be streamed or downloaded, and on advertising for the content.

(NSW) s 15(1). 'A person must not publish an advertisement for a classified film, classified publication or classified computer game unless: (a) the advertisement contains the determined markings relevant to the classification of the film, publication or computer game and relevant consumer advice': *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 42(1).

56 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 8. The current instruments are the *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) and the *Classification (Markings for Certified Exempt Films and Computer Games) Determination 2007* (Cth).

57 *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) s 5.

58 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 1 September 2011, cl 2.18, 2.19.

Advertising for content that must be classified

8.59 The current classification scheme provides for restrictions on the advertising of films, computer games and submittable publications. If the content has been classified, advertisements must usually display the determined classification marking,[59] and should only be shown to 'commensurate audiences' (for example, advertisements for MA 15+ films should not be shown before films classified G, PG or M).[60] If the content has not been classified, the advertising must display a 'Check the Classification' ('CTC') marking. Advertisements for unclassified films and computer games must be assessed by an 'authorised assessor' to determine their likely classification; advertising is then restricted by this likely classification (for example, advertisements for films *likely* to be classified MA 15+ should not be shown before films classified G, PG or M).

8.60 Advertisements for television programs are subject to comparable restrictions, prescribed in the industry code. Section 3 of the code for commercial free-to-air television, for example, provides for program promotions and is intended to ensure that:

- no program classified higher than PG is promoted in programs directed mainly to children;
- higher classified programs are only to be promoted elsewhere in the G and PG viewing periods if the excerpts shown comply in every respect with the classification criteria of those viewing periods and with other the more stringent content restrictions specified [in the code].[61]

8.61 The code for free-to-air television also provides that:

> Clearly visible classification symbols must accompany all press advertising of programs on behalf of a licensee, and all program listings in program guides produced by a licensee.[62]

8.62 The Australian Council on Children and the Media recommended that the 'promotion of legally restricted cinema films and games to under-age audiences or in public places' should be prohibited.[63]

8.63 Many films are advertised well before they are classified; restrictions on the advertising therefore often turn on the likely classification of the film. One criticism of this is that it is difficult to predict the likely classification of a film. Some say that the

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59 For example, 'A person must not publish an advertisement for a classified film, classified publication or classified computer game unless: (a) the advertisement contains the determined markings relevant to the classification of the film, publication or computer game': *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 42(1).

60 For example, 'A person must not, during a program for the exhibition of a classified film (the feature film), publicly exhibit an advertisement for another film or a computer game unless the advertised film or advertised computer game has the same classification as (or has a lower classification than) the feature film': Ibid s 40(1).

61 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 1 September 2011, s 3.

62 Ibid, cl 2.18, 2.19.

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

advertisement itself should therefore be classified, and restrictions should attach to the actual classification of the trailer, rather than the likely classification of the film. This is essentially how trailers are dealt with in the United States and in the United Kingdom. In the United States, for example, advertisements are placed into one of three categories (All Audience, Appropriate Audience, and Mature or Restricted Audience), but where an advertisement is placed depends on both the content of the film and the content of the advertisement.[64] The British Board of Film Classification classifies trailers for feature films as stand-alone works.[65]

8.64 It is also argued that, because trailers and film clips are widely available on the internet well before they appear in cinemas, restrictions on when the advertisements may be shown in cinemas is unnecessary.

8.65 The suitability of an advertisement for a film, computer game or television programs should not depend, in the ALRC's view, solely on the content of the advertisement. Rather, it should also depend on the advertised product itself. That an advertisement for an alcoholic beverage may only feature a cuddly bear does not mean the advertisement should be shown in or with media content designed for children. In the ALRC's view, the likely classification of advertised media content is a relevant and convenient—if imperfect—measure of the suitability of an advertisement.

8.66 However, a strict commensurate audience rule is perhaps ill-suited to a media environment in which users move freely between different types of content. Such a strict rule, applied consistently, might also mean that many films, computer games and television programs could not be advertised in public spaces.

8.67 Accordingly, the ALRC proposes that the new Classification of Media Content Act feature a principled rule regarding advertising for content that must be classified, such as the following: 'An advertisement for content that must be classified must be suitable for the audience likely to view the advertisement. In assessing suitability, regard must be had to: (a) the likely audience of the advertisement; (b) the impact of the content in the advertisement; and (c) the classification or likely classification of the advertised content.'

8.68 This principled rule is intended to allow more flexibility in relation to where advertisements for classified media content may appear. For example, an advertisement on the side of a bus for an MA 15+ film may have a very low impact; the low impact of the advertisement may mitigate any potential harm caused by young minors seeing an advertisement for a film that is not suitable for them. Industry codes, discussed in Chapter 11, may usefully elaborate on how suitability may be measured and assessed. Industry codes may also provide that advertisements for some classified content (such as films likely to be R 18+) should never be shown with children's content.

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64 Motion Picture Association of America, *Advertising Administration Rules* (2009) <http://www.filmratings.com/filmRatings_Cara/downloads/pdf/advertising/cara_advertising_rules.pdf> at 20 September 2011.

65 British Board of Film Classification, *FAQs* <http://www.bbfc.co.uk/about/faqs/> at 15 August 2011.

8.69 The new scheme should not need a separate scheme for assessing advertisements. Instead, authorised industry classifiers (proposed in Chapter 7) would be suitable persons to assess the likely classification of this content.

8.70 Advertisements for classified content should continue to be subject to other advertising standards, such as those in industry codes relating to misleading or deceptive advertisements, and portrayals of violence, sex and nudity, and obscene language in advertisements.[66]

Proposal 8–6 The Classification of Media Content Act should provide that an advertisement for media content that must be classified must be suitable for the audience likely to view the advertisement. The Act should provide that, in assessing suitability, regard must be had to:

(a) the likely audience of the advertisement;

(b) the impact of the content in the advertisement; and

(c) the classification or likely classification of the advertised content.

Public display of media content

8.71 Australians exercise some control over the content they choose for themselves and their families. Not only may they switch television channels and supervise children, but they may use home internet filters and parental locks on televisions. Consumers do not, however, have this level of control over media content shown in streets, shopping centres, parks and other public areas. Some submissions argued that stricter rules should therefore be applied to media content displayed in public. Civil Liberties Australia, for example, submitted:

> the fact that content is accessed in public or at home should absolutely affect whether it should be classified ... Public spaces are all about community, and therefore community standards should apply.[67]

8.72 Dr Nicolas Suzor argued that there is 'a very strong distinction between access in public and in private':

> Classification policy should accordingly restrict public access to content that is likely to cause offence in a way that is consistent with community standards, but should generally not restrict private access.[68]

8.73 The ALRC considers that restrictions on the display of media content in public should be stricter than restrictions on the sale and distribution of content to be viewed in homes and cinemas. However, formal classification may not be the only means to impose such a restriction. The ALRC proposes earlier in this chapter that the Classification of Media Content Act should provide that material likely to be classified

66 See Australian Association of National Advertisers, *AANA Code of Ethics* 2009, s 1.2.
67 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
68 N Suzor, *Submission CI 1233*, 15 July 2011.

R 18+ must be restricted to adults, but otherwise does not need to be classified. Likewise, the Act might provide for a rule in relation to the public display of media content, perhaps prohibiting the public display of media content likely to be classified MA 15+ or higher. If the Regulator considered that a piece of content were likely to be classified MA 15+ or higher, the Regulator could issue a notice to the content provider, requiring the content to be removed or classified.

Outdoor advertising

8.74 The media content currently most commonly displayed in public is advertising—notably billboards. Outdoor advertising is largely self regulated, underpinned by the Australian Association of National Advertisers' *Code of Ethics*[69] (currently under review) and a complaints-handling system administered by the Advertising Standards Bureau and adjudicated by the Advertising Standards Board.

8.75 In July 2011, the House of Representatives Standing Committee on Social Policy and Legal Affairs finalised its inquiry into the regulation of billboard and outdoor advertising with the release of its report, *Reclaiming Public Space*. The Committee made a number of recommendations, including the following:

> The Committee recommends that the Attorney-General's Department review by 30 June 2013 the self-regulatory system for advertising by evaluating the industry implementation reports and assessing the extent to which there has been effective implementation of the recommendations contained in this report. If the self-regulatory system is found lacking, the Committee recommends that the Attorney-General's Department impose a self-funded co-regulatory system on advertising with government input into advertising codes of practice.[70]

8.76 In its report, the Committee concluded that the current classification scheme was inappropriate for regulating outdoor advertising.[71] The Committee expressed concern about the regulatory burden on industry if all outdoor advertisements were required to be classified by the Classification Board. The report also noted that advertising industry self-regulation 'is the standard practice in the developed world'.[72]

8.77 The ALRC has not proposed that advertising be made subject to the National Classification Scheme. However, this Discussion Paper provides for authorised industry classifiers and industry-specific codes. This means that, if advertising were brought into the proposed scheme, outdoor advertising could continue to be assessed or classified by industry, but decisions might be monitored by the Regulator and subject to review by the Classification Board. Industry assessment or classification might minimise any expected financial and administrative burden on industry, which the Senate Committee was concerned could come with 'Government classification'.[73]

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69 Australian Association of National Advertisers, *AANA Code of Ethics* 2009

70 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Reclaiming Public Space: Inquiry into the Regulation of Billboards and Outdoor Advertising: Final Report* (2011), Rec 2.

71 Ibid, par 3.55.

72 Ibid, par 2.7.

73 Ibid, par 3.57.

8.78 If the Australian Government chose to bring outdoor advertising into the co-regulatory National Classification Scheme, the ALRC would suggest that a law prohibiting the display in public places of media content likely to have a higher-level classification may be suitable.