15. Enacting the New Scheme

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Summary

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15.2 The ALRC recommends that the Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme. This conclusion is dictated by the need for classification law to respond effectively to media convergence and the desirability of consistent classification laws, decision making and enforcement.

15.3 The ALRC concludes that the potential scope of Commonwealth legislative power in this area is broad and likely to be sufficient to legislate all significant aspects of a new National Classification Scheme.

15.4 The ALRC also recommends that the new Act should express an intention that it is to cover the field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*.

The Classification of Media Content Act

15.5 As discussed in Chapter 5, the ALRC recommends that a new National Classification Scheme be enacted to provide consolidated and modernised laws to replace the classification cooperative scheme and the co-regulatory schemes for regulating television, online content and content provided by mobile carriers contained in the *Broadcasting Services Act*.

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

15.7 An important part of the rationale for having a new scheme is to avoid inconsistency in the enforcement of classification laws. Chapter 16 discusses enforcement in more detail.

The classification cooperative scheme

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

15.9 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]

15.10 The *Classification Act* itself provides that Commonwealth, state and territory ministers must agree to any amendment to the National 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]

State and territory classification powers

15.11 Some states and territories retain powers to classify or reclassify material.[5] Four jurisdictions—Queensland, South Australia, Tasmania and the Northern Territory—have legislated concurrent classification powers.[6]

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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). A party may withdraw from the agreement by one month's notice in writing: *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(3).

5 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.

6 *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.

15.12 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*.[7] 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.[8]

15.13 Three jurisdictions also reserve the power to reclassify publications, films and computer games already classified by the Classification Board.[9] 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*.[10]

15.14 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'.[11]

15.15 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, breach the Intergovernmental Agreement.[12] 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.[13]

15.16 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

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7 *Classification of Computer Games and Images Act 1995* (Qld) s 5.

8 Ibid s 4(2). No inconsistency with a law of the Commonwealth arises, in terms of s 109 of the *Constitution* (discussed below), because the Classification Board decision may only have effect in Queensland through the operation of the Queensland Act itself.

9 *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.

10 *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+ classification from the Classification Board: 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.

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

12 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.

13 Ibid, 143.

and the enforcement of classification decisions are to be found in complementary laws of the States and Territories'.[14]

15.17 As discussed in Chapter 16, state and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. Penalties for similar offences also differ.

Commonwealth legislative powers

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

15.19 The Parliament of Australia has power to make classification laws with respect to content:

- 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);[15]
- sold, screened or distributed online or sent through the post—relying on s 51(v) of the *Constitution* (the communications power);[16]
- advocating the doing of a terrorist act—relying on s 51(vi) of the *Constitution* (the defence power);[17]
- sold, screened, provided online or otherwise distributed by foreign or trading corporations—relying on s 51(xx) of the *Constitution* (the 'corporations' power);[18] and
- sold, screened, provided online or otherwise distributed in the territories—relying on s 122 of the *Constitution* (the 'territories' power).[19]

15.20 The external affairs power contained in s 51(xxix) of the *Constitution* may 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*;[20]

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

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

16 This is one constitutional basis for schs 5 and 7 of the *Broadcasting Services Act*.

17 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A.

18 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.

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

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

- constraints on freedom of expression—recognising Australia's international obligations under the *International Covenant on Civil and Political Rights*;[21] and
- suppression of obscene publications—recognising Australia's international obligations under the *Convention for the Suppression of the Circulation and Traffic in Obscene Publications*.[22]

Enacting the new Act

15.21 In the Discussion Paper, the ALRC proposed that the Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.[23]

15.22 This proposal was widely supported by stakeholders.[24] Telstra, for example, considered that there is 'adequate constitutional power' for the Australian Parliament to enact the Classification of Media Content Act and noted that

> modern media content industries are national and frequently international in nature. Differing state based classification regimes significantly increase regulatory compliance costs for industry with little consumer benefit. In this context, ensuring a consistent and certain national classification regime is important for the success of the Australian classification scheme.[25]

15.23 Similarly, the National Association for the Visual Arts observed:

> It is hard to see how different standards can be justified around a cohesive country with a small population like Australia, especially in the digital age where communication is instantaneous. These differences serve only to cause confusion, especially where state borders are simply lines on maps. This especially is the case where currently some state legislation can be used to override the decisions of the Classification Board …[26]

15.24 Other stakeholders, including the Attorney General of Western Australia and the Victorian Government, expressed opposition to the Australian Government having sole responsibility for classification of media content and favoured the retention of aspects of the classification cooperative scheme.[27]

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

22 *Convention for the Suppression of the Circulation and Traffic in Obscene Publications*, 12 September 1923, [1935] ATS 19 (entered into force 7 August 1924) as varied by the *Protocol to amend the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*, 12 November 1947, [1947] ATS 16 (entered into force 12 November 1947).

23 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 13–1.

24 Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*; Foxtel, *Submission CI 2487*; S Ailwood, *Submission CI 2486*; New South Wales Council for Civil Liberties, *Submission CI 2481*; National Association for the Visual Arts, *Submission CI 2471*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

25 Telstra, *Submission CI 2469*.

26 National Association for the Visual Arts, *Submission CI 2471*.

27 Victorian Government, *Submission CI 2526*; FamilyVoice Australia, *Submission CI 2509*; Collective

15.25 The Victorian Government expressed the view that, rather than the Australian Government 'taking full legislative and enforcement responsibility for content regulation as the solution to the existing challenges to the scheme', reforms to the existing cooperative arrangements could 'ameliorate many of the acknowledged problems' with the efficient operation of the National Classification Scheme.[28]

> For example, problems associated with inconsistency across jurisdictions could be overcome through the creation of model provisions that could be adopted either through an applied laws regime or through mirror legislation. Difficulties associated with media convergence could be offset through more clearly describing and distinguishing the regulatory responsibility of Victoria and the Commonwealth and by ensuring that the regulation of online content is complementary to 'offline' content and applies the same standards … Furthermore, the governance and decision-making processes underpinning the NCS could be revised with a view to enhancing efficiency and cooperation between participating jurisdictions.[29]

15.26 The Attorney General of Western Australia submitted that the classification cooperative scheme, which he considered to operate satisfactorily, 'ought not be replaced by a centralised Commonwealth regime'. Rather, reform of the National Classification Scheme should take place within the framework of a new cooperative scheme.[30]

15.27 Among other things, the Attorney General stated that the challenges of media convergence could be dealt 'legislatively and administratively' within the framework of a cooperative scheme; the need for Commonwealth, state and territory ministers to reach unanimous agreement on amendments to the Classification Code and guidelines 'demonstrates the strength of the cooperative arrangements' and ensures that account is taken of differing views; and inconsistencies in state and territory enforcement legislation are necessary.[31]

15.28 Classification law needs to respond effectively to media convergence and the ensure consistent classification of content, decision making and enforcement. The ALRC recommends that the Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme.

15.29 A central principle for reform is that, in an environment of converging media, classification regulation should be focused upon content rather than the means of delivery.[32] This suggests that, as far as possible, the same rules should apply to the classification of all classifiable content—offline and online. 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.

Shout, *Submission CI 2450*; Attorney General of Western Australia, *Submission CI 2465*.

28 Victorian Government, *Submission CI 2526*.

29 Ibid.

30 Attorney General of Western Australia, *Submission CI 2465*.

31 Ibid.

32 See Ch 4, Principle 8.

15.30 There are currently several regimes for classification of media content: under the classification cooperative scheme; and co-regulatory schemes for regulating television, online content and content provided by mobile carriers contained in the *Broadcasting Services Act*. The ALRC considers that the framework for any new scheme should unify these laws and amalgamate, as far as possible, the functions of existing agencies and departments responsible for content classification and regulation.

15.31 Given that the Australian Government 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 approach to regulating online content. There was considerable support expressed in submissions for the idea that the Parliament of Australia should enact new national classification laws with this coverage.

15.32 The potential scope of Commonwealth legislative power in this area is broad and likely to be sufficient to legislate for all significant aspects of a new 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.

Referral of state powers

15.33 The Discussion Paper noted that, 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 *Constitution*.[33]

15.34 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.[34] That is, if there are some areas of activity that should be covered by the new scheme, and to which Commonwealth legislative powers may not extend, such a referral of power by the states would be intended to ensure that the legislation is comprehensive in its coverage and not vulnerable to constitutional challenge.

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33 *Australian Constitution* s 51(xxxvii) 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: *Corporations Act 2001* (Cth) s 3; *Criminal Code* (Cth) s 100.3.

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

15.35 The Senate Legal and Constitutional Affairs References Committee, in its review of the existing classification scheme in 2011, 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'.[35] However, 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'.[36]

15.36 In the Discussion Paper, the ALRC proposed that state referrals of power should be used in enacting the Classification of Media Content Act.[37] Some stakeholders supported the idea of referral of powers, at least where reform cannot be implemented effectively using Commonwealth legislative powers alone.[38] Free TV Australia, for example, stated that referrals might 'deal with the problematic inconsistencies that currently exist between Commonwealth and State legislation'.[39]

15.37 In the ALRC's view, it is unnecessary for the Australian Government to seek referral of powers because the Commonwealth's legislative powers are sufficient to enact the Classification of Media Content Act.

15.38 In summary, the Australian Parliament has power to enact legislation for the classification of media content and the enforcement of classification decisions where content is being sold, screened, provided online or otherwise distributed:

- using a communication service;
- by a foreign or Australian trading or financial corporation; or
- in a territory.

15.39 Commonwealth legislative power would also reach content:

- imported into, or exported from, Australia, or dealt with in the course of trade and commerce between states, between a state and a territory, or between territories; or
- that may be classified Prohibited because it is obscene or advocates a terrorist act.

15.40 The Discussion Paper noted that it might be 'problematic' to apply Commonwealth classification laws to material sold and distributed only within one

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

36 Ibid, Rec 11.

37 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 13–2.

38 Arts Law Centre of Australia, *Submission CI 2490*; Watch On Censorship, *Submission CI 2472*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; Free TV Australia, *Submission CI 2452*.

39 Free TV Australia, *Submission CI 2452*.

state. However, this limitation in the coverage of a Commonwealth-only scheme would only apply where the activities do not involve:

- a foreign or Australian trading or financial corporation;
- a communications service; or
- content that is Prohibited because it is obscene or advocates terrorism.

15.41 This limitation in the reach of the Classification of Media Content Act does not appear critical to the success of the overall regime, in particular considering the centrality of communications services (that is, the internet and other communications networks) to content provision.

Inconsistency of Commonwealth and state laws

15.42 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 Classification of Media Content Act would rely, questions involving inconsistency of laws may arise.

15.43 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'.

15.44 Schedules 5 and 7 of the *Broadcasting Services Act* expressly provide 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'.[40]

15.45 As state and territory law is not excluded by schs 5 and 7 of the *Broadcasting Services Act*, 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'.[41]

15.46 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*.[42]

15.47 In the Discussion Paper, the ALRC suggested that the Classification of Media Content Act should be drafted so that state legislation allowing for the classification or re-classification of media content under existing concurrent powers would be

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

41 Telstra, *Submission CI 1184*.

42 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.

inoperative. However, some stakeholders favoured the retention of these concurrent powers.[43] FamilyVoice, for example, stated that there was:

> A legitimate role for 'competitive federalism' in which an individual state (or territory) may opt for stricter laws in response to perceived community attitudes in that jurisdiction.[44]

15.48 Telstra stated that it welcomed the suggestion that the Classification of Media Content Act should 'cover the field' and noted that 'the absence of such a statement with respect to online content regulation under the *Broadcasting Services Act* is a source of unnecessary regulatory uncertainty for online content providers'.[45]

15.49 In the ALRC's view, the Classification of Media Content Act should be drafted to 'cover the field' in constitutional terms. 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.

15.50 A 'cover the field' provision would need to be drafted carefully to ensure it is not overly broad and is targeted—for example, to cover laws with respect to the 'classification of media content and the enforcement of such classification decisions'.

15.51 There are many state and territory laws which deal with the distribution of content, which it is not intended that the new Act displace. These include criminal laws (other than those contained in state and territory classification enforcement legislation)—for example, those prohibiting the distribution of child pornography.

15.52 A number of complexities will arise in considering the desirable application of a 'cover the field' provision. For example, as discussed in Chapter 16, some state and territory enforcement legislation contains provisions dealing with the regulation of online content, making it an offence to upload certain types of content.

15.53 The *Classification (Publications, Films and Computer Games) (Enforcement Act) 1995* (Vic) provides that a person must not use an 'on-line information service to publish or transmit, or make available for transmission' certain types of material, including 'objectionable material' and 'material unsuitable for minors'.[46] 'Objectionable material' and 'material unsuitable for minors' are defined, only in part, by reference to classification categories.[47]

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43 FamilyVoice Australia, *Submission CI 2509*; Collective Shout, *Submission CI 2477*; Attorney General of Western Australia, *Submission CI 2465*.

44 FamilyVoice Australia, *Submission CI 2509*.

45 Telstra, *Submission CI 2469*.

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

47 Ibid s 56.

15.54 The Classification of Media Content Act would make it an offence to upload Prohibited content. The extent to which such a provision in Commonwealth legislation would (or should) invalidate the Victorian provision, or similar state or territory offences remains to be resolved.

Consultation with states and territories

15.55 The Victorian Government suggested that, if the Australian Government were to take sole responsibility for classification laws, it should have an obligation to consult with state and territory governments on policy matters of significance to the scheme.

15.56 The Victorian Government advocated legislative requirements for ongoing consultation on, and state and territory government endorsement of, significant policy changes. Significant policy changes were seen to include changes in relation to: classification categories and criteria; restrictions on access to content (for example, display requirements) or related offences and penalties; the use of co-regulatory codes of conduct; and the form of any public consultation in relation to classification matters.[48] The Victorian Government submitted that consultation obligations should be 'entrenched in the governance framework underpinning the content regulation scheme' to ensure consultation 'is meaningful and to allow Victoria to make informed contributions to policy proposals'.[49]

15.57 The fact that, under the ALRC's recommendations, the Australian Government would have sole responsibility for classification laws does not rule out the need for consultation with the states and territories about the operation of these laws.

15.58 However, the ALRC does not consider that specific consultation obligations need to be imposed by legislation. Australian Government policy and practice recognises the importance of consultation with states and territories, including through ministerial councils. The Regulator can also be expected to consult interested stakeholders before making significant regulatory decisions and the *Legislative Instruments Act 2003* (Cth) requires appropriate consultation to be undertaken before a legislative instrument is made, complementing existing Government policy and practice.

15.59 Further, under the Classification of Media Content Act, state or territory governments would continue to be consulted on the membership of the Classification Board,[50] have standing to request reviews of classification decisions made by the Classification Board or industry classifiers, and be involved in the enforcement of classification laws through the activities of state and territory police forces.

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48 Victorian Government, *Submission CI 2526*.

49 Ibid.

50 As is currently the case under *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 48(3). See Ch 7.

Recommendation 15–1 The Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

Recommendation 15–2 The Classification of Media Content Act should express an intention that it cover the field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*.