8. Markings, Modifications, Time Zones and Advertising

Contents

Summary

8.1 This chapter deals with laws that attach to content that must be classified—laws that prescribe how such content should be marked, packaged and advertised, and laws relating to when and where this content may be screened. Content that the ALRC recommends should be required to be classified is discussed in Chapter 6, and includes feature films, television programs, and computer games likely to be MA 15+ or higher.

8.2 In this chapter, the ALRC recommends that the Classification of Media Content Act (the new Act) should provide that for content that must be classified, content providers must display a classification marking. This marking should generally 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. The ALRC suggests that the detail concerning precisely when and how such markings should appear should be provided for in industry codes approved by the Regulator.

8.3 This chapter also discusses when classified content is changed such that it should be reclassified, or given new consumer advice. The ALRC recommends a more flexible modifications policy, which should reduce the need for the same content to be classified twice. However, the ALRC also suggests laws that will ensure content is not sold in packages with classification markings or consumer advice that is not appropriate for the content.

8.4 The ALRC also considers the phasing out of time-zone restrictions imposed on commercial broadcasting services, in the context of the digital switchover and as parental locks become used more widely.

8.5 In the ALRC's model, advertisements for content that must be classified would be treated in much the same way as advertisements for other products, services and media content. This means that they would be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. However, these codes should be amended to provide that, in determining the suitability of an advertisement, consideration should be given to the classification or likely classification of the content that is being advertised.

8.6 The chapter concludes by considering whether some media content displayed in public, such as higher-level outdoor advertising, should be prohibited.

Markings

8.7 The primary purpose of requiring some content to be classified is to provide people with information or warnings to help them choose media entertainment for themselves and their families. Classification markings and consumer advice are the principal means of communicating that information.[1]

8.8 The ALRC recommends that the new Act should provide that content providers must display a classification marking for content that must be classified and has been classified.[2] 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. A similar proposal in the Discussion Paper[3] was broadly supported in submissions.[4]

Markings rules should be in industry codes

8.9 Currently, classification symbols or markings must generally be displayed on packaging and advertisements for submittable publications, films and computer

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1 The classifications themselves are discussed in Ch 9. This section relates to when and how the markings for those classifications should be displayed.

2 See Recs 6–1 and 6–2 for the content that the ALRC recommends must be classified.

3 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 8–5.

4 See, eg, Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*, Advertising Standards Bureau, *Submission CI 2487*; Outdoor Media Association, *Submission CI 2479*; D Henselin, *Submission CI 2473*, Watch On Censorship, *Submission CI 2472*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

games.[5] If some content has not been classified, advertising must display a 'Check the Classification' (CTC) marking. Legislative instruments prescribe, in some detail, where and how markings must be displayed.[6] 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'.[7]

8.10 For classified television content, the markings requirements are prescribed in industry codes, approved by the Australian Communications and Media Authority (the ACMA). The code for commercial free-to-air television 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.[8]

8.11 This code also 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.[9]

8.12 Effective classification regulation relies on clear and consistent classification markings. In the ALRC's view, content providers should not be free to mark their product in whichever way they please. However, content and advertising is now delivered in many different ways—on various platforms or devices and through various websites, applications and computer programs. This suggests that markings rules may be better placed in industry codes, than legislative instruments. Such codes can be more flexible and informed by industry and developments in technology. In the Discussion Paper, the ALRC proposed that the new Act contain a high-level principled rule concerning the display of classification markings, and that the detail of how and where such markings should be displayed—where this detail is necessary—should be in industry codes.[10]

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5 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* (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).

6 *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).

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

8 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 15 September 2011, cls 2.18, 2.19.

9 Ibid, cls 2.18, 2.19.

10 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 8–5.

8.13 Several stakeholders agreed that these marking requirements should be set out in industry codes.[11] Free TV Australia (Free TV), for example, submitted that this would 'enable each industry to develop a regime that is suitable for the content delivery environment':

> Because industry codes can be amended more easily than legislation, such an approach will also provide more flexibility. If there are changes to the content delivery environment, the codes can be amended accordingly.[12]

Markings only required for content that must be classified

8.14 In the Discussion Paper, the ALRC proposed that these marking requirements should apply to content that must be classified *and* has been classified.[13] The Advertising Standards Bureau suggested that the marking requirements should perhaps apply to content that must be classified *or* has been classified.[14] Although the ALRC encourages the voluntary classification of some content, including lower level computer games, it seems unreasonable to impose a marking obligation on content providers who choose to have their content classified. A content provider may choose to classify a website, for example, to ensure it is not R 18+, and so not subject to proposed laws requiring providers to take reasonable steps to restrict access.[15] If the content is then classified M or MA 15+, the content provider would then be under no obligation to restrict access. It would be unfair to impose a markings obligation on content providers that only choose to classify their content out of caution.

8.15 However, it would be open to content providers to use markings for content they classify voluntarily. The ALRC anticipates that some content providers will consider it desirable to classify and mark their content, despite there being no mandatory requirement to do either.

8.16 In Chapter 7, the ALRC recommends that the Regulator should have the power to deem certain content to have an Australian classification, if the content has been given an equivalent classification under a system approved by the Regulator.[16] Some content may be deemed to be classified, even though it is not content that must be classified. This is important so that content providers who voluntarily classify content, perhaps so they can sell their content with Australian classification markings, may take advantage of this deeming scheme. However, other content providers should not necessarily be required to mark their content because it is deemed to be classified, if they would not otherwise be required to classify or mark their content.

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11 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; Interactive Games and Entertainment Association, *Submission CI 2470*.

12 Free TV Australia, *Submission CI 2519*.

13 See Recs 6–1 and 6–2 for the content the ALRC recommends must be classified.

14 Advertising Standards Bureau, *Submission CI 2487*.

15 See Ch 10.

16 The ALRC also recommends in Ch 7 that this power may be used to classify any film, television program or computer game, rather than only the content that the ALRC recommends should be required to be classified.

8.17 The ALRC recommends that the Regulator's 'deeming' power should be broad and flexible, so that content providers may take advantage of rigorous international classification decision making processes. However, this broad power should not result in placing an unreasonable regulatory burden on content providers who have no reason to provide Australian classification information. Accordingly, in the ALRC's view, only content that must be classified (and has been classified) should be required to display classification markings.

8.18 Classification markings should not be incorrect or misleading. The new Act should contain relevant provisions to this effect, similar to those in existing state classification enforcement legislation.[17] However, the ALRC suggests that an exception may be made for the X 18+ marking, considering this symbol is widely understood through much of the world to be a symbol for pornography.

Markings online

8.19 Several submissions noted the difficulty of requiring online content hosted overseas to carry Australian classification markings. Civil Liberties Australia, for example, said that companies in Australia might use Australian classification markings, but 'it is difficult to see anyone providing content intended for an international audience complying with this requirement'.[18]

8.20 Some submissions called for the recognition of international classification markings. The Internet Industry Association submitted that, in respect of online content,

> the classification regime should accommodate and recognise overseas classifications of content. This might occur by, perhaps, requiring that the overseas classification be displayed with the content, with a notice clearly indicating the country where the classification was made. Consumers might then also be provided with a link to information regarding the meaning of the foreign classification or an industry approved interpretation of the foreign classification in terms of local standards. This approach would greatly enhance the ability of online providers to source and make available a wider range of content.[19]

8.21 Google noted that much content on the Android Market is rated by the person who uploads the content. These ratings, Google submitted,

> apply globally, so while they tend to roughly approximate to the Australian content rating categories, there are differences. Requiring specific markings therefore becomes problematic, whereas if the framework were to recognise *similar* systems for markings, the policy objective may be achieved in a workable way.[20]

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17 For example, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 15(2)–(3) provides that 'A person must not sell an unclassified film if the container, wrapping or casing in which the film is sold displays a marking that indicates or suggests that the film has been classified' and 'A person must not sell a classified film if the container, wrapping or casing in which the film is sold displays a marking that indicates or suggests that the film is unclassified or has a different classification'.

18 Civil Liberties Australia, *Submission CI 2466*.

19 Internet Industry Association, *Submission CI 2528*.

20 Google, *Submission CI 2512* (original emphasis).

8.22 The ALRC has sought to accommodate some of these concerns by recommending a narrower range of content that must be classified, and by confining mandatory classification requirements to content that is likely to have a significant Australian audience, and to content that is made and distributed on a commercial basis. Providers of such content should, in the ALRC's view, have an obligation to provide Australian classification information—particularly considering that this is, by definition, content that is likely to have a significant Australian audience.

8.23 The Australian classification markings are integral to the National Classification Scheme. The value of the scheme depends on the Australian public recognising and understanding the symbols. The requirements to display these symbols for certain content should not be removed lightly. However, the Australian Government could consider whether the Regulator should also be given the power to determine, in some circumstances, that content that must be classified may carry international classification markings, rather than the equivalent Australian classification marking.

8.24 Some global platforms, particularly those of new or emerging content providers, may not be able to tailor classification markings to the countries from which users access the content. Those who cannot provide such information could perhaps also be taken to comply with their markings obligations if their website or platform directs users to where Australian classification information can be found.

8.25 In any event, because many Australians access content provided with international classification markings, the Regulator could provide information about the meaning of common international classification markings to assist Australian audiences.

Recommendation 8–1 The Classification of Media Content Act should provide that content providers must display a classification marking for content that must be classified and has been classified. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be accessed, and on advertising for content directed to Australian audiences.

Modifications

8.26 The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*) provides that, subject to some exceptions, 'if a classified film or a classified computer game is modified, it becomes unclassified when the modification is made'.[21] The Act also prescribes a list of changes that do not amount to a modification.[22] This provision has been applied strictly by the courts. In *Muscat v Douglas*, Buss JA stated that:

21 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 21(1).
22 Ibid s 21.

> Any partial or minor change or alteration to a classified film constitutes a modification for the purposes of that provision. The change of status from classified to unclassified is automatic and immediate.[23]

8.27 This strict and prescriptive modification rule has been the subject of complaints from industry. Some claim that it is too narrow, and results in content being unnecessarily classified many times over, at considerable expense to distributors. A prescriptive, statutory modification rule is also unlikely to keep pace with technology, and does not account for the fact that much online content is dynamic and changes constantly.

8.28 The ALRC considers that the new Act should provide that classified content only becomes unclassified if it is modified in such a way that the modified content is likely to have a different classification from the original content. Neither the Act nor industry codes need to prescribe specific types of modifications that would, or would not, change the classification of content. Whether something has been modified should depend on the content itself, not on the type of modification.

8.29 However, only minor changes should be considered 'modifications'. 'Modify' means to 'make partial or minor changes to; alter without radical transformation'.[24] As discussed later in this chapter, adding extra content will often not be a 'partial or minor' change.

8.30 Submissions were broadly supportive of the ALRC's proposal to set limits to the kind of modifications that would declassify content that has been classified.[25] Free TV, for example, supported the proposed definition of modify, and said it 'will, to a degree, reduce double handling of material'.[26] Telstra also supported the proposal, noting that it would 'not reduce the scope or accuracy of the classification information provided to consumers in any way', and would 'avoid the current costs associated with the valueless duplication of classification assessment processes as content is distributed across multiple platforms'.[27]

8.31 The Interactive Games and Entertainment Association (iGEA) welcomed the proposal, which will 'effectively allow certain modifications of computer games, including expansion packs and downloadable content, to legitimately share the classification of the original game and be marked accordingly'.[28]

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23 *Muscat v Douglas* [2007] 32 WAR 49, per Buss JA, at [143]–[144].

24 Ibid, per Buss JA, citing the *Shorter Oxford English Dictionary*.

25 See Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–7.

26 Free TV Australia, *Submission CI 2519*.

27 Telstra, *Submission CI 2469*.

28 Interactive Games and Entertainment Association, *Submission CI 2470*. See also FamilyVoice Australia, *Submission CI 2509*; Arts Law Centre of Australia, *Submission CI 2490*.

8.32 However, some submissions called for a more certain rule. The Australian Federation Against Copyright Theft, for example, submitted that the proposed definition:

> may raise some issues in practical application since it lacks any objectively verifiable criteria. The inclusion of examples of modification for different programs in an Industry Code may be a useful way to provide practical guidance on the interpretation of 'modify' while retaining the flexibility of the proposed ALRC definition.[29]

8.33 The ALRC's recommendation requires content providers to consider whether changed classified content is 'likely' to have a different classification. Foxtel said that it did not support regulations which require classifiers to decide on 'likely classifications':

> the scheme should either provide that content is required to be classified or it is not required to be classified. This is because the 'likely' pre-decision is, in fact, a classification decision.[30]

8.34 In the ALRC's view, assessing the likely classification of content differs from classifying the content in a few important respects. Generally only trained and authorised classifiers can make classification decisions, whereas others may assess the likely classification. For some content, very little work may need to be done to determine its likely classification. Finally, formal classification decisions may need to be recorded and registered with the Regulator on a database.[31] So, classifying content will generally have a greater regulatory burden and a higher cost than assessing the likely classification of content.

8.35 Under the ALRC's scheme, if a computer game is modified (that is, changed in a minor way), and that modification is unlikely to change the classification of the game, then the modified version of the game will have the same classification as the original version. If the classification is likely to change, however, the game will need to be reclassified. In the ALRC's view, this should ensure that changes to computer games that significantly increase impact are treated appropriately.[32]

Changing platforms

8.36 In the ALRC's view, changing platforms should not cause classified content to become unclassified. If a content provider has content classified for one platform (for example, television), then it or another content provider may use that classification decision for the same content published on another platform (for example, DVD or the internet). This is an important feature of the ALRC's model, and one of the advantages of platform-neutral classification regulation.

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29 Australian Federation Against Copyright Theft, *Submission CI 2517*. See also Motion Picture Distributors Association of Australia, *Submission CI 2513*; Australian Home Entertainment Distribution Association, *Submission CI 2478*.

30 Foxtel, *Submission CI 2497*.

31 This database is discussed in Ch 7.

32 Computer game 'mods' and expansion packs are discussed further below.

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

3D content

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

8.39 The Motion Picture Distributors Association of Australia criticised 'the notion that remaking the film in a revised format is a "modification", even where there was no change to the content', and submitted that the Act:

> should define that it is only content modification, not format variation—such as 2D or 3D—that might require a new classification, and that the perceived impact of the format is not a relevant factor.[33]

8.40 The ALRC agrees that it should not be necessary to classify both the 2D and 3D versions of a film—unless one version of the content is likely to have a different classification from the other version.

8.41 Whether one version of a piece of content is likely to have a different classification from another version should depend on the specific piece of content, and any change in the actual impact of the content by a modification, rather than the abstract question of whether one type of modification alters impact. The ALRC considers that the Act should not prescribe specific types of changes that would or would not declassify content.

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

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

Recommendation 8–2 The Classification of Media Content Act should provide that if classified media content is modified, so that the modified content is likely to have a different classification from the original content, the modified content becomes unclassified. The Act should not prescribe specific types of modifications that operate to declassify content.

Packaging media content

Classified content sold with other classified content

8.43 If multiple classified films, computer games or television programs are sold as a package—for example, a box set of DVDs—then this package of content should not have to be reclassified as though it were new content. Rather, the package should display the classification marking of the content in the package that received the highest classification.

8.44 The relevant markings determination currently provides that a container that holds more than one film or computer game must display the markings applying to the film or computer game included in the container that has the highest classification.[34]

8.45 The ALRC proposes that the new Act should provide that, where multiple pieces of classified content are sold or distributed together as a 'package' (even if the package only amounts to one media disc, or one computer file, with multiple pieces of content), then the package should display the classification of the content with the highest classification.

Classified content sold with unclassified content

8.46 A related scenario concerns packages containing content that must be classified and other content that is not required to be classified. A DVD, for example, may be sold that contains a feature film that must be classified, and other content that, if it were sold separately, would not be required to be classified, such as a short interview with the director of the film.

8.47 It is important that 'extras' and other content not be sold in a package marked with a lower classification than the extra content would receive if it were classified. Accordingly, the ALRC suggests that the new Act should provide that unclassified media content must not be distributed in a package marked with a lower classification than the extra content would receive if it were to be classified.

8.48 For example, if in an interview, the director of the children's film used strong coarse language, parents would hardly expect the interview to be sold on a disc classified G. Distributors may, of course, choose to have higher-level content sold with a feature film with a lower classification; but if they do so, the distributor should have the extra content classified.

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34 *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) s 32.

8.49 Sometimes an 'extra' sold with a feature film, such as a television program about the making of the feature film, might itself meet the definition of content that must be classified.[35] In this case, the extra will need to be classified (but the feature film will not need to be reclassified). The introduction of authorised industry classifiers will reduce the cost of classifying this content.[36]

Additional content scheme

8.50 Under the ALRC's model, there is no need for an 'additional content scheme'. Currently, this scheme allows authorised assessors to submit to the Board assessments of 'additional content' in a film. Additional content is defined to include: additional scenes for the classified film, such as alternative endings or deleted scenes; a film of the making of the classified film; and interviews with, and commentaries by, directors, actors and other persons involved with the making of the classified film.[37] The assessments are considered by the Board when it classifies the new 'film' that essentially consists of all of the content on the DVD or disc—the feature film and additional content.

8.51 Under the new scheme, this additional content does not modify or declassify the feature film, even if it is sold on the same media disc. However, if the additional content is unclassified, it must not be sold on a disc or in a package with classified content, unless it is likely to have the same or a lower classification as the classified content. In the ALRC's view, this is an efficient and effective process that maintains the integrity of the classification scheme.

Computer game 'mods' and expansion packs

8.52 In Chapter 6, the ALRC suggests that only computer games that are 'works', that is, games that are 'produced for playing as a discrete entity', should be required to be classified.[38] 'Mods' and expansion packs will rarely be produced for playing as a discrete entity, and therefore would not meet the definition of content that must be classified. If they are sold separately, therefore, they should not need to be marked and classified.[39] In the ALRC's view, this is an appropriate and effective means of dealing with the volume of separate 'mods' and expansion packs that can be released, many made and produced by users rather than the original developers.

8.53 However, this does not mean they may be sold with classified content, under a classification marking that is lower than the 'mod' or expansion pack would receive if it were classified. This would undermine the integrity of the scheme, and give misleading information to consumers and parents.

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35 See Recs 6–1 and 6–2 for the content the ALRC recommends should be required to be classified.

36 See Ch 7.

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

38 However, these games should only be required to be classified if they are also likely to be MA 15+ or higher, made and distributed on a commercial basis, and likely to have a significant Australian audience: see Rec 6–2.

39 In the new Act, it may prove unnecessary to have a definition of 'add-on', as there is in the *Classification Act*. This content can be treated in the same way as other media content.

8.54 As noted above, the ALRC suggests that the new Act should provide that unclassified media content must not be distributed in a package marked with a lower classification than the content would receive if it were to be classified.

8.55 If an expansion pack or computer game 'mod' increases the impact of a computer game, such that the modified game is likely to have a different classification, then the expansion pack or 'mod' may need to be classified. For example, if an original game were classified M, and the expansion pack were likely to make the game MA 15+, then the expansion pack should be classified.

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

> if the potential impact of the Add-On Content is higher than the impact of the computer game to which the Add-On Content will be applied. In circumstances where the Add-On Content has the same or lower level of impact, such Add-On Content would inherit the classification of the computer game to which the Add-On Content will be applied.[40]

New consumer advice

8.57 Modifying classified content and selling packages of content might, in some cases, call for new consumer advice.[41]

8.58 Sometimes classified content may be modified in such a way that the content does not need a new classification, but it does need new consumer advice. For example, a director's cut of an M-classified feature film may include a sex scene that was not in the original film; the scene might still be suitable for an M-classified film, but it should usually be noted in consumer advice.

8.59 Likewise, where multiple pieces of content are sold in a single package, it will sometimes be necessary to give the content new consumer advice. For example, if one episode of an M-classified television series has consumer advice for violence, and another episode of the same series has consumer advice for sex scenes, and both episodes are later sold together on a DVD, then the consumer advice for the DVD should usually reflect both the violence and the sex, even if all the content on the DVD will still be M and does not need to be reclassified.

8.60 Accordingly, the ALRC suggests that the new Act should provide that if classified content is sold in a package with other classified or unclassified content, so that the consumer advice no longer gives accurate information about the content, then the content must be given new consumer advice, even if the content does not need to be given a different classification.

8.61 The new Act should also provide that if classified content is changed, such that the consumer advice no longer gives accurate information about the content, then the

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

41 Consumer advice is discussed in Ch 9, and refers to the few words beside a classification marking, such as 'Strong violence', that give information about the classifiable elements of the content.

content must be given new consumer advice, even if the content does not need to be given a different classification.

8.62 In Chapter 7, the ALRC recommends that the Act should empower all classifiers, including trained industry classifiers, to determine consumer advice, even if the content has already been classified. It is important that consumer advice can be changed independently of the classification decision because otherwise some content might need to be resubmitted to the Board, at some expense to the distributor, simply to change the consumer advice.

Recommendation 8–3 The Classification of Media Content Act should provide that if classified content is changed, so that the consumer advice no longer gives accurate information about the content, then the content must be given new consumer advice, even if the content does not need to be given a different classification.

Television time-zone restrictions

8.63 Free-to-air television broadcasters in Australia are currently subject to time-zone restrictions. For example, the *Broadcasting Services Act 1992* (Cth) provides that they may only broadcast films classified:

- MA 15+ after 9 pm, and
- M after 8.30 pm, and between noon and 3 pm on school days.[42]

8.64 Further restrictions related to C, G and PG content, and restrictions that apply to content on the free-to-air digital channels, are outlined in codes of practice.[43]

8.65 These limitations are not imposed on subscription broadcast and narrowcast television, or for online content such as television streamed on the internet. Converging media environments, discussed in Chapter 3, may suggest that time-zone restrictions on free-to-air television are becoming less relevant. Content at the MA 15+ level may, in practice, now be watched at any time of day in any Australian home with subscription television, an internet connection, a recording device or a DVD.

8.66 Free TV 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;

42 *Broadcasting Services Act 1992* (Cth) s 123(3A)(c), (d), (3C)(c), (d).

43 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 15 January 2012.

- 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'.[44]

8.67 Free TV 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.[45]

8.68 In the Discussion Paper, the ALRC asked whether Australian content providers—particularly broadcast television—should continue to be subject to time-zone restrictions.[46] Many stakeholders argued that time-zone restrictions should be removed, often drawing upon similar arguments to those raised by Free TV.[47] For example, one person said the 'artificial restriction of content to time zones is a waste of time, effort and money':

> It is currently possible to watch an R 18+ movie on pay TV in your home at 8:30 am any day of the week. You can do the same for X 18+ movies on the internet. With the change to digital television nearly every set will have a child proof lock which will enable parents to restrict access based on the classification. Individuals need to be responsible for what content they consume and parents need to be responsible for their children's access to content in their home.[48]

8.69 The ABC and SBS said that the time-zone restrictions were developed to give parents 'confidence that they could limit the exposure of children to inappropriate material', but their effectiveness

> is diminishing over time as audiences shift from viewing scheduled television to on-demand viewing through personal video recorders, catch-up television services and platforms where no times zones apply, such as pay television and mobile services.[49]

8.70 Some stakeholders pointed to the wide availability of parental lock functions on televisions, particularly following digital switchover in 2013.[50] Foxtel, for example, noted that it has an 'advanced and integrated parental control system to assist parents protect their children, which makes time zones on [subscription television]

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44 Free TV Australia, *Submission CI 1214*.
45 Ibid.
46 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 8–1.
47 See, eg, Free TV Australia, *Submission CI 2519*; A Hightower, *Submission CI 2511*; D Henselin, *Submission CI 2473*; Telstra, *Submission CI 2469*.
48 R Harvey, *Submission CI 2467*.
49 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.
50 See, eg, Free TV Australia, *Submission CI 2519*; Telstra, *Submission CI 2469*.

unnecessary'.[51] Free TV also noted that 'the sort of content that the time-zone system was designed to promote (such as content suitable for children) is now readily available on two advertisement-free, dedicated, government funded children's channels (ABC2 and ABC3)'.[52]

8.71 However, some argued that there continues to be a community expectation that certain television channels are 'safe', particularly for children, at certain times of the day, and that therefore time-zone restrictions are still important. Foxtel, for example, submitted that although times zones should not apply to subscription television, or other fee-based or on-demand services, they should be retained on free-to-air television, 'given the near universal reach' and 'broad appeal' of free-to-air television channels, 'which are more likely to attract children'.[53]

8.72 FamilyVoice Australia submitted that time-zone restrictions should be maintained, and would remain relevant

> as long as there is a sector of broadcasting which is (a) free to air and (b) easily viewed at the time it is broadcast simply by switching on the relevant device.[54]

8.73 FamilyVoice submitted that only material suitable for children to watch unsupervised should be shown at certain critical periods of the day. It also stated that restrictions should continue to be placed on PG media, and that material that is unsuitable for viewing by persons under 15 should not be shown before 9.30 pm.[55] Free TV, on the other hand, suggested that if some time-zone restrictions were maintained, then they should at least be made consistent with the more recent restrictions on the free-to-air digital channels, so that PG content may be shown at any time of the day, M content from 7.30 pm, and MA 15+ content from 8.30 pm.[56]

8.74 Time-zone restrictions on broadcast television continue to be used throughout the world. The UK has a 9 pm 'watershed', before which time content inappropriate for children may not be broadcast. Free-to-air television in the United States of America may not broadcast material which is 'indecent' or 'profane' between 6 am and 10 pm, but these time restrictions are not placed on cable networks, even though the cable networks now account for over 85% of the US television audience. Time-zone restrictions are also in place in New Zealand, Canada and many other countries.[57]

8.75 Under the European Union's Audiovisual Media Services Directive (AVMS Directive), member States must ensure that broadcasters do not include programs which 'might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence' on their linear

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51 Foxtel, *Submission CI 2497*.
52 Free TV Australia, *Submission CI 2519*.
53 Foxtel, *Submission CI 2497*.
54 FamilyVoice Australia, *Submission CI 2509*.
55 Ibid.
56 Free TV Australia, *Submission CI 2519*.
57 See Appendix 3.

services (scheduled services such as broadcast television).[58] Linear broadcasters must also restrict programs detrimental to minors 'by selecting the time of the broadcast or by any [other] technical measure' so that 'minors in the area of transmission will not normally hear or see such broadcasts'.[59]

8.76 In the ALRC's view, time-zone restrictions as they currently apply to commercial broadcasting services may become unnecessary in coming years. The restrictions are becoming anachronistic as media content is increasingly available online, such as on catch-up services, and on subscription television services at all times of the day. Parental locks also give parents greater control over the type of media content that may be watched on televisions and other devices in the home. Children's channels are also now available not only on subscription television, but on dedicated free-to-air television channels. However, the ALRC agrees with the ABC and SBS's submission that:

> A phased transition away from time zones is desirable, but is likely to require a significant public education campaign and robust technological solutions which give parents confidence that they will be effective in protecting children from inappropriate content.[60]

8.77 Industry and the Regulator should therefore plan for the gradual phasing out of these restrictions, perhaps by implementing a public education campaign about how to use parental locks effectively. However, the ALRC does not recommend the immediate removal of mandatory time-zone restrictions. As ABC and SBS submitted,

> policy makers and broadcasters will need to proceed carefully given that most audience members continue to view programs at their broadcast time, rather than time-shifted—at the end of 2011, only about 8% of all free-to-air prime-time viewing was time-shifted.[61]

8.78 Rather than prescribe the precise time-zone restrictions as the *Broadcasting Services Act* currently does, the new Act should provide that time-zone restrictions may be set out in industry codes which must be approved by the Regulator. This provides for a level of flexibility and will enable the restrictions to be adapted, or gradually phased out, in response to a changing media environment.

Recommendation 8–4 The Classification of Media Content Act should not mandate time-zone restrictions for broadcasting services, but these restrictions may be provided for in industry codes.

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58 European Parliament, *Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services*, Directive 2010/13/EU (2010), art 27(1).

59 Ibid, art 27(2).

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

61 Ibid (citation omitted).

Advertisements for films, television programs and computer games

8.79 The ALRC recommends that advertisements for content that must be classified should be treated in much the same way as advertisements for other products, services and media content. Advertisements for content that must be classified should continue to be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. The new Act should not, therefore, need to contain additional, mandatory provisions targeting advertisements for media content that must be classified, such as those provided for in existing state and territory classification enforcement legislation.[62]

8.80 However, the ALRC also recommends that advertisements for media content should be suitable for the audience likely to view the advertisement and that, in assessing suitability, content providers and the Advertising Standards Board should have regard to, among other things: the likely audience of the advertisement; the impact of the content in the advertisement; and the classification or likely classification of the advertised content.

8.81 Advertisements for content that must be classified—such as trailers for feature films—are currently expected to comply both with the mandatory laws under the national classification scheme and with industry codes, such as the Australian Association of National Advertisers' (AANA) Code of Ethics. 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].[63]

8.82 Currently, under the National Classification Scheme, certain content that has been classified should only be shown to 'commensurate audiences'. For example, the NSW classification enforcement Act provides that:

> 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.[64]

8.83 This means, for example, that advertisements for MA 15+ films should not be shown with films classified G, PG or M. The classification scheme also provides for

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62 The requirement for advertisements to feature classifications markings, however, should be maintained, and is discussed earlier in this chapter.

63 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.

64 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 40(1).

advertisements for unclassified films and computer games to be assessed by the Classification Board or an authorised advertising 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).[65]

8.84 The Advertising Standards Bureau submitted that its processes for assessing complaints about advertisements for movies and other classifiable content are 'working effectively'.[66] However, currently, this self-regulation operates in addition to the mandatory statutory requirements outlined above that govern the advertising of some classified content.

8.85 In the ALRC's view, it is unnecessary to have advertisements for certain media content subject to greater regulation than other advertisements. Advertisements for films, television programs and computer games need not be subject to two sets of regulatory requirements (one voluntary, the other mandatory), and able to be reviewed by two separate boards (the Advertising Standards Board and the Classification Board).

8.86 Accordingly, the ALRC no longer considers it necessary for the new Act to contain a provision that mandates standards for advertisements for content that must be classified, as was proposed in the Discussion Paper. Instead, such standards should be set out in the existing industry codes.

8.87 This does not mean there should be a blanket exemption for advertisements in the definition of media content in the new Act. Rather, like all other media content, advertisements should be subject to the mandatory statutory requirement, recommended in Chapter 10, that content providers should take reasonable steps to restrict access to media content that is likely to be R 18+ or X 18+.[67] In the ALRC's view, it is important that all media content—including advertisements—should be subject to these statutory protections. This also means that there should be no need to have separate provisions in the new Act for publishing advertisements that have been or would be refused approval by the Classification Board, such as those now in the *Classification Act* and state and territory classification enforcement legislation.[68]

Assessing suitability

8.88 Advertisements for media content that must be classified should, in the ALRC's view, be suitable for their likely audience. In assessing suitability, the content provider—or if there is a complaint, the Advertising Standards Board—should have regard to the following matters, among others:

(a) the likely audience of the advertisement;

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65 *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* cl 2.9.

66 Advertising Standards Bureau, *Submission CI 2487*.

67 Offences related to Prohibited content would also apply to advertisements: see Ch 12.

68 For example, *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 29, 30; and *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 38.

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

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

8.89 This idea was largely supported in submissions.[69] For example, the Advertising Standards Bureau submitted that it

> already assesses the suitability of advertisements for classifiable material which includes movies, TV programs, DVDs, games and advertisements wherever they appear (including the internet and social media). The Board looks at the Australian Association of National Advertisers (AANA) Code of Ethics which requires the Standards Board to look at the Discrimination; Violence; Sex, Sexuality and Nudity; Language and Community Standards. In assessing suitability of the advertisements for media content the Standards Boards takes into account the likely audience of the advertisement; the impact of the content and the classification or likely classification of the advertisement.[70]

8.90 A number of stakeholders argued that the classification or likely classification of content being advertised should not be the only matter relevant to determining the suitability of an advertisement. Free TV and the Motion Picture Distributors Association of Australia submitted that, in assessing the suitability of an advertisement, regard should be had to the content of the advertisement itself.[71] The National Association of Cinema Operators submitted, by way of illustration, that 'many comedies will carry an ultimate classification of M, but their trailers are very general in content and could not offend even a G or PG audience'.[72]

8.91 The ALRC agrees that the content of the advertisement itself should also be a relevant consideration. An advertisement for a violent film might itself have a very low impact; and it is conceivable that an advertisement for a children's film might have a higher impact than the film itself.

8.92 The AANA Code of Ethics does not, however, require consideration of the classification or likely classification of content being advertised. In the ALRC's view, this is an important consideration that should be incorporated into the AANA's Code of Ethics, particularly if the mandatory restrictions on advertisements in the National Classification Scheme were to be removed. FamilyVoice Australia submitted that it is 'not desirable to be showing extracts from MA 15+ programs during C, P, G and PG programs'.[73]

8.93 The ALRC recommends that in assessing the suitability of advertisements for media content, content providers and the Advertising Standards Board should have regard to the classification or likely classification of the advertised content. This is consistent with the principle that adult content should not be advertised to minors, and

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69 See, eg, Motion Picture Distributors Association of Australia, *Submission CI 2513*; Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*; R Harvey, *Submission CI 2467*; Interactive Games and Entertainment Association, *Submission CI 2470*; D Henselin, *Submission CI 2473*.

70 Advertising Standards Bureau, *Submission CI 2487*.

71 Free TV Australia, *Submission CI 2519*; Motion Picture Distributors Association of Australia, *Submission CI 2513*.

72 National Association of Cinema Operators–Australasia, *Submission CI 2514*.

73 FamilyVoice Australia, *Submission CI 2509*.

content that may be suitable for a person in their late teens should not be advertised to young children.

8.94 Relevant industry codes may usefully provide further guidance on advertisements for content that must be classified. For example, industry codes might provide that advertisements for R 18+ content should not be shown with content for minors, and advertisements for MA 15+ content should not be shown with content for young children.[74]

8.95 Even with such measures in place, regulation is unlikely to entirely prevent minors from seeing advertisements for content that is not suitable for them, particularly if minors seek out the advertisement and use computers or media devices without activated filters or parental locks. Trailers for films and computer games are widely available on the internet, and are rarely restricted. As discussed further in Chapter 10, parental supervision, parental locks and internet filters are more likely to be effective in limiting or preventing minor's access to adult content, including advertisements for adult content.

Recommendation 8–5 Advertisements for content that must be classified should continue to be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. These voluntary codes should be amended to provide that, in assessing the suitability of an advertisement for media content that must be classified, the following matters should be considered:

(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

8.96 Australians exercise considerable control over the content they choose for themselves and their families. They switch television channels and supervise children's entertainment, and may also use internet filters and parental locks on televisions. The public does 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. For example, Civil Liberties Australia submitted that 'public spaces are all about community, and therefore community standards should apply'.[75]

74 The National Association of Cinema Operators suggested that trailers for films likely to be MA 15+ or R 18+ should continue to be shown only to commensurate audiences, even though they submitted that similar requirements for lower-level films should be relaxed: see National Association of Cinema Operators - Australasia, *Submission CI 2514*.

75 Civil Liberties Australia, *Submission CI 1143*.

8.97 Dr Nicolas Suzor argued that there is 'a very strong distinction between access in public and in private', and that, therefore, classification policy should

> 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.[76]

8.98 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, this does not mean that all public media must necessarily be classified.

8.99 In Chapter 10, the ALRC recommends that content providers should take reasonable steps to restrict access to adult content, including media content on public display.[77] This would apply to media content displayed in public. However, the new Act could provide for further restrictions on the public display of media content. It might, for example, prohibit the public display of media content likely to be classified MA 15+ or higher. If the new Act contained such a provision, and if the Regulator considered that a particular piece of media content displayed in public was 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

8.100 The media content currently most commonly displayed in public is advertising—notably billboards. Outdoor advertising is largely self regulated, underpinned by the AANA's Code of Ethics[78] and a complaints-handling system administered by the Advertising Standards Bureau and adjudicated by the Advertising Standards Board.

8.101 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.[79]

8.102 In its report, the Committee concluded that the current classification scheme was inappropriate for regulating outdoor advertising.[80] The Committee expressed concern

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76 N Suzor, *Submission CI 1233*.
77 This does not mean this content must necessarily be classified.
78 Australian Association of National Advertisers, *AANA Code of Ethics* 2009.
79 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.
80 Ibid, [3.55].

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'.[81]

8.103 The ALRC does not recommend that advertising be brought into the new classification scheme. However, this Report provides for authorised industry classifiers and industry-specific codes. This means that, if advertising were brought into the new 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 Board. Industry assessment or classification might minimise any expected financial and administrative burden on industry, which the Committee was concerned could come with 'Government classification'.[82]

8.104 If the Australian Government chose to bring outdoor advertising into the new co-regulatory 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 appropriate.

81 Ibid, [2.7].
82 Ibid, [3.57].