16. Enforcing Classification Laws

Contents

Summary

16.1 This chapter discusses enforcement of classification laws under 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).

16.2 Under the classification cooperative scheme, the enforcement of classification laws is primarily the responsibility of states and territories. These arrangements contribute to problems of inconsistency in offence and penalty provisions between Australian jurisdictions and lack of compliance with classification laws.

16.3 An important part of the rationale for replacing the existing National Classification Scheme is to avoid inconsistency in enforcement of classification laws and associated penalties. The ALRC concludes that the Australian Government should be responsible for the enforcement of classification laws and makes recommendations for a regime of offences and penalties.

Enforcement of classification laws offline and online

16.4 The following material describes the offences and penalties relevant to the enforcement of current classification laws, including in relation to:

- offline content under the classification cooperative scheme—mainly by state and territory law enforcement agencies; and
- online content under the *Broadcasting Services Act*—mainly by the Australian Communications and Media Authority (the ACMA).

16.5 These laws include those that:

- impose obligations to classify media content according to prescribed criteria;
- impose prohibitions or restrictions on access to media content, or the sale, distribution or advertising of content; or
- provide for offences and penalties in relation to other classification laws.

Enforcement under the classification cooperative scheme

16.6 Under the classification cooperative scheme, state and territory enforcement legislation prohibits the sale, distribution and advertising of unclassified material; and restricts the sale, distribution and advertising of classified material in various ways.

16.7 State and territory enforcement legislation also provides that the Director of the Classification Board may require 'submittable publications', films or computer games to be submitted for classification.[1] Failure to comply with a notice 'calling in' a publication, film or computer game (a call in notice) is an offence under state and territory laws.

State and territory offences

16.8 State and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. The main types of offence concern:

- selling, screening, distributing or advertising unclassified material;
- failing to comply with restrictions on the sale, distribution and advertising of classified material; and
- failing to comply with call in notices.

Offences in relation to unclassified material

16.9 State and territory enforcement legislation provides for offences in relation to selling, screening, distributing or advertising unclassified material. For example, in NSW, it is an offence to:

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1 Except in the ACT, where the offence is contained in the Commonwealth Act: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23(3), 23A(3), 24(3).

- sell or publicly exhibit an unclassified film;
- sell or deliver a submittable publication; or
- sell or publicly demonstrate an unclassified computer game.[2]

16.10 Similar offences apply in all other state and territory jurisdictions, with minor variations in formulation.[3]

Offences in relation to classified material

16.11 State and territory enforcement legislation provides for offences in relation to selling, screening, distributing or advertising certain categories of classified material (or material that, if classified, would be classified as being in a certain category). Offences vary significantly in relation to:

- the kinds of classified material that can be sold, screened, distributed, advertised or possessed; and
- how classified material can be sold, screened, distributed or advertised.

16.12 These differences can be illustrated by reference to X 18+ films. While the sale or public exhibition of X 18+ films is prohibited in all states, the ACT and the Northern Territory permit it,[4] subject to various restrictions. Similarly, while Queensland prohibits the selling, distributing or advertising of Category 1 Restricted and Category 2 Restricted publications,[5] these publications may be sold in all other states and territories.

16.13 State and territory enforcement legislation contains provisions regulating how classified material can be sold, distributed or advertised. These provisions vary, particularly in relation to where certain material may be sold and how it may be displayed. For example, in 2009, South Australia enacted new laws restricting the display and promotion of R 18+ films. These impose requirements to display material for an R 18+ film in a different area of business premises from material for other films and with a prescribed notice warning that the material may cause offence.[6] These requirements are unique to South Australia.

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2 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 6, 19, 27.

3 See, eg, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 6, 15, 25, 34.

4 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ss 9, 22; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 49. However, the Commonwealth Act prohibits the possession or control of Category 1 Restricted and Category 2 Restricted publications, X 18+ films, and RC material by persons in prescribed areas of the Northern Territory: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 101–102.

5 *Classification of Publications Act 1991* (Qld) s 12.

6 *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 40A, inserted by *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Act 2009* (SA).

16.14 Penalties for similar offences also differ between jurisdictions. For example, the maximum penalty for failing to comply with a call in notice is as follows:

- Queensland $2,000;
- Victoria $11,945; and
- NSW $11,000 for an individual (and $22,000 for a corporation).[7]

Offences in relation to call in notices

16.15 All states and territories have similar offence provisions relating to failure to comply with call in notices issued by the Director of the Classification Board. For example, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) provides that the Director may call in for classification:

- publications that are submittable publications;[8]
- unclassified films that are not exempt films; and
- computer games that contain contentious material, and unclassified games that are not exempt.[9]

State and territory law enforcement agencies

16.16 In most jurisdictions, state and territory police are responsible for enforcing classification laws.[10] In the ACT, classification laws are enforced by ACT Policing and by the ACT Office of Regulatory Services.[11]

16.17 In Queensland, the Department of Employment, Economic Development and Innovation enforces classification laws using Office of Fair Trading inspectors. Police do not investigate or prosecute alleged classification offences, unless the complaint involves suspected child exploitation.[12]

The Classification Liaison Service

16.18 The Australian Government provides some assistance in relation to enforcement, through the operation of the Classification Liaison Scheme (CLS). The Attorney-General's Department operates the CLS—a joint Australian Government, state and territory initiative.

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7 *Classification of Films Act 1991* (Qld) s 25CA(3); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 60(3), 60A(3), 61(3); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46(2), 46A(2), 47(2).

8 See *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5 definition of 'submittable publication'.

9 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46, 46A, 47.

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

11 Ibid.

12 See, Explanatory Notes State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld).

16.19 The primary functions of the CLS are to educate industry about legal obligations under the National Classification Scheme and to verify compliance with classification laws. In this context, CLS officers visit premises throughout Australia checking whether classifiable material complies with classification laws and refer possible breaches of the law to police and other law enforcement agencies.[13]

Customs and Border Protection Service

16.20 As discussed in Chapter 13, the Australian Customs and Border Protection Service (Customs) identifies and confiscates 'objectionable material' at the Australian border. The definitions of 'objectionable material' in the *Customs (Prohibited Imports) Regulations 1956* (Cth) and *Customs (Prohibited Exports) Regulations 1958* (Cth) substantially mirror the definition of material classified RC under the *Classification Act* and National Classification Code.

Enforcement under the *Broadcasting Services Act*

Television content

16.21 Under the *Broadcasting Services Act*, commercial television content is regulated under a system of industry-developed codes of practice, which must be approved by the ACMA.[14]

16.22 The ACMA acts as an independent adjudicator where complaints about matters relating to codes of practice—including under codes of practice notified by the Australian Broadcasting Corporation and the Special Broadcasting Service[15]—are not resolved between the complainant and the television station.

16.23 Where ACMA finds a breach of a code of practice, it may take enforcement action by imposing an additional condition on a licence or accepting an enforceable undertaking.[16]

Online content

16.24 Under schs 5 and 7 of the *Broadcasting Services Act*, the ACMA investigates complaints about online content that the complainant believes to be 'prohibited content' or 'potential prohibited content'. Prohibited content and potential prohibited content are defined with reference to the classification categories in the *Classification Act*. The ACMA and content or hosting service providers may apply to the Board for

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

14 In addition, licence conditions regulate matters such as tobacco and therapeutic goods advertisements, sponsorship announcements on community television and the broadcast of political matter; and compulsory standards determined by the ACMA regulate Australian content and children's program content.

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

16 *Broadcasting Services Act 1992* (Cth) s 205W.

classification of content.[17] The steps the ACMA may take following an investigation, including the issuing of a take-down notice, are summarised in Chapter 2.

16.25 Schedules 5 and 7 of the *Broadcasting Services Act* provide for a range of offences, punishable by criminal, civil and administrative penalties.

16.26 Schedule 5 contains criminal offences concerning contravention of 'online provider rules',[18] including contravening an industry code or industry standard.[19] The maximum penalty for contravening an online provider rule or an ACMA direction with respect to an online provider rule is 50 penalty units ($5,500)[20] for an individual and $27,500 for a body corporate. These are continuing offences, so that a person who contravenes the provisions is guilty of a separate offence in respect of each day during which the contravention continues.[21]

16.27 Schedule 7 provides criminal, civil and administrative penalties for non-compliance with 'designated content/hosting service provider rules', which include the rules relating to prohibited content.[22] It is a criminal offence to contravene a designated content/hosting service provider rule[23] or a written direction from the ACMA with respect to a contravention of such a rule.[24] The maximum penalty for these offences is 100 penalty units ($11,000) for an individual and $55,000 for a body corporate. Again, these are continuing offences.

16.28 In addition, sch 7 provides that these contraventions are 'civil penalty provisions' and a person is deemed to commit a separate contravention in respect of each day during which the contravention continues.[25] Such penalties must not exceed the maximum penalty that could have been imposed on conviction for the corresponding criminal offence.[26]

16.29 Finally, a range of administrative 'quasi-penalties'[27] apply to contraventions of designated content/hosting service provider rules. For example, where there is a contravention, the ACMA may apply to the Federal Court for an order that the person cease providing the designated content/hosting service.[28] In addition, contraventions of

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17 Ibid sch 7 cl 22.

18 See Ibid sch 5 cls 79, 82, 83.

19 For example, provisions of the Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008), obliging internet service providers to make Internet Industry Association Family Friendly Filters available.

20 *Broadcasting Services Act 1992* (Cth) sch 5 cls 82–83.

21 Ibid sch 5 cl 86.

22 Ibid sch 7 cl 53(6).

23 Ibid sch 7 cl 106.

24 Ibid sch 7 cl 108.

25 Ibid sch 7 cls 107, 108(7)–(8).

26 Ibid s 205F(4).

27 Administrative 'quasi-penalties' have been defined as those administrative actions that require the exercise of discretion that goes beyond a mechanistic application of the relevant legislation—such as licensing decisions—as opposed to true administrative penalties where monetary penalties are imposed administratively as with, for example, charges and interest payable under the *Taxation Administration Act 1953* (Cth): see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2002), [2.124], [2.146].

28 *Broadcasting Services Act 1992* (Cth) sch 7 cl 110.

civil penalty provisions may have an effect on related ACMA decisions under the *Broadcasting Services Act*—for example, in relation to whether a company is a suitable licensee or a suitable applicant for a licence, such as a subscription television broadcasting licence.[29]

State and territory online content regulation

16.30 Some state and territory enforcement legislation contains provisions dealing with matters beyond the classification of publications, films and computer games and including the regulation of online content. For example, the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) makes it an offence to 'use an on-line information service to publish or transmit, or make available for transmission' objectionable material, child pornography or 'material unsuitable for minors'—the latter category being defined by reference to classification categories.[30]

16.31 At the time the Broadcasting Services (Online Services) Bill 1999 (Cth) was introduced, it was intended that the Commonwealth would be responsible for regulating the activities of internet service providers and internet content hosts and the Attorney-General would encourage the development of uniform state and territory offence provisions, creating 'offences for the publication and transmission of proscribed material by users and content creators'. However, such a scheme did not eventuate and the regulation of internet content in the states and territories continues to 'vary drastically'.[31]

Enforcement problems

Classification cooperative scheme

16.32 Problems with the enforcement of classification laws under the classification cooperative scheme were identified in the 2011 Senate Legal and Constitutional Affairs Committee review of the National Classification Scheme. The Senate Committee examined the effectiveness of the call in notice procedure and the enforcement of classification laws by the states and territories.[32]

16.33 The report concluded that several aspects of the enforcement system require urgent attention. These included:

- the lack of enforcement of call in notices;
- the operations and resourcing of the CLS; and
- inconsistent provisions in state and territory enforcement legislation.[33]

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29 Ibid s 98.

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

31 C Penfold, 'Child Pornography Laws: The Luck of the Locale' (2005) 30(3) *Alternative Law Journal* 123, 125.

32 See, Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Ch 6.

33 Ibid, recs 12, 13, 15–21.

Online regulation

16.34 As discussed in various contexts elsewhere in this Report, enforcing classification laws in relation to online media content poses significant challenges, including:

- the quantity of online content;
- the fact the content is dynamic or mutable;
- the number of persons producing content;
- that content is produced and hosted all over the world; and
- the difficulty of determining age and of restricting content.

Enforcement under Commonwealth law

16.35 The existing classification cooperative scheme, under which the Commonwealth classifies publications, films and computer games, and the states and territories enact complementary enforcement legislation, has resulted in substantial variations in state and territory enforcement provisions. This situation can be seen as inconsistent with the whole idea of a 'national scheme' for classification.

16.36 There are also inconsistencies in the regulation of classifiable content between the classification cooperative scheme and schs 5 and 7 of the *Broadcasting Services Act*. For example, content classified X 18+ is prohibited content under the *Broadcasting Services Act*, but may be sold as a DVD or magazine in some Australian jurisdictions.

16.37 In response to the Issues Paper, many stakeholders emphasised the importance of consistency in the enforcement of classification laws, including in relation to international standards. Lack of consistency was identified as causing a number of problems, including higher compliance costs for media content publishers and distributors.[34]

16.38 Some stakeholders—including some state or territory governments—may consider it an advantage for states and territories to be able to implement their own enforcement arrangements. For example, the Attorney General of Western Australia stated that inconsistent laws may be necessary because 'local communities and States may, for very good reasons, have differing views on what classification levels ought to apply'—as is the case with X 18+ films.[35]

16.39 In contrast, the Victorian Government referred to the 'diminishing relevance of State and Territory borders in an era of national distribution' and to the proliferation of

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34 See Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), [14.37].

35 For example, Attorney General of Western Australia, *Submission CI 2465*. The extent to which community standards relevant to classification may differ between states and territories is a matter that might be tested by research.

online content as making such inconsistencies harder to justify.[36] Arguably, in 'today's digital media landscape, the concept of state boundaries is no longer applicable'.[37]

16.40 As the report of the Senate Legal and Constitutional Affairs Committee Inquiry observed, the fact that state and territory law enforcement agencies are responsible for law enforcement regarding classification matters is a 'particularly disjointed and fractured arrangement of the so-called "cooperative scheme"'.[38]

16.41 There was broad support from stakeholders, in responses to the Discussion Paper,[39] for classification laws to be enforced under Commonwealth, rather than state and territory, law.[40] The New South Wales Council for Civil Liberties, for example, noted that it is 'unsatisfactory that activities that are acceptable in one state or territory are illegal in another'.[41] Free TV Australia reinforced that

> any enforcement provisions should be set out in Commonwealth legislation. A single set of central and uniform laws more appropriately deals with the realities of the content distribution environment and will eliminate inconsistencies that currently exist.[42]

16.42 The ALRC recommends that the Classification of Media Content Act provide for enforcement of classification laws under Commonwealth law. The Act should require media content providers to have certain content classified—whether by the Classification Board or by authorised industry classifiers—and provide offences and penalties for failure to do so in accordance with the requirements of the legislation and approved industry codes. The Classification of Media Content Act should also provide for restrictions on access to content, and on the sale, screening, provision online or other distribution of content.

Alternative approach

16.43 Under the ALRC's recommendations, existing inconsistencies in state and territory legislation concerning restrictions on the sale, distribution or advertising of classifiable publications, films and computer games would be resolved in the Classification of Media Content Act—for example, in relation to the sale and distribution of X 18+ films and DVDs.

16.44 The Discussion Paper noted that, for political or pragmatic reasons, the Australian Government may consider that the states and territories should retain some enforcement powers. While it did not consider this desirable, the ALRC proposed that, if this were the case, a new intergovernmental agreement should be entered into under

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36 Victorian Government, *Submission CI 2526*.
37 SBS, *Submission CI 1833*.
38 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 175.
39 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 14–1.
40 ACP Magazines, *Submission CI 2520*; Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*; New South Wales Council for Civil Liberties, *Submission CI 2481*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.
41 New South Wales Council for Civil Liberties, *Submission CI 2481*.
42 Free TV Australia, *Submission CI 2519*.

which the states and territories agree to enact legislation to provide for the enforcement of classification laws, with respect to publications, films and computer games only.[43]

16.45 Under such an agreement, Commonwealth, state and territory ministers would agree on the best approach to classification-related offences and penalties and to apply, or enact, uniform provisions. Without further agreement between the Commonwealth, states and territories, leaving enforcement to the states and territories would be likely to result in a new scheme with similar inconsistencies to those that exist at present.

16.46 The existing classification cooperative scheme has been criticised,[44] because the *Classification Act* 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;[45] and the intergovernmental agreement under which the scheme is established and maintained may be amended only by unanimous agreement.[46]

16.47 The need for unanimity has been criticised[47] and it has been suggested that any new intergovernmental agreement should provide only that amendments require the support of the Australian Government and six other parties, including the ACT.[48]

16.48 Two main approaches to implementing a new Commonwealth, state and territory classification cooperative scheme appear available. First, agreement might be reached on adopting enforcement provisions as part of a complementary 'applied' law scheme for enforcement of classification laws. Under such a scheme, provisions would be enacted by one jurisdiction (most likely the Commonwealth), and then applied by other jurisdictions.[49] Alternatively, the states and territories might enact mirror legislation—that is, one jurisdiction enacts a law that is then enacted in similar terms by the other jurisdictions.[50]

16.49 A number of stakeholders supported continued state and territory responsibility for enforcement laws under a new intergovernmental agreement.[51] The Attorney General of Western Australia submitted that the ALRC should more clearly set out the

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43 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 14–2.

44 I Graham, *Submission CI 1244*; MLCS Management, *Submission CI 1241*.

45 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 6, 12.

46 *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).

47 I Graham, *Submission CI 1244*. Also *Confidential Submission CI 1185*, 15 July 2011 (agreement of 6 of 9 jurisdictions should be required). MLCS Management stated that the existing Intergovernmental Agreement 'creates logistical and practical difficulties in dealing with classification issues' and the need to gain unanimous agreement on significant issues hampers change: MLCS Management, *Submission CI 1241*.

48 I Graham, *Submission CI 1244*.

49 A recent example of such a scheme is the Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth).

50 The uniform Evidence Acts are an example of mirror legislation, although the original Acts have diverged somewhat over time.

51 Victorian Government, *Submission CI 2526*; Motion Picture Distributors Association of Australia, *Submission CI 2513*; FamilyVoice Australia, *Submission CI 2509*; Collective Shout, *Submission CI 2477*; Attorney General of Western Australia, *Submission CI 2465*.

'federal cooperative alternative to a centralised classification scheme'.[52] The Victorian Government considered that alternatives to sole Commonwealth responsibility including model legislation or an applied law regime should be 'discussed by all jurisdictions at an appropriate time, and the merits of such alternatives thoroughly tested'.[53] John Dickie suggested that further consideration be given to a 'possible supervisory federal structure' incorporating the ALRC's other reforms, to act as a 'fallback' position in the event states and territories retain enforcement powers.[54]

Offences and penalties

16.50 If, as is recommended, the Classification of Media Content Act provides for the enforcement of classification laws under Commonwealth law, an appropriate regime of offences and penalties should be incorporated in the Act, in accordance with best practice guidance.

16.51 Best practice guidance in the Commonwealth law context includes the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. This provides information about, among other things, provisions of the *Criminal Code* (Cth) and *Crimes Act 1914* (Cth) that have a bearing on the way that offences and related provisions should be framed; other legal and policy considerations that are relevant to how offence, civil penalty and enforcement provisions are framed; and suggested precedents for various types of offence, civil penalty and enforcement provisions.[55]

16.52 One starting point for framing new offence and penalty provisions might be those set out in the *Broadcasting Services Act*—after taking into account any changes to the *Broadcasting Services Act* that may result from the conclusions of the Convergence Review.[56]

16.53 Existing state and territory provisions are also starting points for the framing of new offences and penalties. Some states, for example, have enacted infringement notice schemes applicable to minor breaches of classification laws.

16.54 Under an infringement notice scheme, a non-judicial officer is empowered to give a notice alleging the offence to a suspected offender providing that the suspected offender may pay a specified penalty to avoid prosecution.[57] For example, in South Australia, offences under the *Classification (Publications, Films and Computer Games) Act 1995* (SA) are subject to 'expiation fees', set at around 5% of the

52 Attorney General of Western Australia, *Submission CI 2465*.
53 Victorian Government, *Submission CI 2526*.
54 J Dickie, *Submission CI 2457*.
55 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007).
56 See Ch 1.
57 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

maximum fine.[58] Failure to comply with a call in notice, for instance, is punishable by a maximum fine of $5,000 and may be subject to an expiation fee of $315.[59]

16.55 In the Discussion Paper, the ALRC proposed that the Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with restrictions on the sale, screening, distribution and advertising of classified material; statutory obligations to classify media content or to restrict access to media content; provisions of industry codes or directions of the Regulator.[60]

16.56 The ALRC also proposed that breaches of the new Act should be subject to criminal, civil and administrative penalties similar to those under the *Broadcasting Services Act*;[61] and the Australian Government should consider whether the Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.[62]

16.57 Stakeholders provided a range of comments about how enforcement provisions should operate in relation to classification laws. Free TV Australia, for example, stated that criminal offences for breach of the Act should be 'reserved for acts that are particularly serious or likely to cause significant harm to the community' and that the 'compliance and enforcement regime is proportionate, and framed to punish the most damaging breaches'. In particular, offences should apply only to:

> failure to comply with a statutory obligation to classify content … where that content is likely to be rated R 18+ or above. It should not apply in cases where the 'must classify' rule may be arguable—for example, in relation to a current affairs program on commercial free-to-air television, where there is some dispute over whether the content satisfies the description of 'current affairs'. Limiting the offence provision to instances where exposure to the content may cause harm to minors is supported by the underlying rationale of the classification regime, and means that the consequences will be commensurate with the breach.[63]

16.58 Another stakeholder commented in similar terms that:

> it is not appropriate to punish people, especially individuals engaging in non-commercial publication, for an inability to accurately predict the decisions of the Classification Board. No offences should apply to people who publish unclassified content in an honest belief that it was not likely to be classified in such a way as to make their action illegal, even if their belief would not be regarded as reasonable by a

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58 In SA, expiation fees generally must not be more than 25% of the maximum fine prescribed for the offence: *Expiation of Offences Act 1996* (SA) s 5(3).

59 *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 24A(4). NSW and Western Australia have enacted similar schemes. The ALRC understands in none of these jurisdictions have infringement notices actually been issued in relation to classification matters.

60 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 14–3.

61 Ibid, Proposal 14–4.

62 Ibid, Proposal 14–5.

63 Free TV Australia, *Submission CI 2519*.

> person with a full knowledge of the classification criteria and the tendencies of the Classification Board (although higher-level RC content may be an exception).[64]

16.59 Stakeholders also emphasised the need for offences and penalties to provide a proportionate response to non-compliance with classification-related obligations. The Australian Home Entertainment Distributors Association stated that 'the sanctions regime should involve graduated response mechanisms starting with educational notices, escalate to warnings and then finally some sort of sanction'.[65] Free TV Australia also submitted that 'a range of graduated enforcement actions' should be available to the Regulator, including:

- acceptance of a voluntary undertaking, for example, in relation to training or quality assurance;
- acceptance of an enforceable undertaking;
- in the event of a repeated failure to comply with a Code, the imposition of a Standard or Rule; and
- in the case of repeated egregious breaches, the issue of an infringement notice.[66]

16.60 Other stakeholders expressed concerns about the idea of basing offence and penalty provisions on those of the *Broadcasting Services Act*.[67] Irene Graham noted that offences under sch 7 of the *Broadcasting Services Act* apply to generally commercial 'designated content/hosting service providers' and involve significant monetary penalties, and may not be a suitable model for provisions applicable to non-commercial content providers who are covered by the Classification of Media Content Act.

> The types of offences in sch 7 of BSA are, in the writer's opinion, totally unsuitable for application to many types of online content providers, and some offline providers under ALRC proposals, as are offences in States' Classification Enforcement Acts.[68]

16.61 Amy Hightower also noted that a clear distinction should be drawn between commercial operators, non-commercial operators and individuals for the purposes of any form of enforcement.[69]

16.62 Other stakeholders also made specific comments on offences and penalties. For example, Free TV Australia expressed particular concern that simple failure to comply with an industry code should not be an offence, given the wide range of obligations that may be imposed by codes.[70]

16.63 The Interactive Games and Entertainment Association stated that it generally supported an infringement notice scheme for more minor breaches of the new Act,

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64 Lin, *Submission CI 2476*.
65 Australian Home Entertainment Distribution Association, *Submission CI 2478*.
66 Free TV Australia, *Submission CI 2519*.
67 I Graham, *Submission CI 2507*; A Hightower, *Submission CI 2511*.
68 I Graham, *Submission CI 2507*.
69 A Hightower, *Submission CI 2511*.
70 Free TV Australia, *Submission CI 2519*.

provided these were clearly identified.[71] FamilyVoice commented that while infringement notice schemes can be an appropriate means of dealing with minor breaches, they 'are counterproductive if the scheme reduces the penalty to such insignificance that its imposition fails to provide any deterrent to the committing of the offence or breach'.[72] Another stakeholder noted that infringement notice schemes 'are problematic in principle because they impose costs and risks on people who exercise their right to defend themselves in court'.[73]

Drafting offence and penalty provisions

16.64 The Discussion Paper proposed that the penalty regime provided by sch 7 of the *Broadcasting Services Act* apply to offences under the Classification of Media Content Act. However, this was only intended to indicate that a modern, flexible regime of penalties would be required—one that provides for criminal, civil and administrative penalties. The *Broadcasting Services Act* serves as one sensible starting point in this regard.

16.65 In addition, it may be desirable to implement an infringement notice scheme for minor offences. The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states that an infringement notice scheme 'may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective'.[74]

16.66 The ALRC has not chosen to develop detailed recommendations on how the offence and penalty provisions in the Classification of Media Content Act should be drafted. This would require offence-specific consideration of different options for imposing liability, the relevant physical and fault elements of offences, penalty benchmarks, extraterritorial application and other matters which are beyond the present capacity of the Inquiry to resolve. Furthermore, the appropriate framing of offences and penalties is dependent on the eventual framing of classification-related obligations under the new Act.

16.67 The ALRC recommends simply that the Classification of Media Content Act provide a flexible range of compliance and enforcement mechanisms. These should allow the Regulator, depending on the circumstances, to issue notices to comply with provisions of the Act, industry codes or standards; accept enforceable undertakings; pursue civil penalty orders; refer matters for criminal prosecution; and issue infringement notices.

16.68 The Act should provide for the imposition, depending on the circumstances, of criminal, civil and administrative penalties in relation to failing to comply with notices of the Regulator; an industry code or standard; restrictions on the sale, screening,

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71 Interactive Games and Entertainment Association, *Submission CI 2470*.
72 FamilyVoice Australia, *Submission CI 2509*.
73 Lin, *Submission CI 2476*.
74 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

distribution and advertising of media content; statutory obligations to restrict access to media content; and statutory obligations to classify and mark media content.

16.69 For example, the Classification of Media Content Act might provide for:

- A criminal offence applicable to intentionally making content available to the public, knowing or being reckless as to whether the content is, or would be, Prohibited content.
- A criminal offence and civil penalty applicable to failing to comply with notices from the Regulator ordering that reasonable steps be taken to restrict access to R 18+ or X 18+ content.
- Infringement notices to be issued by the Regulator—providing an alternative to prosecution for minor offences or civil litigation—for example, in relation to failing to properly mark content or comply with any restrictions on the display of content.
- Administrative action by the Regulator to remove the authorisation of an industry classifier.

16.70 Other chapters provide more discussion of how some of the classification-related obligations provided by the Classification of Media Content Act may be enforced by the Regulator.

Conducting enforcement activity

16.71 As discussed in Chapter 14, the Regulator would be responsible for most regulatory activities related to the classification of media content—both offline and online—and including encouraging, monitoring and enforcing compliance with classification laws.

16.72 The Regulator would initiate criminal prosecutions through the Office of the Commonwealth Director of Public Prosecutions (CDPP),[75] bring civil proceedings and take administrative actions, such as withdrawing authorisation of an industry classifier. The Regulator might be empowered to prosecute some more minor offences and could, for example, issue infringement notices, if such a scheme were implemented.

16.73 The ALRC recommends that the Regulator issue enforcement guidelines explaining the factors it will take into account and the principles it will apply in exercising its enforcement powers. By analogy, in exercising its enforcement powers, the ACMA must have regard to enforcement guidelines formulated under a provision of the *Broadcasting Services Act*.[76] These provide, among other things, for a 'graduated approach' so that enforcement is 'commensurate with the seriousness of the

75 The CDPP is responsible for the majority of prosecutions under Commonwealth criminal law—although some regulators such as the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission, have power to prosecute some offences.

76 *Broadcasting Services Act 1992* (Cth) s 215.

breach concerned'.[77] The enforcement guidelines state that the ACMA will use its powers in a manner that 'involves using the minimum power or intervention necessary to achieve the desired result, consistent with the scale, risk and urgency of the breach' and 'is most likely to produce regulatory arrangements which are stable, predictable, and deal effectively with breaches of rules'.[78]

16.74 In relation to classification-related enforcement activity, enforcement guidelines should explain the range of factors the Regulator will take into account in deciding whether to take action with respect to particular items of media content.

16.75 The ALRC would expect these factors to include, for example, the likely size and age of the Australian audience; whether the content has been the subject of complaints, and if so, the number of complaints; the likely classification of the content; any relevant international classification decision; and whether issuing a notice is likely to have any practical effect.

16.76 The size and age of the Australian audience is clearly relevant to determining whether, for example, film and television content has a significant Australian audience and classification requirements should be enforced. However, it may also be relevant to prioritising enforcement action in other contexts in that the Regulator may be expected to focus on content most likely to be viewed by an Australian audience.

16.77 While the Regulator should have discretion not to investigate complaints, the number of non-frivolous complaints received about a particular item of content may be relevant to decisions about whether or not to pursue enforcement action.

16.78 The Regulator's attention may be expected to be focused more on Prohibited content rather than content at low classification levels. The equivalence of international classification decisions may also be relevant to decisions about whether to enforce Australian classification requirements on international content, as will limitations on the effective enforcement of Australian law on overseas entities.

16.79 Other bodies may also be involved in enforcing classification laws under the Classification of Media Content Act. For example, the AFP might undertake the investigation of serious criminal offences, such as providing content that would be classified as Prohibited over the internet on a commercial basis.

16.80 In addition, there is no reason why state and territory law enforcement agencies should not also be involved in the enforcement of criminal offences under the Classification of Media Content Act. Under existing legislation, state and territory police may perform functions related to the enforcement of Commonwealth legislation. These include powers of arrest, executing search warrants and confiscating property.[79]

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77 Australian Communications and Media Authority, *Guidelines Relating to the ACMA's Enforcement Powers Under the Broadcasting Services Act 1992 (Cth)* (2011), [3.3].

78 Ibid, [3.3], [3.4].

79 See, for example, *Crimes Act 1914* (Cth) pt 1AA, div 4 (powers of arrest) and pt IE (forfeiture of child pornography material).

State and territory authorities may also institute proceedings for any Commonwealth offence in state and territory courts.[80]

16.81 The willingness of state and territory law enforcement agencies to become involved in classification-related enforcement may become an issue that needs to be resolved through inter-governmental discussions, including about the funding of enforcement activities.

Recommendation 16–1 The Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.

Recommendation 16–2 The Classification of Media Content Act should provide a flexible range of compliance and enforcement mechanisms allowing the Regulator, depending on the circumstances, to:

(a) issue notices to comply with provisions of the Act, industry codes or standards;

(b) accept enforceable undertakings;

(c) pursue civil penalty orders;

(d) refer matters for criminal prosecution; and

(e) issue infringement notices.

Recommendation 16–3 The Classification of Media Content Act should provide for the imposition of criminal, civil and administrative penalties in relation to failing to comply with:

(a) notices of the Regulator;

(b) an industry code or standard;

(c) restrictions on the sale, screening, online provision and distribution of media content;

(d) statutory obligations to restrict access to media content; and

(e) statutory obligations to classify and mark media content.

Recommendation 16–4 The Classification of Media Content Act should require the Regulator to issue enforcement guidelines outlining the factors it will take into account and the principles it will apply in exercising its enforcement powers.

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80 Ibid s 13. However, the CDPP retains the power to take over the proceedings: Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [3.11]. In an analogous area of content regulation, state police and public prosecutors are involved in copyright and trade marks prosecutions under Commonwealth intellectual property legislation: M Speck and G Urbas, 'Criminal Infringement of Intellectual Property Rights in Australia: Assessing Recent Reforms' (Paper presented at Australian Copyright Council Copyright Symposium, Sydney, 13 October 2011).