13. Enacting the New National Classification Scheme

Contents

Summary

13.1 This chapter discusses the legislative and constitutional basis for the existing Commonwealth-state cooperative scheme for the classification of publications, films and computer games (the classification cooperative scheme) and the *Broadcasting Services Act 1992* (Cth). The chapter proposes that the new Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia, supplemented by state referrals of power, if necessary.

The new Classification of Media Content Act

13.2 As discussed in Chapter 4, the ALRC proposes that a new National Classification Scheme be enacted providing consolidated and modernised laws to replace the classification cooperative scheme and the Commonwealth co-regulatory scheme for regulating online content and content provided by mobile carriers contained in schs 5 and 7 of the *Broadcasting Services Act*.

13.3 As the centrepiece of this new framework, the ALRC proposes a new Classification of Media Content Act, establishing a new classification scheme applicable to offline and online media content.

13.4 An important part of the rationale for having a new National Classification Scheme is to avoid inconsistency in the enforcement of classification laws. Chapter 14 discusses enforcement in more detail and presents an alternative framework for a National Classification Scheme, applicable if the Australian Government determines that the states and territories should retain enforcement powers.

The classification cooperative scheme

13.5 As explained in Chapter 2, the classification cooperative scheme is based on the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (the *Classification Act*) and complementary state and territory enforcement legislation and is underpinned by the Intergovernmental Agreement on Censorship (the Intergovernmental Agreement).

13.6 The *Classification Act* was enacted by the Parliament of Australia to provide for the classification of publications, films and computer games for the ACT, pursuant to its power to make laws for the government of a territory (the 'territories' power).[1] The *Classification Act* specifically provides that it is intended to form part of a Commonwealth, state and territory scheme for classification and the enforcement of classifications.[2]

13.7 The *Classification Act* itself provides that Commonwealth, state and territory ministers must agree to any amendment to the Classification Code and on classification guidelines or amendments to those guidelines.[3] The Intergovernmental Agreement, under which the scheme is established and maintained, may be amended only by unanimous agreement of the Commonwealth, states and territories.[4] A party may withdraw from the agreement by one month's notice in writing.[5]

State and territory classification powers

13.8 Some states and territories retain powers to classify or re-classify material.[6] Four jurisdictions—Queensland, South Australia, Tasmania and the Northern Territory—have legislated concurrent classification powers.[7]

13.9 For example, under the *Classification of Computer Games and Images Act 1995* (Qld), a classification officer has the power to classify computer games that have yet to be classified under the *Classification Act*.[8] Further, if a computer game is classified under the Queensland Act and is subsequently also classified by the Classification Board under the *Classification Act*, the Queensland Act provides that the Commonwealth classification decision has no effect in Queensland.[9]

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1 *Australian Constitution* s 122.
2 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 3.
3 Ibid ss 6, 12.
4 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), cl 3(2).
5 Ibid, cl 3(3).
6 In addition, a state or territory minister is entitled to require the Commonwealth Minister to apply to the Classification Review Board for a review of a decision: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 42.
7 *Classification of Publications Act 1991* (Qld) s 9; *Classification of Films Act 1991* (Qld) s 25CA; *Classification of Computer Games and Images Act 1995* (Qld) s 5; *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 16; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 41A; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 16.
8 *Classification of Computer Games and Images Act 1995* (Qld) s 5.
9 Ibid s 4(2). No inconsistency with a law of the Commonwealth arises, in terms of s 109 of the

13.10 Three jurisdictions also reserve the power to reclassify publications, films and computer games already classified by the Classification Board.[10] For example, in South Australia, the South Australian Classification Council may make classification decisions with respect to publications, films or computer games that prevail, in South Australia, over any inconsistent decisions made under the Commonwealth *Classification Act*.[11]

13.11 While the classification criteria used by the South Australian Classification Council are identical to those applied by the Classification Board, the Council's Annual Report notes that 'there may still be a difference between the two bodies because the Council is comprised of South Australian residents and endeavours to consider the standards accepted by the South Australian community in particular'.[12]

13.12 In other jurisdictions, any divergence from a classification decision made under the classification cooperative scheme would require amendment to state or territory legislation and, arguably, breaching the Intergovernmental Agreement.[13] It has been observed that

> Such action would seem to be rather drastic for the occasional controversial classification decision. However, although State and Territory jurisdictions may find it difficult or burdensome to overturn a decision, it is still possible for State authorities to choose not to prosecute offences related to banned works.[14]

13.13 Under the classification cooperative scheme, the enforcement of classification laws is primarily the responsibility of states and territories. The *Classification Act* itself states that 'provisions dealing with the consequences of not having material classified and the enforcement of classification decisions are to be found in complementary laws of the States and Territories'.[15]

13.14 As discussed in Chapter 14, state and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. Penalties for similar offences also differ.

Constitution (discussed below), because the Classification Board decision may only have effect in Queensland through the operation of the Queensland Act itself.

10 *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 17; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 41A; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 16.

11 *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 16, 17. In 2005, the South Australian Classification Council reclassified the film, *9 Songs*, as X 18+, after it had received an R 18+ rating from the Classification Board and been cleared for national release: South Australian Classification Council, *Annual Report 2005–06*, 3. More recently, the Council reclassified a DVD version of the film, *A Serbian Film*, as RC, after it had received an R 18+ rating from the Classification Board.

12 South Australian Classification Council, *Annual Report 2008–09*, 2.

13 M Ramaraj Dunstan, 'Australia's National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions' (2009) 37 *Federal Law Review* 133, 143.

14 Ibid, 143.

15 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 3.

Commonwealth legislative powers

13.15 A threshold question concerning a National Classification Scheme centred on a new Classification of Media Content Act, is the extent to which the Parliament of Australia has legislative power to enact legislation establishing such a framework.

13.16 The Parliament of Australia may legislate for the classification of online and mobile content and broadcasting relying on s 51(v) of the *Australian Constitution* (the 'communications' power). This is one constitutional basis for schs 5 and 7 of the *Broadcasting Services Act*.

13.17 It appears that the Parliament of Australia also has power to make classification laws with respect to publications, films and computer games:

- imported into, or exported from, Australia or dealt with in the course of interstate trade—relying on s 51(i) of the *Constitution* (the 'trade and commerce' power);[16]
- uploaded to, downloaded from, sold, distributed, or advertised on the internet or sent through the post—relying on s 51(v) of the *Constitution* (the 'communications' power);
- sold, distributed, advertised or otherwise dealt with by foreign or trading corporations—relying on s 51(xx) of the *Constitution* (the 'corporations' power);[17] and
- sold, distributed, advertised or otherwise dealt within the territories—relying on s 122 of the Constitution (the 'territories' power).[18]

13.18 The external affairs power contained in s 51(xxix) of the *Constitution* might also be invoked, for example, with respect to:

- restrictions on child pornography—recognising Australia's international obligations under the United Nations *Convention on the Rights of the Child*;[19] or
- constraints on freedom of expression—recognising Australia's international obligations under the *International Covenant on Civil and Political Rights*.[20]

13.19 Despite this potential wide scope of Commonwealth legislative power, there may be gaps—some areas of activity that should be covered by the new National Classification Scheme but to which Commonwealth legislative powers may not extend.

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16 For example, *Customs Act 1901* (Cth) s 233BAB.

17 For example, the *Broadcasting Services Act* relies on the corporations power to provide an additional constitutional basis for rules about the disclosure of cross-media relationships: *Broadcasting Services Act 1992* (Cth) s 52A.

18 This is the constitutional basis of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

19 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), art 19.

20 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), art 19.

For example, it may be problematic to apply Commonwealth classification laws to material published by individuals or unincorporated entities and sold or distributed only within one state.

Referral of state powers

13.20 While any gaps in Commonwealth legislative power may not be significant, and might be left to the states to regulate, such gaps could be covered by a referral of state powers to the Commonwealth under s 51(xxxvii) of the *Australian Constitution*.

13.21 Section 51(xxxvii) of the *Australian Constitution* gives the Parliament of Australia power to make laws with respect to matters referred to the Parliament by the Parliament of any state. The states have referred a number of matters to the Commonwealth including, for example, corporations law and counter-terrorism.[21]

13.22 To address any remaining or potential gaps, a state referral of powers may be stated to cover all matters relating to the operation of new Commonwealth classification legislation to the extent that the matter is not otherwise included in the legislative powers of the Parliament of the Australia.[22]

Inconsistency of Commonwealth and state laws

13.23 Where the power to legislate is held concurrently by the Commonwealth and the states, as it is under most of the heads of power on which a new Classification of Media Content Act would rely, questions involving inconsistency of laws may arise.

13.24 Section 109 of the *Constitution* provides that when 'a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid'.

13.25 As discussed above, a number of states have concurrent classification powers with respect to publications, films and computer games also covered by the Commonwealth *Classification Act*.[23]

13.26 Schedules 5 and 7 of the *Broadcasting Services Act* provide expressly for concurrent operation of state and territory laws. Both schedules state that it is the intention of the Parliament that the schedules are 'not to apply to the exclusion of a law of a State or Territory to the extent to which that law is capable of operating concurrently'.[24]

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21 *Corporations Act 2001* (Cth) s 3; *Criminal Code* (Cth) s 100.3.

22 See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW) and cognate state and territory legislation; *Corporations Act 2001* (Cth) s 3.

23 The *Classification Act* provides expressly for the concurrent operation of State and Territory laws in relation to material prohibited in prescribed areas of the Northern Territory: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 100.

24 *Broadcasting Services Act 1992* (Cth) sch 5 cl 90; sch 7 cl 122.

ALRC's views

13.27 One principle for reform is that classification regulation should be focused upon content rather than means of delivery.[25] This suggests that the same rules should apply to the classification of all classifiable content—offline and online.[26] Such a model would also be consistent with the reform principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose and should be clear in its scope and application.

13.28 As discussed in Chapter 2, there are two regimes for classification of media content: under the classification cooperative scheme; and schs 5 and 7 of the *Broadcasting Services Act*. The ALRC considers that the framework for any new National Classification Scheme should unify these laws, as far as possible, and amalgamate the functions of existing regulators.

13.29 Given that the Commonwealth is responsible for regulating online content, using the legislative powers of the Parliament of Australia is the most practical way to ensure that any new framework for the classification of publications, films and computer games 'aligns with the Commonwealth's approach to regulating Internet content' under the *Broadcasting Services Act*.[27] There was considerable support expressed in submissions for the idea that the Parliament of Australia should enact new national classification laws—whether using Commonwealth legislative powers or powers referred by the states, where necessary.[28]

13.30 The potential scope of Commonwealth legislative power in this area is broad and may be sufficient to legislate nearly all aspects of a new National Classification Scheme—especially as virtually all important media content will, in the future, be available on the internet or through other electronically distributed means. The Parliament of Australia is clearly able to legislate more broadly in relation to classification of media content than it has done to date.

13.31 If there are some areas of activity that should be covered by the new National Classification Scheme, and to which Commonwealth legislative powers may not extend, a referral of power by the states would ensure that Commonwealth classification legislation is comprehensive in its coverage and not vulnerable to constitutional challenge.

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25 See Ch 4, Principle 8.

26 This position is widely supported by stakeholders: eg, Screen Australia, *Submission CI 2284*, 15 July 2011; Internet Industry Association, *Submission CI 2445*, 28 July 2011; National Civic Council, *Submission CI 2226*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; Telstra, *Submission CI 1184*, 15 July 2011; The Communications Council, *Submission CI 1188*, 16 July 2011; Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011.

27 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

28 For example, Internet Industry Association, *Submission CI 2445*, 28 July 2011; A Hightower and Others, *Submission CI 2159*, 15 July 2011; S Ailwood and B Arnold, *Submission CI 2156*, 15 July 2011; SBS, *Submission CI 1833*, 22 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011; Free TV Australia, *Submission CI 1214*, 15 July 2011.

13.32 The Senate Legal and Constitutional Affairs References Committee reached similar conclusions in its review of the existing classification scheme in 2011. The Senate Committee recommended that the Australian Government request 'the referral of relevant powers by states and territories to the Australian Government to enable it to legislate for a truly national classification scheme'.[29] In the event that this was not able to be negotiated before June 2012, the Senate Committee recommended that the Government 'prepare options for the expansion of the Australian Government's power to legislate for a new national classification scheme'.[30]

13.33 In the ALRC's view, it seems unnecessary to seek referral of powers as a first step, because the Commonwealth's legislative powers already may be sufficient and it is uncertain whether the states would be able to agree on a referral of power.

13.34 In constitutional terms, the new Classification of Media Content Act should be drafted to 'cover the field'. That is, the Act should contain an express intention that it is to be exclusive within its field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*. This would mean that, for example, state legislation allowing for the classification or re-classification of media content under existing concurrent powers would be inoperative.

13.35 As discussed in Chapter 14, some state and territory enforcement legislation also contains provisions dealing with the regulation of online content, making it, for example, an offence to upload 'objectionable material' or 'material unsuitable for minors'.[31] This may provide another reason for the Australian Government to 'cover the field' and avoid inconsistent application of offences concerning online content.

13.36 State and territory law is not excluded by schs 5 and 7 of the *Broadcasting Services Act*. As a result, the states and territories 'are free to enact laws imposing additional classification obligations leaving open the prospect of costly and inefficient jurisdictional inconsistencies being imposed on the providers of online content in Australia'.[32] Telstra submitted that Commonwealth legislation touching on classification in this area should provide explicitly that it is intended to exclude concurrent State and Territory laws.[33]

13.37 If the Australian Government determines that the states should retain concurrent powers in some areas—for example, in relation to restrictions on the sale or display of certain material such as magazines, or in relation to uploading media content onto the internet—the new Classification of Media Content Act would need to contain provisions reserving these powers to the states.

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29 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 10.

30 Ibid, Rec 11.

31 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 56, 57, 57A, 58.

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

33 Ibid.

Proposal 13–1 The new Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

Proposal 13–2 State referrals of power under s 51(xxxvii) of the *Australian Constitution* should be used to supplement fully the Parliament of Australia's other powers, by referring matters to the extent to which they are not otherwise included in Commonwealth legislative powers.