



**Submission to
Australian Law Reform Commission
National Classification Scheme Review**

Chris Berg

Research Fellow, Institute of Public Affairs

Tim Wilson

Director of Climate Change Policy
and the Intellectual Property and Free Trade Unit

July 2011

Submission to Australian Law Reform Commission National Classification Scheme Review

Australia's National Classification System is unsustainable in the medium to long term. Technological developments have already undermined the basis of classification in Australia, and that the trends which we are already seeing will increase exponentially.

As a consequence, we recommend a radical rethink of the principles and justification for classification. Australians increasingly have to rely on private forms of classification. Private classification and content assessment will dominate the future media landscape.

Failure to face the inevitable demise of classification – a process which has already begun – will lead to inconsistencies within the law.

The Australian classification system struggled by the exponential growth in media and entertainment. This growth has been sparked by a number of overlapping trends:

- The shift of media onto the internet and internet-enabled home entertainment systems
- Increasing comfort with shopping online.
- The expansion of “niche” content – increased globalisation and technological development has meant producers can target narrower interests, expanding the diversity and pool of entertainment.
- An increasingly multicultural society seeking media produced for ethnic diasporas.
- The rise in prominence and importance of forms of media like video and mobile gaming.
- The shift in mobile and video gaming online.

The sheer volume of content available to Australians – even before we account for the internet – has strained the National Classification System to the breaking point.

In 2007, we published a column in *The Age* outlining a small but important episode in which a gay and lesbian video store, Out Video, was targeted by the Attorney-General's department for the sale of videos which had not been classified.

This episode highlights the problem Australia's classification system has had at dealing with niche markets, and we excerpt it below:

Recently a small St Kilda video store, Out Video, drew the attention of the federal Attorney-General's Department for selling and renting imported titles that have not been classified in Australia. Bureaucrats may be doing their job, but by acting against a small niche video shop, they have inadvertently exposed critical flaws in our film classification laws.

Out Video markets films primarily directed at the gay and lesbian community. Many are produced overseas and never achieve general or selected release in Australia. And because of the prohibitively high cost of classification, they never get classified.

The A-G's Department contacted Out Video because they were selling and renting out titles not given the all-clear by the Office of Film and Literature Classification (OFLC). As a result, Out Video says nearly half their stock will have to be shelved permanently.

This highlights two major flaws in Australia's classification regime:

1. The regime has not adapted to a marketplace that allows media to be accessed through more than just domestic broadcasters and distributors. Consumers demand access to an increasingly wide selection of entertainment from overseas, and they can get it through the internet.

2. Our classification laws are not designed to accommodate small markets. Instead, the classification processes are optimised for large, general-release films. The system simply doesn't lend itself to small-run films, and the law unfairly harms businesses trying to service niche markets...

The sale of unclassified material is hardly uncommon. If government bureaucrats want to clamp down on unclassified videos, they should take a walk down Victoria Street or Sydney Road. Both are hives of foreign-language video stores that stock unclassified foreign-language films. In all likelihood the Government wouldn't dare act in these cases: the electoral backlash would be considerable.

It is unlikely that homophobia played a part in the Government's decision to enforce the law: it acted because it received a complaint. But if homophobia was the cause of that complaint, it would merely demonstrate how the classification laws can be manipulated.

Current film classification laws undermine access to films for different sections of the community. And businesses that are trying to meet a diverse market demand for unique niche content should not be punished for doing so.¹

A more critical challenge to the coherence and consistency of the national classification system is provided by burgeoning online content. In ABC's *The Drum*, Chris Berg wrote that "the entire foundation of Australia's classification system has collapsed."

Under no circumstances could an Australian classification agency even begin to categorise online content against any rating scheme. In 2008, Google was indexing 1 trillion separate webpages. YouTube claims its users upload the equivalent of 150,000 full-length movies every week, and it would take 1,700 years for one person to watch all of its content already online.

And under no circumstances could the Australian Government apply the principles which animate our classification system to online material - one of which is "everyone should be protected from exposure to unsolicited material that they find offensive". Even if you thought protection against offence was a worthy goal of public policy, there's simply no way to do so.

The internet challenge should be an opportunity to rethink the purpose of the government classification programs as a whole.

The committee's failure is all the more acute considering potentially classifiable film and television is increasingly being distributed online, aided by consumer plug-in interfaces which allow Australians to connect their television to the internet.

Media consumption is rapidly moving out of the reach of government classifiers.

As a consequence, attempts to quarantine film, television, or computer games from the Australian market do little but encourage piracy.

Take videogames, whose censorship has been so thoroughly circumvented that reform seems more formality than necessity. Yes, it would have been nice if gamers were able to purchase adult-only games at retail stores. But with online shopping, international shipping, and, of course, downloading, there are few serious barriers to getting hold of banned games like *Mortal Kombat* or *Left 4 Dead 2*.

And for online and mobile videogames, classification is in practice voluntary.

It took five years for *World of Warcraft* - one of the most popular games in history - to be classified by Australian regulators, because, it was an online game.

¹ "Film classification laws out of sync with the 21st century", *The Age*, 1 October 2007. Available at <http://www.theage.com.au/articles/2007/09/30/1191090938881.html>

It's easy to forecast similar situations occurring with film and television, once a) Australians become more comfortable downloading or streaming film and television from overseas, and b) entertainment business models adjust to a world where most media consumption is online.

That's not a question of if, but when.

The inevitable slide of government media classification into irrelevancy does not mean classification will disappear entirely. It'll just go private.

Non-profit groups which rate films according to ethical or religious criteria have been around for a long time. There's a cottage industry of conservative Christians in the United States judging Hollywood films for nudity and swearing and unethical behaviour. Sites like www.common sense media.org provide far more information and greater detail than the Australian Government. Parents looking for kids films or games in the new media world have a wealth of resources to assess appropriateness.

And, of course, there are the wide range of filters one can install on a home computer that's used by children to control their internet use. Parents have had to take matters into their own hands already.

... If our classification system cannot deal with the fact that entertainment is moving online, then its long-term viability must be seriously in doubt.²

The elimination of the national classification system would be a saving to taxpayers. Alternatively, this money could be redirected to education programs alerting consumers to the existence of private classification and personal internet filters for home use, although we observe that the Australian government already spends a significant amount of money doing the latter.

It would also reduce the regulatory and financial burden placed upon the production and distribution of media.

It is our view that the classification is increasingly impossible in a digital age. If the Australian Law Reform Commission does not recommend wholesale reform with this firmly in mind, then it is an issue the government will be compelled to tackle again in the near future.

² "Giving up on national classification", *ABC The Drum*, 6 July 2011. Available at <http://www.abc.net.au/unleashed/2783418.html>

About the Institute of Public Affairs

The Institute of Public Affairs, founded in 1943, is the world's oldest free market think tank. The IPA is a not-for-profit research institute based in Melbourne, Australia with staff and associates based around Australia. Think tanks act as public policy incubators and develop public policy solutions. The objective of the IPA is to promote evidence-based public policy solutions rooted in a liberal tradition of free markets and a free society. The IPA achieves these objectives by undertaking and disseminating research; participating in national and international policy debate through the media; and engaging with opinion leaders, stakeholders and public policy makers.

All work completed by the IPA is published in the public domain for the consumption of governments, politicians, domestic and international policy makers and the public-at-large. The IPA has a demonstrated track record of contributing to, and changing the terms of the public policy debate in Australia and internationally.

About the authors

Chris Berg is Research Fellow with the Institute of Public Affairs. He is a regular columnist with the *Sunday Age* and ABC's *The Drum*, covering cultural, political and economic issues. He is an award-winning editor of the *IPA Review*. His monograph, *The Growth of Australia's Regulatory State*, was published in 2008. He is also the editor of *100 Great Books of Liberty* (with John Roskam) published by Connor Court Publishing in 2010, and *The National Curriculum: A Critique* (2011).

Tim Wilson is Director of Climate Change Policy and the IP and Free Trade Unit. He is also a Senior Fellow at New York's Center for Medicine in the Public Interest, has studied global public health policy in a joint program of Geneva's Institut de Hautes Études Internationales et du Développement and the World Health Organisation and participated in *The Australian* newspaper's Shaping our Future: Ideas to Change a Century series on reforming healthcare finance. He serves on the Department of Foreign Affairs and Trade's IP industry consultative group and the Steering Committee of the Sydney Opera House's Festival of Dangerous Ideas. He regularly appears on Australian and international television, radio and in print media and previously co-hosted ABC News 24 TV's Snapshot segment. Tim's worked in international development across South East Asia, consulting and politics. In 2009 *The Australian* newspaper recognised him as one of the ten emerging leaders of Australian society as part of its Next 100 series, is a recipient of an Australian Leadership Award from the Australian Davos Connection and was selected to participate in the inaugural Australia-ASEAN Emerging Leaders Program. At University Tim was twice elected Student Union President as well as to the University's Board of Directors. He's currently completing a Graduate Diploma of Energy and the Environment (Climate Science and Global Warming) at Perth's Murdoch University. He has a Masters of Diplomacy and Trade and a Bachelor of Arts from Monash University, a Diploma of Business and has completed Asialink's Leaders Program at the University of Melbourne.