

## 12. The New Regulator

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### Summary

12.1 This chapter discusses the ALRC's proposal for a new Regulator with primary responsibility for regulating the new National Classification Scheme. The Regulator would be responsible for a range of functions that are currently performed by the Classification Branch of the Australian Government Attorney-General's Department (Classification Branch); the Director of the Classification Board; and the Australian Communications and Media Authority (ACMA). The Regulator would also have a range of new functions necessary for the operation of the scheme.

12.2 The Regulator would be responsible for most regulatory activities related to the classification of media content—both offline and online. The Classification Board would be retained as an independent statutory body responsible for making some classification decisions, reviewing decisions, and auditing decisions made by industry classifiers.

12.3 The Regulator need not be a stand-alone agency, but might form one part of the ACMA with its broader responsibilities for the regulation of broadcasting, the internet, radio-communications and telecommunications.

## Existing agencies

12.4 The operation of the existing National Classification Scheme involves a number of Commonwealth agencies, as well as state and territory law enforcement and other bodies. These agencies and their roles in regulation of the classification system are briefly described below. For this purpose, ‘regulation’ of the classification system is used broadly to refer to decision-making, administrative and policy functions, as well as to encouraging, monitoring and enforcing compliance with classification laws.

### Attorney-General’s Department

12.5 The Attorney-General’s Department is responsible for dealing with ‘censorship’ matters<sup>1</sup> and the Minister for Home Affairs and Justice for administering the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). The Classification Branch is responsible for:

- providing administrative support to the Classification Board and the Classification Review Board
- assisting with the development of Classification policy and advising on legal matters related to the National Classification Scheme
- providing classification training, and
- administering the Classification Liaison Scheme.<sup>2</sup>

### Classification Board and Classification Review Board

12.6 The Classification Board is responsible for classifying publications, films and computer games. The Classification Review Board reviews Classification Board decisions on application. Both Boards are independent statutory bodies established under the *Classification Act*. As discussed in Chapter 7, the Director of the Classification Board also has a role in relation to authorised industry-based assessors.<sup>3</sup> This role includes authorising industry assessors; revoking such authorisations; and approving and providing training to assessors.<sup>4</sup>

12.7 Under the classification cooperative scheme, neither the Attorney-General’s Department nor the Boards have power to enforce classification laws. As discussed in Chapter 14, the enforcement of classification laws is primarily the responsibility of states and territories. However, the Australian Government provides some assistance in relation to enforcement, through the operation of the Classification Liaison Scheme, which verifies compliance with classification laws and refers breaches to state and territory police or other agencies.

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1 *Administrative Arrangements Order 2010* (Cth).

2 Australian Government Attorney-General’s Department, *What Happened to the Office of Film and Literature Classification (OLFC)?* <<http://www.ag.gov.au/www/cob/classification.nsf/>> at 8 September 2011.

3 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 14, 14B, 17.

4 See *Ibid* ss 22D, 22E; *Classification (Authorised Television Series Assessor Scheme) Determination 2008* ss 4,5; *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* sch 2, [2.1].

## Department of Broadband, Communications and the Digital Economy

12.8 The Australian Department of Broadband, Communications and the Digital Economy (DBCDE) is responsible for dealing with ‘content policy relating to the information economy’<sup>5</sup> and the Minister for Broadband, Communications and the Digital Economy for administering the *Broadcasting Services Act 1992* (Cth).

## Australian Communications and Media Authority

12.9 The ACMA is a statutory agency within the portfolio of the Minister for Broadband, Communications and the Digital Economy. Among its many activities relating to communications and media, the ACMA is responsible for regulation of internet content.<sup>6</sup>

12.10 The ACMA administers co-regulatory arrangements for online content regulation under schs 5 and 7 of the *Broadcasting Services Act*. The role and functions of the ACMA include:

- Investigation of complaints about online content;
- Encouraging the development of codes of practice for the online content service provider industries as well as registering, and monitoring compliance with such codes;
- Providing advice and information to the community about online safety issues, especially those relating to children’s use of the internet and mobile phones;
- Undertaking research into internet and mobile phone usage issues and informing itself and the Minister of relevant trends;
- Liaising with relevant overseas bodies.<sup>7</sup>

12.11 In performing this role, the ACMA is guided by statutory objects and statements of regulatory policy set out in the *Broadcasting Services Act* including, for example, to ensure online content service providers ‘respect community standards in relation to content’, while not imposing ‘unnecessary financial and administrative burdens’ on industry.<sup>8</sup>

12.12 In exercising its enforcement powers, the ACMA must have regard to its enforcement guidelines, which are formulated by the ACMA under s 215 of the *Broadcasting Services Act*. In the enforcement guidelines, the ACMA recognises that co-regulatory arrangements apply to some industry sectors and states that the guidelines ‘will operate in that context when those arrangements apply’.<sup>9</sup> For example, the guidelines set out how the ACMA will exercise its discretion to accept written

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5 *Administrative Arrangements Order 2010* (Cth).

6 Australian Communications and Media Authority, *How regulation works* <[http://www.acma.gov.au/WEB/STANDARD/pc=PUB\\_HOW\\_DIR](http://www.acma.gov.au/WEB/STANDARD/pc=PUB_HOW_DIR)> at 11 September 2011.

7 Australian Communications and Media Authority, *Online Regulation* <[http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC\\_90169](http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_90169)> at 11 September 2011.

8 *Broadcasting Services Act 1992* (Cth) ss 3–4.

9 *Guidelines Relating to the ACMA's Enforcement Powers under the Broadcasting Services Act 1992 2011* (Cth) cl 6.1.

undertakings given by a person that the person will take specified action to comply with an industry code.<sup>10</sup>

### **Australian Customs and Border Protection Service**

12.13 The Australian Customs and Border Protection Service (Customs) administers import and export controls on ‘objectionable’ material at the border. The definitions of ‘objectionable material’ in the *Customs (Prohibited Imports) Regulations 1956* (Cth) and *Customs (Prohibited Exports) Regulations 1958* (Cth) substantially mirror the definition of RC material in the National Classification Code.

12.14 The Attorney-General’s Department provides information and assistance to Customs in relation to assessing whether material is objectionable.<sup>11</sup> There is also an administrative agreement between the parties that outlines their respective roles and responsibilities.<sup>12</sup>

12.15 The role of Customs in this area has been described as providing ‘a dedicated border control that also covers material that may not be intended for commercial use’.<sup>13</sup> This is in contrast with classification, which is generally not done ‘for the purpose of controlling what a person is able to have in his or her own home’.<sup>14</sup>

### **Functions of the new Regulator**

12.16 The ALRC’s proposal for a single regulator is a central element of the new National Classification Scheme, and arises as a logical consequence of regulating the classification of online, offline and broadcast television media content under the same regime. A number of submissions in response to the Issues Paper called for a single regulator for a National Classification Scheme;<sup>15</sup> and many submissions called generally for measures to reduce the administrative complexity of current arrangements.

12.17 The new Regulator’s functions should be based upon functions that are currently performed by the Classification Branch in relation to the classification of publications, films and computer games; and the ACMA, in relation to online and mobile content and broadcast television. In addition, while the Classification Board would be retained, some of its present functions, in their new form, should be conducted by the Regulator.

12.18 These functions include the proposed equivalent of the present powers for the Director of the Classification Board to require content to be submitted for

10 Ibid cls 9.6, 9.7, 9.10, 9.11.

11 Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011.

12 Ibid.

13 Ibid.

14 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [5.16].

15 SBS, *Submission CI 1833*, 22 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

classification—the ‘call in’ power<sup>16</sup> and to authorise industry assessors and approve training for assessors.<sup>17</sup>

12.19 Combining functions currently performed by the Classification Branch, the Director of the Classification Board, and the ACMA in a single regulator will help in the creation of a simpler, more streamlined classification scheme. There are obvious administrative and financial advantages for the Australian Government in having one regulator of media content rather than several, as well as benefits for consumers and industry. It is also consistent with the principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose.<sup>18</sup>

12.20 The new Regulator would also have new functions necessary for the operation of the scheme. These do not currently have equivalents, including those relating to the enforcement of classification laws that are currently the responsibility of state and territory agencies.<sup>19</sup> The proposed functions of the new Regulator are summarised below.

### **Enforcement of classification laws**

12.21 The ALRC proposes that the new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.<sup>20</sup> The Regulator should exercise these powers—just as the ACMA is currently empowered to respond to breaches of the *Broadcasting Services Act*<sup>21</sup>—by taking administrative action, civil action, or referring matters to the Commonwealth Director of Public Prosecutions for the prosecution of a criminal offence. The possible regime of offences and penalties that might apply under the new Act is discussed in Chapter 14.

12.22 In exercising its enforcement powers, including in relation to ensuring compliance with co-regulatory industry codes, the ACMA is guided by statutory objects and statements of regulatory policy set out in the *Broadcasting Services Act*, and by its own enforcement guidelines. These enforcement guidelines provide, for example, that ACMA will use enforcement powers in a manner that ‘involves using the minimum power or intervention necessary to achieve the desired result, consistent with the scale, risk and urgency of the breach’ and ‘is most likely to produce regulatory arrangements which are stable, predictable, and deal effectively with breaches of rules’.<sup>22</sup> The new Classification of Media Content Act might also provide for the issuing by the Regulator of enforcement guidelines.

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16 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23(3), 23A(3), 24(3).

17 *Ibid* pt 2 div 2A.

18 See Ch 4, Principle 7.

19 See Ch 14.

20 Proposal 14–1.

21 *Guidelines Relating to the ACMA's Enforcement Powers under the Broadcasting Services Act 1992 2011* (Cth) cl 5.2.

22 *Ibid*, [3.3], [3.4].

### Complaint handling

12.23 The Regulator should be empowered to handle and resolve complaints about the operation of the new National Classification Scheme.

12.24 The report of the Senate Legal and Constitutional Affairs References Committee review of the classification system (the Senate Committee review) suggested that ‘improved complaints-handling processes must be established across the National Classification Scheme’.<sup>23</sup>

12.25 Under the *Broadcasting Services Act*, complaints about matters covered by an industry code must be made to the relevant content provider in the first instance. If a person does not receive a response within 60 days, or receives a response but considers it to be inadequate, a complaint about that matter can be made to the ACMA.

12.26 In the Senate Committee review, suggestions were made that complaints about online content should be able to be made directly to the ACMA. In response, the AMCA observed that requiring all complaints to be made directly to it—rather than to a content provider, such as a broadcaster, in the first instance—would not be in keeping with co-regulation under the *Broadcasting Services Act*. This co-regulation ‘envisages that [broadcasting] licensees take primary responsibility for the material they broadcast’. The ACMA also expressed concern about the effect such a change would have on its workload.<sup>24</sup>

12.27 The ALRC considers that the starting point should be that complaints about classification matters should be dealt with by the Regulator only where they have not been handled satisfactorily by content providers or industry complaints-handling bodies. This accords with best practice in complaint handling mechanisms, where complaints are dealt with as close as possible to the point of origin, and helps to ensure that the Regulator will deal only with the complaints that are most difficult to resolve or raise systemic issues.

12.28 However, in some cases, it may be difficult for consumers to know where to complain. While the new scheme will simplify the current framework, the Regulator will co-exist with a Classification Board and industry bodies that handle complaints pursuant to industry classification codes approved by the Regulator under the Act or self-regulatory arrangements, such as those operated by the Australian Association of National Advertisers.

12.29 In this context, the Senate Committee recommended the establishment of a classification complaints ‘clearinghouse’, where complaints in relation to classification can be directed and that would be ‘responsible for forwarding them to the appropriate body for consideration’.<sup>25</sup>

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23 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), [12.70].

24 Australian Communications and Media Authority, *Responses to Questions Taken on Notice*, Senate Legal and Constitutional References Committee Hearing 27 April 2011, 13 May 2011.

25 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 29.

12.30 The ALRC agrees that a consumer ‘should not be required to have a detailed knowledge of the classification system, along with the role of the various bodies involved in classification and their associated responsibilities’.<sup>26</sup> As an adjunct to its complaints-handling functions, the Regulator might usefully perform the sort of central coordination role suggested by the Senate Committee. This might involve, for example, running a classification ‘hotline’ or internet portal for the lodgement of complaints.

12.31 Another issue related to complaint handling concerns the discretion of the Regulator to decline to investigate complaints. Generally, under the *Broadcasting Services Act*, the ACMA must investigate a complaint, unless it is satisfied that a complaint is frivolous, vexatious or not made in good faith.<sup>27</sup> The ACMA has noted that:

It is unusual for the ACMA to decide not to investigate a complaint on these grounds and determining whether a matter is frivolous, vexatious or not made in good faith can be resource-intensive in itself. The ACMA does not have any other discretion not to investigate a valid complaint.<sup>28</sup>

12.32 A similar lack of discretion applies to complaints to the ACMA under schs 5 and 7 relating to prohibited or potentially prohibited content<sup>29</sup>—although the ACMA may also decline to investigate a complaint if it has reason to believe that the complaint was made for the purpose of frustrating or undermining the effective administration of the schedules.<sup>30</sup>

12.33 The discretion of other Australian Government regulators is not similarly constrained.<sup>31</sup> The new Regulator should be granted appropriate discretion to determine how best to respond to complaints. Given its wide responsibilities and finite resources, it is critical that the new Regulator be able to prioritise the investigation of complaints. For example, the Regulator may choose to focus on investigating the most serious complaints about content, such as those about online child sexual abuse material, or those complaints that raise systemic issues concerning the operation of industry classification arrangements.

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26 Ibid, [12.71].

27 *Broadcasting Services Act 1992* (Cth) s 38.

28 Australian Communications and Media Authority, *Responses to Questions Taken on Notice*, Senate Legal and Constitutional References Committee Hearing 27 April 2011, 13 May 2011.

29 *Broadcasting Services Act 1992* (Cth) sch 5, cl 26(2)(a); sch 7, cl 43(3)(a).

30 Ibid sch 5, cl 26(2)(b); sch 7, cl 43(3)(b).

31 For example, the Australian Securities and Investments Commission ‘may make such investigation as it thinks expedient’: *Australian Securities and Investments Commission Act 2001* (Cth) s 13; and the Ombudsman may decline to investigate a complaint where it considers that ‘the complainant does not have a sufficient interest in the subject matter of the complaint’ or ‘an investigation, or further investigation, of the action is not warranted having regard to all the circumstances’: *Ombudsman Act 1976* (Cth) s 6(1)(b)(ii)–(iii).

**Question 12–1** How should the complaints-handling function of the Regulator be framed in the new Classification of Media Content Act? For example, should complaints be able to be made directly to the Regulator where an industry complaints-handling scheme exists? What discretion should the Regulator have to decline to investigate complaints?

### Authorising industry classifiers

12.34 The ALRC proposes that some media content should be able to be classified by authorised industry classifiers.<sup>32</sup> The ALRC proposes that the new Regulator have a number of important roles in relation to industry classification, including authorising industry classifiers who have completed training approved by the Regulator.

12.35 At present, the Director of the Classification Board is empowered to authorise and revoke the authorisation of industry assessors (the equivalent of industry classifiers under the new scheme).<sup>33</sup> The ALRC proposes that the new Regulator should undertake these functions. The Regulator should have powers necessary to maintain the integrity of industry classification decisions and to deal with misconduct or incompetence by industry classifiers.

12.36 Removing this function from the Classification Board would mean that the Board would be more able to focus on its role as a classification decision maker and avoid any conflict of interest that may be involved in the Board authorising or revoking the authorisation of other classification decision-makers.

12.37 The ALRC also proposes that the Regulator authorise industry-developed classification instruments—such as online, interactive questionnaires—as suitable for use in making classification decisions.<sup>34</sup>

### Classification training

12.38 Under existing arrangements, the Classification Branch provides classification training to members of the Classification Board and to officers of agencies including the ACMA and Customs.<sup>35</sup> The ALRC proposes that, under the new scheme, the Regulator should be empowered to provide classification training to members of the Classification Board and to industry classifiers.

12.39 Consistency in training is essential for acceptance by the community of more material being classified by industry than is currently the case. The increasing role of industry classification means that it may be impractical or inappropriate for the Regulator to provide, or be a major provider of, classification training. The Regulator

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32 See Ch 7.

33 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) pt 2 div 2A.

34 See Proposal 7–5.

35 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.



should, therefore, also be empowered to approve classification training courses provided by others.

12.40 The ALRC understands that, if recognition for classification training were to be brought within the Australian Qualifications Framework,<sup>36</sup> as discussed in chapter 7, then it is likely that the Regulator would be involved in accreditation of training providers—perhaps working with relevant industry and other groups on auditing classification training programs.

### **Codes of practice**

12.41 The ALRC proposes that the Classification of Media Content Act should provide for the development and operation of industry classification codes of practice.<sup>37</sup> The new Regulator would promote and facilitate industry classification of media content under codes of practice and, in relation to some codes, enforce compliance.

12.42 As discussed in Chapter 11, the Regulator would be responsible for overseeing the development of, and approving, industry codes. The new Regulator should also be empowered to approve any variations of the codes, revoke any of its approvals if required, and maintain a register of such codes of practice—similar to the role currently played by the ACMA in relation to broadcasting and internet codes of practice.

12.43 Where an industry classification code of practice relates to media content that must be classified, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.<sup>38</sup>

### **Liaison**

12.44 The new Regulator should liaise with relevant Australian and overseas media content regulators and law enforcement agencies. For example, under the Classification of Media Content Act, the Regulator would have an obligation to liaise with law enforcement agencies where media content may contain child sexual abuse material, or other illegal content.<sup>39</sup> The ACMA currently liaises with regulatory and law enforcement bodies overseas with the aim of developing cooperative arrangements for preventing and reporting child abuse material that is online.<sup>40</sup>

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36 The Australian Qualifications Framework (AQF) is the national policy for regulated qualifications in Australian education and training.

37 Proposal 11–1.

38 Proposal 11–4.

39 For example, under the *Broadcasting Services Act*, ACMA has an obligation to notify law enforcement agencies where Australian-hosted prohibited or potential prohibited content is also considered to be sufficiently serious: *Broadcasting Services Act 1992* (Cth) sch 7, s 69.

40 See Australian Communications and Media Authority, *Working Together to Fight Online Child Abuse Material* <[http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC\\_90166](http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_90166)> at 11 September 2011.

### Other functions

12.45 The new Regulator might have a number of other functions, although these might also be performed by the Department of Broadband, Communications and the Digital Economy or other department responsible for the new National Classification Scheme. These other functions include:

- providing administrative support to the Classification Board, including in relation to the recruitment and training of Board members;
- assisting with the development of classification policy and legislation, and advising on matters related to the new National Classification Scheme;
- conducting or commissioning research relevant to classification;<sup>41</sup> and
- educating the Australian public about the new National Classification Scheme and promoting media literacy more generally, for example, providing information on appropriate consumer tools such as content filters.

**Proposal 12–1** A single agency ('the Regulator') should be responsible for the regulation of media content under the new National Classification Scheme. The Regulator's functions should include:

- (a) encouraging, monitoring and enforcing compliance with classification laws;
- (b) handling complaints about the classification of media content;
- (c) authorising industry classifiers, providing classification training or approving classification training courses provided by others;
- (d) promoting the development of industry classification codes of practice and approving and maintaining a register of such codes; and
- (e) liaising with relevant Australian and overseas media content regulators and law enforcement agencies.

In addition, the Regulator's functions may include:

- (f) providing administrative support to the Classification Board;
- (g) assisting with the development of classification policy and legislation;
- (h) conducting or commissioning research relevant to classification; and
- (i) educating the public about the new National Classification Scheme and promoting media literacy.

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41 See, eg, Proposal 9–5.