13. Codes and Co-regulation

Contents

Summary

13.1 In this chapter, the ALRC recommends that the Classification of Media Content Act provide for the development and operation of industry classification codes, consistent with statutory obligations to classify and restrict access to media content and with statutory classification categories and criteria.

13.2 The intention is that industry codes may deal with a range of classification-related matters that are too detailed or media-specific to be included in legislation, introducing additional flexibility to the regulatory scheme while meeting underlying policy goals.

13.3 Industry codes might include provisions relating to, for example, methods of restricting access to certain content, the use of classification markings, methods of classifying media content, including through the engagement of authorised industry classifiers, and guidance on the application of statutory classification obligations and criteria to media content covered by the code.

13.4 The chapter examines the possible processes for the development of industry classification codes, and recommends mechanisms for the approval and enforcement of codes by the new Regulator. The ALRC also recommends that the Act should enable the Regulator to enforce compliance with an industry classification code, where the

provisions relate to media content that must be classified or to which access must be restricted.

Regulatory forms

13.5 The development and operation of industry classification codes involves elements of co-regulation. Co-regulation is a regulatory form that can be placed on a continuum of government oversight ranging from self-regulation, through quasi-regulation and co-regulation, to direct government regulation.[1] Some examples of these forms are described below, with reference to aspects of the current classification system.

Self-regulation

13.6 Self-regulation is generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement.

13.7 For example, the content of advertising is subject to a self-regulatory system created by the Australian Association of National Advertisers (AANA) in 1998. The AANA established a Code of Ethics and the Advertising Standards Bureau (ASB), which incorporates an independent Advertising Standards Board to hear complaints regarding advertising content.

13.8 The 'classification' of audio material is also self-regulated, under the *Recorded Music Labelling Code of Practice*.[2] There is no legislation and individual record companies are responsible for labelling recordings under a code that outlines labelling provisions and establishes a complaints-handling mechanism.

13.9 The processes and procedures followed by video-sharing websites and other internet content providers in controlling content that they sell or distribute may also be characterised as a form of self-regulation. These processes include responding to user reporting (or 'flagging') of inappropriate content and methods to detect inappropriate content using algorithms and other technical means. For example, YouTube users click a flag button to report a video which they consider to be inappropriate and flagged videos are routed into 'smart' queues for manual review by a specialist review team before a decision is made whether to take the video down, or age-restrict it.[3]

Quasi-regulation

13.10 Quasi-regulation describes those arrangements where government influences businesses to comply, but which do not form part of explicit government regulation.

13.11 An example of quasi-regulation is the agreement by Telstra, Optus and Primus to filter voluntarily a list of child abuse URLs compiled and maintained by the Australian Communications and Media Authority (the ACMA). This arrangement was

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1 See Australian Government, *Best Practice Regulation Handbook* (2010). The ALRC's usage of these terms is based on this publication.

2 Australian Music Retailers Association and Australian Recording Industry Association, *Recorded Music Labelling Code of Practice* (2003).

3 Google, *Submission CI 2336*.

entered into against the background of the Australian Government's proposed system for mandatory internet service provider level filtering of URLs.[4]

13.12 Arguably, the AANA self-regulatory system for advertising might equally be characterised as quasi-regulation. This is because governments may have regulated this area if a self-regulatory regime did not exist—and may regulate in the future if this regime does not demonstrate its responsiveness to community expectations.[5]

Co-regulation

13.13 Co-regulation typically refers to situations where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced.

13.14 Regulation of radio and television content is co-regulatory. Various industry groups have developed codes under the *Broadcasting Services Act 1992* (Cth). Most aspects of program content are governed by these codes, which include the *Commercial Television Industry Code of Practice* and the *Commercial Radio Australia Code of Practice and Guidelines*. Once implemented, the ACMA monitors these codes and deals with unresolved complaints made under them.

Direct government regulation

13.15 Direct government regulation comprises primary and subordinate legislation. It is the most commonly used form of regulation.[6] Direct government regulation applies to the classification of publications, films and computer games under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*).

Factors in determining regulatory form

13.16 The Australian Government *Best Practice Regulation Handbook* states that direct government regulation should be considered when, among other things: the problem is high-risk, of high impact or significance; the community requires the certainty provided by legal sanctions; or there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles, with no possibility of effective sanctions.[7]

13.17 On the other hand, self-regulation—or by extension, more co-regulation—may be a feasible option if: there is no strong public interest concern, in particular no major public health and safety concerns; the problem is a low-risk event, of low impact or significance; and the problem can be fixed by the market itself—for example, if there are market incentives for individuals and groups to develop and comply with self-

4 See S Conroy (Minister for Broadband Communications and the Digital Economy), 'Outcome of Consultations on Transparency and Accountability for ISP Filtering of RC Content' (Press Release, 9 July 2010).

5 See, eg, 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), viii, rec 2.

6 Australian Government, *Best Practice Regulation Handbook* (2010), 34–35.

7 Ibid, 35.

regulatory arrangements.[8] Practical factors may also favour more self- or co-regulation if the time, effort or cost of government regulation outweighs its benefits.[9]

13.18 In the communications and media context, the ACMA has identified 10 'optimal conditions' for co-regulatory arrangements, including 'environmental' conditions and features of the regulatory scheme. Briefly, the factors favouring co-regulation can be summarised as follows:

- a small number of market players with wide coverage of the industry;
- a competitive market with few barriers to entry;
- homogeneity of products—that is, products are essentially alike or comparable; and
- common industry interest—that is, collective will or genuine industry incentive to co-regulate.[10]

13.19 When used in the right circumstances, it is said that self-regulation and co-regulation can offer a number of advantages over direct regulation. These include:

- greater flexibility and adaptability;
- potentially lower compliance and administrative costs;
- an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly; and
- quick and low-cost complaints-handling and dispute resolution mechanisms.[11]

Existing industry codes

13.20 Codes underpinned by legislation are typical of co-regulation. Sometimes legislation sets out mandatory government standards, but provides that compliance with an industry code can be deemed to comply with those standards. Legislation may also provide for government-imposed arrangements in the event that industry does not meet its own arrangements.[12]

13.21 The ACMA has stated that co-regulatory mechanisms can include legislation that:

- delegates the power to industry to regulate and enforce codes;
- enforces undertakings to comply with a code;

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8 Ibid, 34.

9 For more detailed discussion of the optimal conditions for self- and co-regulatory arrangements, see Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010). See also Australian Public Service Commission, *Smarter Policy: Choosing Policy Instruments and Working with Others to Influence Behaviour* (2009).

10 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010), 10–11.

11 Ibid, 5 citing an OECD study: Centre for Regulated Industries, *Self-regulation and the Regulatory State—A Survey of Policy and Practice* (2002).

12 Australian Government, *Best Practice Regulation Handbook* (2010), 35.

- does not require a code but has a reserve power to make a code mandatory;
- requires industry to have a code and, in its absence, government will impose a code or standard;
- prescribes a code as a regulation but the code only applies to those who subscribe to it—prescribed voluntary codes; and
- prescribes a code as a regulation to apply to all industry members—prescribed mandatory codes.[13]

Codes and classification

13.22 The *Broadcasting Services Act*, the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth) provide varying mechanisms for the development of industry codes concerning the regulation of media content. These codes are discussed briefly below, with reference to their relationship to the classification requirements of the *Classification Act*.

13.23 In relation to online content, sch 7 of the *Broadcasting Services Act* states that the Australian Parliament 'intends that bodies or associations that the ACMA is satisfied represent sections of the content industry should develop codes (industry codes) that are to apply to participants in the respective sections of the industry in relation to their content activities'.[14]

13.24 Schedule 7 provides a process for registering codes when the ACMA is satisfied that:

- the body or association developing the code represents a particular section of the content industry;
- where the code deals with matters of substantial relevance to the community, the code provides appropriate community safeguards or, in other cases, deals with matters in an appropriate manner; and
- there has been adequate public and industry consultation.[15]

13.25 Compliance with an industry code is voluntary unless the ACMA directs a particular participant in the content industry to comply with the code.[16] Failure to comply with such a direction is an offence punishable by criminal, civil and administrative penalties.[17] In addition, the ACMA has power to make an industry standard if there are no industry codes or if an industry code is deficient.[18]

13.26 The content of codes dealing with classification of online material is constrained by *Classification Act* concepts. Schedule 7 of the *Broadcasting Services Act* evinces an

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13 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010), 5.
14 *Broadcasting Services Act 1992* (Cth) sch 7 cl 80.
15 Ibid sch 7 cl 85.
16 Ibid sch 7 cl 89.
17 See Ch 16.
18 *Broadcasting Services Act 1992* (Cth) sch 7 cls 91–94.

intention that industry codes provide that content be assessed according to *Classification Act* categories and criteria; and definitions of 'prohibited content' and 'potential prohibited content' in sch 7 reflect *Classification Act* categories.

13.27 Section 81 of sch 7 prescribes matters that must be dealt with in industry codes for commercial content providers.[19] Notably, these include the engagement of trained content assessors and ensuring that unclassified content likely to be classified MA 15+, R 18+, X 18+ or RC by the Classification Board is not released unless a trained content assessor has assessed the content.

13.28 Commercial television and subscription television codes of practice are less constrained by classification legislation.[20] However, these codes of practice must (for films) apply the film classification system set out in the *Classification Act* and, in the case of commercial television broadcasting, must provide specified time-zone restrictions for M and MA 15+ films.[21]

13.29 Under the *Australian Broadcasting Corporation Act* and the *Special Broadcasting Service Act*, the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) have a duty to develop codes of practice relating to 'programming matters' and to notify those codes to the ACMA.[22]

13.30 There are, however, no statutory requirements relating to the content of the code's classification provisions. This reflects that the ABC and SBS are public broadcasters subject to special governance and accountability arrangements.[23] In theory, this gives the ABC and SBS flexibility to develop their own classification categories and procedures. In practice, however, the ABC Television Program Classification Standard states that it is 'adapted from' the Classification Board's Classification Guidelines;[24] and the SBS Television Classification Code states that it is 'based on' the Classification Board's Classification Guidelines.[25]

Codes and co-regulation

13.31 In the Discussion Paper, the ALRC proposed that the Classification of Media Content Act should provide for the development of 'industry classification codes of

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19 Other matters may also be dealt with: Ibid sch 7 cl 81(3). Such matters include complaint handling and promoting awareness of safety issues: sch 7 cl 82.

20 For example, the *Broadcasting Services Act* permits commercial broadcast and subscription television industries to develop, in consultation with the ACMA, codes of practice that relate to 'preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry', 'methods of ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority' and 'methods of classifying programs that reflect community standards': Ibid s 123.

21 Ibid s 123.

22 *Australian Broadcasting Corporation Act 1983* (Cth) s 8(e)(i); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(j).

23 See, *Australian Broadcasting Corporation Act 1983* (Cth) pt II; *Special Broadcasting Service Act 1991* (Cth) pt 2.

24 Australian Broadcasting Corporation, *Editorial Policies: Television Program Classification—Associated Standard*, 1.

25 Special Broadcasting Service, *Codes of Practice 2006: 4. Television Classification Code*, [4.1].

practice by sections of industry involved in the production and distribution of media content'.[26]

13.32 Stakeholders expressed a range of opinions on the desirability of codes as part of a new classification scheme. Codes received broad support from industry stakeholders in particular,[27] in part due to generally positive experiences of television and online codes under the *Broadcasting Services Act*. Telstra, for example, stated that:

> The use of industry codes allows for the incorporation of technical expertise and detail in the implementation of classification processes, whilst avoiding the inflexibility that would result from an attempt to impose this level of detail through direct regulation.[28]

13.33 Free TV Australia (Free TV) also supported the ALRC's proposals concerning codes. It stated that this aspect of the proposed new classification scheme 'essentially expands the co-regulatory system that currently applies to commercial free-to-air television broadcasters to other sectors', which it considered to be 'working well'.[29]

13.34 Foxtel agreed that any new Act should 'confirm the role of co-regulation as a central tenet' of the classification framework, including

> provisions facilitating the development of industry codes of practice and industry complaints-handling, and the accreditation of industry classifiers. Where the new Act provides statutory criteria for matters such as classification categories and access restrictions, it should also provide, as proposed by the ALRC, for industry-specific guidance on these matters to be given in industry codes of practice.[30]

13.35 In contrast, some stakeholders expressed concern about co-regulatory approaches to classification, including in relation to existing television classification codes.[31] The Australian Council on Children and the Media (ACCM) referred to the complexity and 'tendency to liberalise' of commercial broadcasting codes:

> Overall our experience of industry codes is that they operate mostly as public relations for the industry in question. They make it look like they are doing something, but in fact their main function is to make the industry look better. Industries do not voluntarily stop doing things they otherwise want to do—especially things that make

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26 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 11–1.

27 For example, Free TV Australia, *Submission CI 2519*; Motion Picture Distributors Association of Australia, *Submission CI 2513*; Foxtel, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*. Other stakeholders who expressed support for codes included Arts Law Centre of Australia, *Submission CI 2490*; Collective Shout, *Submission CI 2477*.

28 Telstra, *Submission CI 2469*.

29 Free TV Australia, *Submission CI 2519*. In this context, while there were 2816 complaints made under the Commercial Television Industry Code of Practice in the 2010–11 financial year, only 11% of these complaints concerned classification of content: Free TV Australia, *Commercial Television Industry Code of Practice: Annual Code Complaints Report 2010-11*.

30 Foxtel, *Submission CI 2487*.

31 I Graham, *Submission CI 2507*; Australian Council on Children and the Media, *Submission CI 2495*; Commissioner for Children and Young People Western Australia, *Submission CI 2480*; Lin, *Submission CI 2476*.

> them money … If limits are needed on industry in the public interest, those limits should be imposed by public institutions.[32]

13.36 The Commissioner for Children and Young People (WA) expressed concern about a classification scheme incorporating a co-regulatory approach, including because 'industry codes of practice and self-regulation currently in place, for example, in advertising and print media, are not sufficient to ensure the safety, protection and wellbeing of children and young people'.[33]

Industry codes and the new scheme

13.37 The *Classification Act* provides a model for the classification of publications, films and computer games based on direct regulation and legislative rules, with classification decisions made by an independent statutory body, the Classification Board. The *Broadcasting Services Act* provides a co-regulatory approach under which rules are developed by industry in codes, subject to some legislative requirements, and industry classifies content.[34] Elements of both approaches are incorporated in the ALRC's recommended National Classification Scheme.

13.38 In the ALRC's view, there is a strong community expectation that government will ensure that at least some media content is assessed according to statutory classification criteria before being made available, and that access to at least some media content should be restricted by law.

13.39 On the other hand, conditions for self- or co-regulation exist in some areas, including where there are market incentives for content providers to voluntarily classify material themselves because distributors and consumers of some products want and expect advice about content.

13.40 In this context, the reforms recommended by the ALRC should be seen as introducing more regulation into some areas and reducing regulation in others. The ALRC's scheme combines elements of direct regulation, co-regulation and self-regulation. For example, the ALRC recommends retaining mandatory classification by the Classification Board of some media content, as determined by the Regulator (direct regulation).

13.41 Much other content would be subject to industry classification, sometimes under codes developed by industry. The use of codes would introduce some elements of co-regulation not previously present in regulating publications, films and computer games. However, because industry codes under the Classification of Media Content Act would have to be consistent with statutory obligations to classify and restrict access to some content, and statutory classification criteria, the code process may be characterised as closer to direct regulation than pure co-regulation. That is, industry would only be free to develop its own rules within the constraints of the legislative requirements.

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32 Australian Council on Children and the Media, *Submission CI 2495*.
33 Commissioner for Children and Young People Western Australia, *Submission CI 2480*.
34 *Broadcasting Services Act 1992* (Cth) s 123.

13.42 In some areas, classification is a lower level concern for consumers and the effort or cost of government regulation is not justified. Recognising this, the ALRC recommends that some content no longer be subject to any classification obligations—notably computer games likely to be classified lower than MA 15+.

13.43 Stakeholders generally endorsed the proposed role of industry codes, where industry is able to develop codes to support statutory provisions, and administer those codes under the oversight of the Regulator. Such an approach is consistent with the reform principles that the classification regulatory framework should be adaptive to different technologies, platforms and services; and regulation should be kept to the minimum needed to achieve a clear public purpose.[35]

Content of industry classification codes

13.44 In the Discussion Paper, the ALRC proposed that industry classification codes may include provisions that deal with a range of matters, including guidance on the application of statutory classification obligations and criteria to different kinds of media content; methods of classifying and marking media content; methods of restricting access to certain content; the provision of consumer advice; and complaint handling.

13.45 The non-exhaustive list of topics that might be covered by codes was based on proposed statutory obligations, in respect to which guidance or clarification might be provided in industry codes, and on provisions of sch 7 of the *Broadcasting Services Act*. While sch 7 also provides a separate list of matters that *must* be dealt with in industry codes,[36] this may not be necessary under the Classification of Media Content Act because—unlike under the *Broadcasting Services Act*—there would be overarching statutory obligations to classify, mark and restrict access to content.

13.46 The proposed indicative list of industry code content was well received by stakeholders.[37] Free TV, for example, stated that the list was 'comprehensive and reasonable'.[38] Some concerns were expressed about possible duplication of classification obligations when content providers are operating across a range of platforms and therefore may be subject to more than one industry code;[39] and about codes encouraging inconsistent interpretation of the statutory classification criteria.[40] The ALRC observes that, under the new Act, content will generally only have to be classified once, and that codes are intended to provide guidance on the application of classification criteria, rather than differing interpretations.

35 See Ch 4, Principles 4, 7.
36 *Broadcasting Services Act 1992* (Cth) sch 7 cls 81, 82.
37 For example, Free TV Australia, *Submission CI 2519*; Uniting Church in Australia, *Submission CI 2504*; Foxtel, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Collective Shout, *Submission CI 2477*; Telstra, *Submission CI 2469*.
38 Free TV Australia, *Submission CI 2519*.
39 Ibid; Australian Subscription Television and Radio Association, *Submission CI 2494*.
40 Australian Council on Children and the Media, *Submission CI 2495*.

13.47 There are a range of classification-related matters that are too detailed or media-specific to be included in legislation. For example, the ALRC recommends that statutory obligations be placed on content providers to take reasonable steps to restrict access to R 18+ or X 18+ content to adults.[41] What constitutes reasonable steps may vary greatly, depending on the content and the industry.

13.48 Codes provide the flexibility to provide for what constitutes reasonable steps in relation to, for example, how to restrict access online; promoting and distributing of parental locks and user-based internet filters; and how and where to advertise, package and display hardcopy R 18+ and X 18+ content. For this reason, the ALRC recommends that the Classification of Media Content Act provide that reasonable steps to restrict access to content may be set out in industry codes.

13.49 Industry codes might also contain guidance on how classification markings should be displayed in different media. The ALRC recommends that the Classification of Media Content Act provide that, for content that must be classified and has been classified, content providers must display a classification marking. Exactly what this means for marking, for example, an online computer game, or content on an R 18+ website, may also be clarified in codes of practice.

13.50 Industry codes would also allow participants in media content industries to develop particular arrangements in areas where statutory classification or other obligations do not apply, provided these are consistent with the recommended single set of classification categories and criteria.

13.51 For example, the ALRC recommends that there be no statutory obligation to classify computer games likely to be classified lower than MA 15+. Participants in the computer game industry might, nevertheless, choose to develop a code of practice governing the classification of games likely to be classified below MA 15+. Classification of these games might involve, for example, the use of a self-assessment process such as a 'sophisticated questionnaire specifically designed to generate and assign a classification for computer games in the Australian market'.[42] Under the ALRC's recommendations, participants in the computer game industry might choose to use an authorised classifier or classification instrument, or have their own instrument approved by the Regulator for this purpose.[43]

Recommendation 13–1 The Classification of Media Content Act should provide for the development of industry classification codes by sections of industry or persons involved in the production and distribution of media content; and for the Regulator to request that a body or association representing a particular section of industry develop a code.

41 See Ch 10.
42 Interactive Games and Entertainment Association, *Submission CI 1101*.
43 See Ch 7.

Recommendation 13–2 Industry classification codes may include provisions relating to:

(a) methods of restricting access to certain content;

(b) the use of classification markings;

(c) methods of classifying media content, including by authorised industry classifiers;

(d) guidance on the application of statutory classification criteria;

(e) maintaining records, reporting classification decisions and quality assurance;

(f) protecting children from certain content;

(g) providing consumer information in a timely and clear manner;

(h) providing a responsive and effective means of addressing community concerns, including complaints handling; and

(i) reporting to the Regulator on the administration of the code.

Approval of codes

13.52 In the Discussion Paper, the ALRC proposed that the Regulator should be empowered to approve an industry classification code if satisfied that: the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code; the body or association developing the code represents a particular section of the relevant media content industry; and there has been adequate public and industry consultation on the code.[44]

13.53 Industry stakeholders generally supported the proposal.[45] Free TV stated that the proposed criteria for code approval were 'achievable, practical and flexible'.[46] Telstra supported the proposal, but stated that the Act should provide that the Regulator must approve codes that satisfy the statutory requirements in order to protect against 'potential regulatory scope creep through the imposition of additional obligations in industry codes by the Regulator as a condition of acceptance'.[47]

13.54 The Interactive Games and Entertainment Association (iGEA) also supported the proposal, but submitted that it would be critical to include provisions in the Act to address issues concerning the approval of codes, including:

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44 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 11–3.

45 For example, Free TV Australia, *Submission CI 2519*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

46 Free TV Australia, *Submission CI 2519*.

47 Telstra, *Submission CI 2469*.

- relevant timeframes for Regulator review, public consultation and Regulator approval;
- empowering the Regulator to provide guidance or relief in any transitionary period when an industry classification code of conduct is being considered; and
- outlining any appeal or review mechanism for situations where the Regulator does not approve an industry classification code of practice.[48]

13.55 Some stakeholders expressed concerns about the extent of public consultation that may be required.[49] The ACCM stated:

> Once again this echoes the co-regulatory system for commercial broadcasting. As indicated above, we have been disappointed at the level of scrutiny provided by the ACMA in the last two reviews of that code. In particular, it seems that 'adequate public and industry consultation' consists of inviting and receiving comments, but not necessarily taking notice of them.[50]

13.56 FamilyVoice submitted that the Act should specify at least some of the conditions for public consultation, including 'a minimum period of six weeks for input on draft codes of practice, the release of the final version of the code of practice as submitted to the Regulator for approval, and the opportunity for input directly to the Regulator'.[51]

13.57 The ALRC's proposal was based on provisions of sch 7 of the *Broadcasting Services Act*,[52] under which the ACMA must be satisfied that the body or association developing the code represents a 'particular section' of the media content industry and that there has been public and industry consultation on the code.

13.58 Specifically, sch 7 requires that the ACMA be satisfied that the body or association has published a draft of the code and invited members of the public and participants in that section of the industry to make submissions about the draft within a specified period; and gave consideration to any submissions that were received within that period.[53]

13.59 The ALRC recommends that the Regulator under the Classification of Media Content Act be similarly empowered to approve an industry code. The code should also be required to be consistent with statutory obligations to classify and restrict access to media content and with statutory classification categories and criteria.

13.60 Industry codes might be developed, for example, by the film production and distribution industry, broadcast and subscription television, internet protocol television (IPTV), computer games production and distribution industry, and the internet and digital content industries. While it may sometimes be problematic to define what constitutes a particular section of the media content industry—particularly in the online

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

49 FamilyVoice Australia, *Submission CI 2509*; Australian Council on Children and the Media, *Submission CI 2495*; Collective Shout, *Submission CI 2477*.

50 Australian Council on Children and the Media, *Submission CI 2495*.

51 FamilyVoice Australia, *Submission CI 2509*.

52 *Broadcasting Services Act 1992* (Cth) sch 7 cl 85.

53 Ibid sch 7 cl 85(1)(e), (f).

environment—part of the role of the Regulator would be to ensure that the body or association developing the code is sufficiently representative. As emerging content industries develop, the Regulator would be able to encourage or request the development of codes by new industry groupings. The Regulator may also have to resolve situations where two or more industry representative bodies wish to develop a code dealing with the same subject matter.

13.61 As is the case under sch 7 of the *Broadcasting Services Act*, the Regulator should also have the power to determine an industry standard where a code is desirable but cannot be, or is not, developed by industry. Such standards might be applied to aspects of the 'informal' online content industry—for example, prescribing what would constitute 'reasonable steps' by video-sharing sites to restrict access to R 18+ and X 18+ material.

13.62 In addition, in some circumstances, a code may be replaced with an industry standard that binds all participants in the industry.[54]

Recommendation 13–3 The Classification of Media Content Act should enable the Regulator to approve an industry classification code if satisfied that:

(a) the code is consistent with statutory obligations to classify and restrict access to media content and statutory classification categories and criteria;

(b) the body or association developing the code represents a particular section of the media content industry; and

(c) there has been adequate public and industry consultation on the code.

Recommendation 13–4 The Classification of Media Content Act should enable the Regulator to determine an industry standard if:

(a) there is no appropriate body or association representing a relevant section of industry; or

(b) a request to develop an industry code is not complied with.

Mandatory and voluntary codes

13.63 In the Discussion Paper, the ALRC proposed that, where an industry code relates to media content that must be classified or to which access must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.[55] In contrast, compliance with a code that relates to media content that is not subject to statutory classification obligations would be voluntary.

54 Ibid sch 7 cl 95.

55 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 11–4.

13.64 While this proposal received support from some stakeholders,[56] concern was expressed about how it would operate in practice. In particular, Telstra submitted that caution should be used when attempting to make industry codes 'universally enforceable' against any participant in the relevant part of the media content industry—especially given the 'uneven membership of multiple industry groups dealing with issues related to online content'.[57]

13.65 Telstra considered that the ALRC's proposal created the risk of binding content providers who have not contributed to the development of a code, undermining the objective of 'using industry codes to develop a more detailed implementation of classification obligations reflective of the technical and commercial expertise of industry participants'. It submitted that the Act should include 'checks and balances as to the representativeness of the process for developing an industry code before being empowered to enforce it more broadly'.[58]

13.66 Concerns were also expressed about the possible effects on competition of industry codes:

> If new entrants to an industry are to be covered by a code formulated by incumbents without them having any say in the matter, the incumbents will have an incentive to develop the code in such a way as to disadvantage new entrants. To help prevent this, the Act should require the Regulator to obtain approval from the [Australian Competition and Consumer Commission] before approving a code.[59]

13.67 As discussed above, there are a range of mechanisms by which industry codes of practice may be made enforceable. Under sch 7 of the *Broadcasting Services Act*, compliance with a code is effectively voluntary (or left to the industry to enforce), unless the ACMA directs a particular participant in the industry to comply.[60] A slightly different approach is taken, for example, under the *Competition and Consumer Act 2010* (Cth), which provides that regulations may declare an industry code, or specified provisions of an industry code, to be mandatory or voluntary.[61]

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56 Uniting Church in Australia, *Submission CI 2504*; Foxtel, *Submission CI 2487*; Communications Law Centre, *Submission CI 2484*; Telstra, *Submission CI 2469*.

57 Telstra, *Submission CI 2469*.

58 Ibid.

59 Lin, *Submission CI 2476*. The Australian Competition and Consumer Commission has issued *Guidelines for Developing Effective Voluntary Industry Codes of Conduct*, which include guidance on ensuring codes do not have a negative effect on competition: Australian Competition and Consumer Commission, *Submission CI 2463*.

60 *Broadcasting Services Act 1992* (Cth) sch 7 cl 89.

61 *Competition and Consumer Act 2010* (Cth) s 51AE.

13.68 Given the diversity and rapidly evolving nature of the media content industry, the Regulator should have broad discretion to require compliance with a code. Issues concerning how this discretion should be exercised may be dealt with in enforcement guidelines, similar to those already issued by the ACMA. In existing 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'.[62]

13.69 For example, the guidelines set out how the ACMA will exercise its discretion to accept written undertakings given by a person that provide the person will take specified action to comply with an industry code.[63] Enforcement guidelines might also, for example, provide that, in considering the approval of industry codes, the Regulator will take into account the competitive effect of codes and may consult the Australian Competition and Consumer Commission in this regard.

13.70 The ALRC recommends that the Act should enable the Regulator to enforce compliance with a code against any participant in the relevant section of the media content industry, when an industry classification code relates to media content that must be classified or to which access must be restricted. Compliance with an industry code that relates to media content that is not subject to statutory classification-related obligations should be voluntary.

13.71 For example, the ALRC recommends that feature films and television programs that are both likely to have a significant Australian audience, and made and distributed on a commercial basis, should be classified.[64] If the film production and distribution industry were to develop a code, approved by the Regulator, the Regulator should have the power to require any Australian film production or distribution company to comply with it.

13.72 On the other hand, the ALRC recommends that computer games not likely to be classified MA 15+ or higher need not be classified. As noted above, participants in the computer game industry may choose to develop a code of practice governing how industry participants should classify games likely to be classified below MA 15+, and agree to be bound by the provisions of the code. If so, the Regulator would not be empowered to require a computer game developer or distributor, who had not agreed to be bound by the code, to comply with the code.

62 Australian Communications and Media Authority, *Guidelines Relating to the ACMA's Enforcement Powers Under the Broadcasting Services Act 1992 (Cth)* (2011) cl 6.1.
63 Ibid cls 9.6, 9.7, 9.10, 9.11.
64 Ch 6.

Recommendation 13–5 The Classification of Media Content Act should enable the Regulator to enforce compliance with a code against any participant in the relevant section of the media content industry, where an industry classification code relates to media content that must be classified or to which access must be restricted.

Self-regulatory codes

13.73 Some existing self-regulatory codes may continue to operate alongside the Classification of Media Content Act. For example, the *Recorded Music Labelling Code of Practice* developed by the Australian Music Retailers Association (AMRA) and the Australian Recording Industry Association (ARIA)[65] applies a three-tiered labelling scheme (Level 1, Level 2 and Level 3)[66] to CDs and other recorded music products. The *Recorded Music Labelling Code of Practice* is adhered to by ARIA and AMRA members on a voluntary basis.[67]

13.74 Under the Act there would be, in practice, no statutory obligation to classify music—only an obligation to restrict access to R 18+ content. This obligation is consistent with the obligation under the *Recorded Music Labelling Code of Practice* to restrict access to Level 3 recorded music products. The *Recorded Music Labelling Code of Practice* would continue to operate as a self-regulatory regime.

13.75 However, ARIA and AMRA would also have the option of bringing these arrangements under the Act as a code. Provided the new code was considered to be consistent with the classification criteria provided by the Act, it could be approved by the Regulator, giving the code a legislative basis, but otherwise leaving the operation of the music labelling scheme untouched.

13.76 The scheme of industry self-regulation applying to advertising under the AANA Code of Ethics could also continue to operate alongside the Classification of Media Content Act, and the statutory obligation to restrict access to advertising likely to be R 18+.[68] The House of Representatives Standing Committee on Social Policy and Legal Affairs recommended that the Australian Government Attorney-General's Department review advertising regulation and, 'if the self-regulatory system is found

65 Australian Music Retailers Association and Australian Recording Industry Association, *Recorded Music Labelling Code of Practice* (2003).

66 These categories can be seen as broadly consistent with the M, MA 15+ and R 18+ categories of the *Classification Act*.

67 ARIA and AMRA argued for the continuation of self-regulation based on the *Recorded Music Labelling Code of Practice*: The Australian Recording Industry Association Ltd and Australian Music Retailers' Association, *Submission CI 1237*.

68 The AANA, Advertising Standards Board and the Outdoor Media Association submitted that advertising should continue to be regulated under the AANA Code of Ethics regime: Australian Association of National Advertisers (AANA), *Submission CI 2285*; Outdoor Media Association, *Submission CI 1195*; Advertising Standards Bureau, *Submission CI 1144*.

lacking', impose a 'co-regulatory system on advertising with government input into advertising codes of practice'.[69]

13.77 If the Government were to determine that advertising content should be subject to new classification obligations—for example, so that outdoor and billboard advertisements likely to be rated M or higher are not permitted—a code of practice under the Classification of Media Content Act could provide guidance on assessing advertisements using the criteria for this classification category.[70]

69 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. See also Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), rec 23.

70 See Ch 8.