



**Submission to the Australian Law Reform Commission National
Classification Scheme Review Issues Paper**

15 July 2011

Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to make a submission to the Australian Law Reform Commission National Classification Scheme Review Issues Paper.

About ASTRA

ASTRA is the peak industry body for subscription television in Australia. ASTRA was formed in September 1997 when industry associations representing subscription television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major subscription television operators, as well as channels that provide programming to these platforms. A list of members is attached at Annexure A.

The subscription TV industry is the undisputed leader of digital broadcasting. A dynamic sector that is constantly evolving and growing, it is received nationally by 34% of Australians through their homes and many more through hotels, clubs and other entertainment and business venues.

Overview of content regulation on subscription television in Australia

ASTRA supports consistency in the assessment and classification of content to be delivered on any platform, in line with the National Classification Code and Guidelines for the Classification of Films and Computer Games ('Classification Guidelines') established under the *Classification Act 1995*.

All licensed television broadcasting services (including commercial and national broadcasters and subscription television services) are responsible for establishing and maintaining practices for classifying programs in a way that reflects community standards. Classification requirements are contained in the codes of practice developed for particular sections of the industry, and registered with the Australian Communications and Media Authority (ACMA), under section 123 of the *Broadcasting Services Act 1992 (BSA)*.

Subscription television providers are licensed to provide a number of subscription broadcast and narrowcast services. Requirements for classification of content broadcast by these services are in the Subscription Broadcast Television and Subscription Narrowcast Television codes of practice (the Codes). Classification categories under the Codes reflect the National Classification Code and Classification Guidelines.

Under the BSA, subscription television licensees are subject to the same licence conditions as commercial and community broadcasters, and broadcasters operating under a class licence, in relation to the broadcast of political and controversial material, election advertisements, advertisements relating to medicines, tobacco advertising, and material that has been classified RC (refused classification) or X18+ by the Classification Board.

Under the Codes for subscription television, the classification symbol for programs classified PG or above must be clearly displayed at the commencement of the program and in the program guides. For material classified M and MA15+, consumer advice concerning the reasons for a classification must be given at the commencement of the program. The advice will be consistent with the relevant aspects of the Classification Guidelines. Material classified R 18+ can only be broadcast by a subscription narrowcasting service, and only where access to that material is restricted.

FOXTEL and AUSTAR provide content classification information in printed guides and as part of the on-screen electronic program guide.

Complaints regarding any matter under the Codes, including in relation to the classification of content, are first directed to the relevant subscription television broadcasting licensee. If unsatisfied with the outcome of the complaint to the broadcaster, the complainant may take the matter to the ACMA.

Unlike commercial television broadcasting services, subscription television services do not have restrictions on the times at which material of a certain classification can be shown. This reflects the different model of content delivery for subscription television as opposed to free-to-air broadcasting – subscription television providers have a direct relationship with their subscribers, who expect to be able to see the material they want through the service they pay for at the time they wish to see it. It also recognises that subscription television providers have greater control over how content is delivered and accessed on their platforms.

ASTRA submits that the existing framework for regulating content on subscription television works effectively to maintain community standards and protect children from harm while enabling subscribers to view the content they want to see when they want to see it.

Parental lock functionality

Subscription television platform operators including FOXTEL and AUSTAR have invested heavily in technology such as the parental lock system which provides subscribers with a greater degree of control over the programs they and their children watch via their set top unit, as well as other innovations that deliver unique capabilities to viewers.

The parental lock system enables subscribers to block programs (based on their classification) utilising a PIN. Applying this viewing restriction enables viewers to select the classification category they wish to restrict (from PG, M, MA15+ and R18+) and access to programming with that classification requires a PIN. FOXTEL's parental lock system also allows its subscribers to block entire channels and AUSTAR is currently working on the implementation of channel blocking as an additional feature of its parental lock system for its MyStar and MyStar HD set top boxes. FOXTEL and AUSTAR also have the technology to allow subscribers to block Adults Only program titles from being displayed in the electronic program guide.

In addition, FOXTEL has a remote control - the 'Mini Mote' - specifically designed for children. The 'Mini Mote' provides an additional tool for parents to manage their children's television viewing through restricted channel availability. The 'Mini Mote' features eight pre-programmed buttons that link directly to children's channels. Two extra buttons exist for parents to program other channels they may wish to enable their children to view.

Responses to questions raised in the Issues Paper

ASTRA provides the following responses to selected questions raised in the Issues Paper. ASTRA makes “nil comment” for questions on issues where ASTRA does not have a position and/or where we do not consider it would be appropriate for ASTRA to respond.

Approach to the Inquiry

Question 1. In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?

ASTRA does not see any need for the development of a new framework for the classification of content. ASTRA believes the current classification framework is appropriate, including the evidence-based approach by the Classification Board to ensure classification decisions reflect community standards.

For the subscription television industry, the current co-regulatory scheme overseen by the ACMA works well to reflect community standards and protect children from harm, while enabling adults to access the content they want when they want. The existing National Classification Scheme and Classification Guidelines are incorporated into the ASTRA Codes of Practice and form the basis of content classification delivered by subscription television broadcasters.

ASTRA does believe there may be a need to ensure greater consistency in the classification of content as undertaken by different regulators. ASTRA understands that while the ACMA has regard to Classification Board decisions when making determinations on material that is the subject of complaints under broadcasting codes of practice, the ACMA is not bound by the Board’s decisions.

Why classify and regulate content?

Question 2. What should be the primary objectives of a national classification scheme?

ASTRA believes that a national classification scheme should provide consumers with adequate guidance to make informed choices about the content they want to view. In particular, content classification should empower parents to be confident when making decisions on the content they allow their children to see.

ASTRA agrees that the availability of some material may be beyond the limits of prevailing community attitudes and that such material may not be appropriate to be classified for viewing at any level of restriction. However, the fact that some material may be confronting or even offensive to some people should not necessarily prevent that material being available, provided appropriate advice is provided and children are adequately protected.

What content should be classified and regulated?

Question 3. Should the technology or platform used to access content affect whether content should be classified, and, if so, why?

ASTRA supports the general principle that *classification* of content should be platform neutral, that is, a film that, for example, is classified MA15+ for cinematic release should, if unedited, be classified “MA15+” for viewing on DVD, subscription television or other media platform.

There may, however, be different community expectations regarding how the *access or use* of content should be regulated depending on how that content is delivered. Consumers who are legally permitted to purchase content or subscribe to a content service would expect to be able to

access and use that content when they want. However, for a platform such as free to air television, which is universally accessible and has traditionally been subject to more stringent content requirements to balance other regulatory privileges, there may be different community expectations as to how access and use of content provided by that platform is to be regulated.

ASTRA notes that regulating access or use of content on different delivery platforms is expected to be one of the key issues of the Government's Convergence Review, with a particular focus on future regulation of broadcasting content.

Question 4. Should some content only be required to be classified if the content has been the subject of a complaint?

ASTRA has no specific comment in relation to this question. ASTRA recognises that there would be significant practical difficulties in regulating use and access to online or internet content in the same way that broadcast content is regulated.

Question 5. Should the potential impact of content affect whether it should be classified? Should content designed for children be classified across all media?

ASTRA submits that the potential impact of content is a key consideration of the existing National Classification Scheme. Along with the six classifiable elements (themes, violence, sex, language, drug use and nudity) and the importance of context, the assessment of impact is one of the three essential principles underpinning the Classification Guidelines and thus is one of the factors taken into consideration by classifiers when determining the classification of particular content (or indeed whether that content should be classified). As discussed above, ASTRA believes that the existing classification scheme works well, including the operation of the Classification Guidelines.

For material required to be classified under the ASTRA Codes, material classified M or MA15+ must include the provision of consumer advice concerning the reasons for a classification at the commencement of a program, in a style consistent with relevant aspects of the Classification Guidelines.

ASTRA also recognises that the classification categories of G and PG are important guiding symbols for parents who will refer to content classification when making decisions regarding the content on subscription television that they will allow their children to see.

Question 6. Should the size or market position of particular content producers and distributors, or the potential mass market reach of the material, affect whether content should be classified?

ASTRA does not agree with the principle that the size and market position of particular content producers, or the potential reach of material, should affect whether content should be classified. Rules that govern how content should be accessed or used should attempt to reflect community expectations regarding content from different content services. As discussed at Question 3, there may be public policy rationales for access or use of content delivered by particular services to be regulated in particular way.

However, ASTRA would caution against content regulation that unduly burdens small content providers, as the evolution of cross-platform entertainment is being driven by such parties (eg. amateur bloggers not affiliated with conventional media business, non-commercial filmmakers on YouTube, user driven content, etc). Future policy decisions on classification should be careful not to stifle creativity and innovation through overly burdensome regulation on emerging sources of content.

Question 7. Should some artworks be required to be classified before exhibition for the purpose of restricting access or providing consumer advice?

Nil comment.

Question 8. Should music and other sound recordings (such as audio books) be classified or regulated in the same way as other content?

Nil comment.

Question 9. Should the potential size and composition of the audience affect whether content should be classified?

ASTRA submits that the size or composition of the audience or intended audience should not be a determining factor as to whether content should be classified.

Question 10. Should the fact that content is accessed in public or at home affect whether it should be classified?

ASTRA submits that the classification of content should be consistent, but that there may be different community expectations regarding how that access and use of that content is regulated, depending on the context.

Question 11. In addition to the factors considered above, what other factors should influence whether content should be classified?

Nil comment.

How should access to content be controlled?

Question 12. What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?

Nil comment.

Question 13. How can children's access to potentially inappropriate content be better controlled online?

Nil comment.

Question 14. How can access to restricted offline content, such as sexually explicit magazines, be better controlled?

ASTRA notes that subscription television platforms AUSTAR and FOXTEL include parental lock functions that enable subscribers to prevent children from watching programs of particular classifications. ASTRA has no comment in relation to magazines or other "off the shelf" content such as DVDs.

Question 15. When should content be required to display classification markings, warnings or consumer advice?

The ASTRA Codes require classification information to be displayed at the commencement of certain programs, and in electronic and printed program guides. As noted above, ASTRA believes the current co-regulatory system for subscription television broadcasting, incorporating the National

Classification Scheme and Classification Guidelines, works well for subscription television consumers.

Who should classify and regulate content?

Question 16. What should be the respective roles of government agencies, industry bodies and users in the regulation of content?

With respect to subscription television broadcasting, ASTRA believes the current distribution of responsibilities between Government, regulators and industry, together with consumer and community engagement through code development and complaints processes, largely works well to achieve the desired public policy outcomes for reflecting community standards and protecting children from harm, while taking into account the different business models for content delivery.

ASTRA supports an approach where general principles and a national framework for content classification are determined by the Government through Parliament, but where content providers are primarily responsible for ensuring compliance with classification and content regulations that may apply. Working within a framework that reflects prevailing community attitudes and standards, content providers are best placed to respond appropriately and in a timely manner to consumer concerns relating to content classification.

The current co-regulatory model for subscription television is an example of industry-based content classification regulation that works well both for consumers and broadcasters. Under the current model, where a consumer has a classification concern or believes content has been inappropriately classified, the consumer first directs those concerns to the relevant subscription television broadcasting licensee. If the consumer is unsatisfied with the response from the licensee, the consumer may make a complaint to the ACMA.

Question 17. Would co-regulatory models under which industry itself is responsible for classifying content, and government works with industry on a suitable code, be more effective and practical than current arrangements?

Co-regulatory models already exist under the BSA for all sectors of the broadcasting industry, including subscription, commercial and community television and radio. As the ACMA has noted:

Key to the co-regulatory approach embodied in the Broadcasting Services Act is that the various sectors of the broadcasting industry are responsible for developing their own code of practice, which are to be observed in the conduct of their broadcasting operations. The Broadcasting Services Act intends that codes of practice provide flexible, responsive and cost-effective means for regulation.¹

Industry-based regulatory frameworks are likely to provide more flexibility and be more responsive to changes to community expectations about the suitability of content.² The codes of practice in place for broadcasting under the BSA are subject to regular review with extensive public consultation to ensure that these codes continue to reflect prevailing community attitudes applicable to the broadcasting operations of each sector of the broadcasting industry. The development of codes of practice by industry groups (such as ASTRA) representing particular sectors of the broadcasting industry must take into account any relevant research conducted by the ACMA.³ The ACMA regularly undertakes research to assist in maintaining awareness of prevailing community attitudes.

¹ ACMA, *Reality Television Review Final Report*, 30 March 2007, p. 18.

² See *ibid* for examples of where codes of practice for broadcasting have been modified in response to changes in community attitudes or to better reflect community standards.

³ BSA, s 123

ASTRA believes it is important that the principles for classification adopted under industry codes of practice are consistent with a national approach to content classification. As such, the ASTRA codes of practice directly refer to the National Classification Code and Classification Guidelines in codifying classification standards for subscription broadcasting. Moreover, the direct relationship with subscribers means that subscription television platform providers will always be responsive to consumer concerns. This is reflected in the very small number of written complaints made to subscription television broadcasting licensees in relation to classification and program content matters, and the even smaller number of complaints that are subsequently referred to the ACMA.

Question 18. What content, if any, should industry classify because the likely classification is obvious and straightforward?

ASTRA submits that the primary role of classifying content delivered on a particular platform or by a particular service should remain with the industry participants providing that content, operating within the regulatory frameworks established for that particular industry.

Classification fees

Question 19. In what circumstances should the Government subsidise the classification of content? For example, should the classification of small independent films be subsidised?

Nil comment.

Classification categories and criteria

Question 20. Are the existing classification categories understood in the community? Which classification categories, if any, cause confusion?

ASTRA believes that the existing classification categories are well recognised in the community and generally well understood, as reflected in research undertaken by regulators in 2004 and 2005.⁴ While this research did conclude some level of uncertainty in relation to some specific aspects of classification categories, ASTRA believes that recognition and understanding is likely to have increased since those studies were undertaken.

Question 21. Is there a need for new classification categories and, if so, what are they? Should any existing classification categories be removed or merged?

ASTRA believes the existing categories are generally well understood by the community and give consumers a firm base upon which to make viewing choices for themselves and their children. Additional categories, or the merging of categories, are likely to cause confusion. ASTRA submits there would need to be compelling evidence that the current categories are ineffective or inappropriate, and that a reconfiguration of categories would be more effective, before any substantial changes are contemplated.

Question 22. How can classification markings, criteria and guidelines be made more consistent across different types of content in order to recognise greater convergence between media formats?

ASTRA submits that co-regulatory models in the broadcasting industry, referenced or based on the National Classification Scheme, works well. ASTRA would not support mandatory 'harmonisation' of content classification and regulation that diminished co-regulatory approaches, or that sought to impose more stringent content regulatory requirements on subscription television broadcasters.

⁴ See OFLC, *Classification Study*, June 2005 and ABA/OFLC, *Community Attitudes Towards Media Classification and Consumer Advice*, March 2004.

Question 23. Should the classification criteria in the Classification (Publications, Films and Computer Games) Act 1995 (Cth), National Classification Code, Guidelines for the Classification of Publications and Guidelines for the Classification of Films and Computer Games be consolidated?

ASTRA submits that the current separation of the Act, Code and Guidelines works well, with the primary legislation providing the general framework and the Code and Guidelines providing additional explanation and detail for classifiers, industry and consumers when required.

Refused Classification (RC) category

Question 24. Access to what content, if any, should be entirely prohibited online?

Nil comment.

Question 25. Does the current scope of the Refused Classification (RC) category reflect the content that should be prohibited online?

Nil comment.

Reform of the cooperative scheme

Question 26. Is consistency of state and territory classification laws important, and, if so, how should it be promoted?

Nil comment.

Question 27. If the current Commonwealth, state and territory cooperative scheme for classification should be replaced, what legislative scheme should be introduced?

Nil comment.

Question 28. Should the states refer powers to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of media content in Australia?

Nil comment.

Other issues

Question 29. In what other ways might the framework for the classification of media content in Australia be improved?

Nil comment.

ANNEXURE A

Subscription Television Platforms

AUSTAR
FOXTEL
Optus Television
Telstra

Program Channel Providers

Aurora
Australian Christian Channel
Australian News Channel
BBC Worldwide Channels Australasia
Discovery Networks
E! Entertainment
ESPN
Eurosport
Expo Networks
KidsCo
Movie Network
MTV Networks
National Geographic
NBC Universal
Nickelodeon
NITV
SBS Subscription TV
Premier Media Group
Premium Movie Partnership
Setanta Sports Australia
Sky Racing
Turner International (Australia)
TV1
TVN
TVSN
Walt Disney Company (Australia) Pty Ltd
XYZ Networks Pty Ltd

Communications Companies and Other Associate Members

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Cath Ward Media Services
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The Playroom Sydney/Omnilab

Affiliate Members

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Minter Ellison