

# *National Classification Scheme Review*



## **Submission from the Eros Association**

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### **Preamble**

This submission follows on from our face-to-face consultation with Commission members a few weeks before. Some of the points we made in that meeting have been re-iterated here but many new issues have been raised in this submission and a number of reference materials included. In particular we wish to bring to the attention of the ALRC the conclusive and overwhelmingly supportive data contained in the large number of opinion polls on classification that we have attached. From our perspective, as representatives of the adult media sector, our views on classification have been consistently and demonstrably supported by the wider community but have not been supported by legislators. We also wish to emphasise the inconsistency, bias and illogicality inherent in the current so-called national classification scheme through a listing of the major inconsistencies. Finally, the utter necessity of moving classification issues away from myopic state governments, as the technology for delivering information and entertainment becomes more and more global.

### **Background**

The **Eros Association** is Australia's national adult retail association. It was formed in 1992 and has been the industry's main interface with government.

The association has 170 members, many owning multiple retail outlets and many owning adult businesses in other areas than retail. We represent the major part of the adult industry in Australia

There are approximately 1,000 adult retail shops in Australia ranging from small annexes in the back of a newsagent to large destination stores the size of Officeworks. There are about a dozen major wholesalers and importers who bring in a wide range of X and R rated DVDs as well as unclassified films and an equally wide range of Restricted publications.

Many of our members run websites offering similar material to that in their shops. We also have members who run websites offering adult material on a commercial basis

ranging from MA to X rated. All of these companies have their sites parked off shore to escape Australia's onerous online regulations prohibiting ISPs from hosting adult content. However many will produce their content in Australia – mostly in the ACT but often running the gauntlet of state laws.

## **Recent Prosecutions**

Last year, Daryl Cohen, an adult shop owner on Oxford Street in Sydney became the first Australian to go to jail for a censorship offence since Robert S Close was imprisoned in 1945 for writing a novel entitled "Love Me Sailor." Close was a great novelist about the seafaring life and was charged with writing an obscene libel. Like Daryl Cohen he received three months in jail and lived most of the rest of his life in France and Spain. Daryl Cohen was charged with selling 41 X18+ classified films. The films he sold were classified at the Classification Board offices less than a kilometre away from where he sold them.

Also last year, a Victorian based company called Abby Winters was prosecuted by police for selling X18+ films. This prosecution was brought about by a Herald Sun reporter who wrote several stories around the fact that this company was employing young women (18 -25) to film themselves in erotic poses and then purchasing the material for broadcast on its website. The material was only provided on line. As part of their investigation, police visited the women, many of whom lived at home with their parents, threatening to charge them as accessories to a crime. When the case came to court it was clear that the magistrate found the police investigation totally unsatisfactory. She fined the company \$6,000. Abby Winters subsequently packed up the business and moved to the Netherlands where their business now functions as it did before but without the threat of prosecution.

There have been approximately 50 prosecutions of adult shops around Australia over the past few years for selling X18+ films involving fines of up to \$40,000. Some husband and wife adult shop teams have lost their homes and others have gone bankrupt. The hardship to ordinary Australian families through police raids and confiscation of federally classified films has been heart-breaking.

Eros openly encourages its members to break state laws banning the sale of federally classified X18+films as a matter of civil disobedience against a bad law that is completely out of touch with community opinion. We do not encourage the sale of unclassified material and we actively discourage the sale of RC material.

## **The Nature of Black Markets in Australia**

Governments in Australia either do not understand how black markets are formed or do not care because they are in pursuit of another ideal or goal. This is the only conclusion that can be drawn from the continued bans on X18+ films in the states and the continuing refusal of the Commonwealth to intervene in the situation. In all states in Australia the penalties for selling a federally classified X18+ film are roughly the same as selling an RC film. It stands to reason then that there is no benefit or encouragement in selling a classified film over an unclassified film in the Australian states.

When a popular product (see attached polling figures) is banned for sale the ban does not negate the need or desire for that product. When a product is so popular that up to 40% of the population are using or buying it, market forces simply determines that someone will step in to provide that product. If it is illegal then the product is likely to be supplied without any checks and balances. In the adult marketplace there is a balancing force in the form of the industry's national association which has codes of practice for its members. When our members sell X18+films in breach of state laws we refer to that sale as a 'grey market' rather than a 'black' one because mostly our members will sell material that they believe will roughly fit the X18+ category. However, adult traders who are not signed up to an association code do not abide by our standards and therefore a very black market can and does develop.

Prohibition of alcohol in the USA in the 1920s represents exactly the same form of government prohibition that we are dealing with here. It has devastating consequences for the community at large and makes large numbers of people party to a criminal act who would not normally engage in this way. The US government bans on alcohol were broken by large numbers of ordinary people while organized crime grew rich on the profits. Indeed there is plenty of evidence that the riches of those days have provided crime bosses in the US with the largess to do business even today.

We believe that the grey market in X18+ films in Australia is worth approximately \$20 - \$30 million a year and the black market may be around the same figure.

State governments maintain their bans against 28 years of the Commonwealth keeping the X rating in the Classification Scheme. This is because a category of films showing non violent adult explicit sex scenes fits within the Code. It also has to do with the fact that federal bodies like the Australian Institute of Criminology (AIC) understand and advise the federal government on the nature of black markets and the extent to which crime gangs (often overseas) eye the adult film industry in Australia from time to time. (In 1988 the AIC was extremely concerned about the possibility of then Attorney General Lionel Bowen, banning X rated films federally and for the possibility of Chinese Triad syndicates taking the industry over on the black market. There has been some evidence that copyright infringement on and sale of black market X18+ films has fuelled overseas terrorist groups).

State governments also use the adult film industry for political reasons. Before many state elections the tabloid press will run headline stories about a 'crackdown on porn'. Indeed before the 2006 NSW state election, NSW police were ordered to raid every adult shop in Kings Cross and closed all of them down with lurid stories about searches for child porn. The only charges laid were for selling federally classified X rated films.

### **Major Inconsistencies Between the Classification Act and Among the Various Enforcement Acts**

- 1) It is legal to purchase and legal to possess federally classified X rated films in all states but illegal to sell them. This fractured legislation is unique to X rated films and applies to no other product in Australia.

- 2) In most states it is legal to produce and sell a Category 2 Restricted magazine which explicitly depicts people having sex. This law has not changed in over 25 years. However if a person films the pages of that Category 2 Restricted magazine with a video or digital camera and then sells the film in any of the states, they can go to jail for two years and risk a fine of around \$16,000. This is because the film of a Category 2 Restricted magazine is classified as X rated and banned in all states. \* (see National Competition Council report below)
- 3) In Queensland it is legal to produce and sell an R rated erotic film which depicts adults having simulated sex. However if a person takes still images from the film and publishes them in a magazine they can go to jail for three months and be fined thousands of dollars. This is because R rated erotic images on film are classified as Category 1 Restricted when turned into still images. Category 1 publications are banned in Queensland.
- 4) South Australia and Tasmania still have their own censorship boards and may classify material differently than the national classification board.
- 5) In Tasmania it is legal to supply a minor with a Category 1 or 2 publication if they are your own children or if the minor is married.
- 6) In Tasmania the penalty for making child pornography and bestiality is the same as selling a classified X rated film to an adult — 2 years jail. This would indicate to the people of Tasmania that federally classified X rated films are as damaging and have the same potential to offend as child and animal rapes.
- 7) A number of states insist that Category 1 Restricted publications must be exhibited in sealed opaque bags that cannot be seen through, even though the front and back covers of these magazines can only show Unrestricted imagery or images that are suitable for children to see. In effect, the laws demand that covers that are suitable for children to see must still be wrapped up so they cannot be seen.
- 8) Most states do not differentiate between selling a federally classified non violent erotic film and a film depicting bestiality or actual and explicit sexual violence. Even the Northern Territory does not differentiate between making an X rated non violent erotic films and a film that would be Refused Classification.
- 9) Canada, New Zealand, South Africa and the UK have all adopted a similar classification scheme to Australia's federal scheme but in all of these countries the classification decisions apply nationally.
- 10) In QLD, it is illegal to sell Category 1 Restricted magazines. In all other States and Territories, Category 1 Restricted magazines are legally restricted and can only be sold to people 18 years and over, and can only be displayed for sale in general outlets (eg. a newsagency, convenience store or service station) if they are in sealed wrapping.
- 11) In SA, VIC, NT and WA the wrapping must be opaque. In WA, a retailer

needs to be registered with the WA Censorship Office before they can sell Category 1 Restricted magazines or Category 2 Restricted magazines.

- 12) In WA, it is *not* an offence for a minor to sell adult restricted material. This means the 12 year old sons and daughters of newsagents and corner store operators can see and handle sexually explicit material. However it would be an offence for an adult to sell the same 12 year old a sexually explicit magazine.
- 13) In ACT, NSW, NT, SA and Victoria, Category 2 Restricted magazines can only be displayed for sale or sold in a restricted publications area, for example an adult shop.
- 14) In Tasmania and WA, Category 2 Restricted magazines can be sold in premises that are not restricted publications areas, provided certain conditions are met like having a curtain across the material.

### **Customs Impediments to Classification**

All classification of X18+films is about to cease in Australia following a decision by Customs on Refused Classification material. Since the Classification Act was introduced in 1995, Customs have allowed the importation of one unclassified master film from overseas for the purposes of editing to meet Australian classification standards. Some years ago there was an attempt made to try and bring the Customs Act more into line with the Classification Act and as a result, Customs changed the definition of their prohibited imports under Section 4A of the Customs Act to include films that were or 'were likely' to be classified RC. At this point they still allowed reputable companies that they had been dealing with, to bring in single unclassified films for the purposes of editing even if there was a chance that in their original format they would have been classified RC if submitted. After Senator Barnett's comments in Senate Estimates last year and his accusations that Customs were not doing enough to stop RC material from entering Australia, things changed and now, the public company (Adultshop.com/Calvista) which is the only adult company classifying its films, has had the flow of unclassified master films stopped at Customs and refused entry on the grounds that they may be RC films. It is not illegal to possess and not illegal to view RC films in Australia (with the possible exception of WA) and neither is it illegal to purchase or download RC films off the internet. Indeed, one Customs officer recently asked Calvista following a complaint from that company about what was happening, "Why don't you just download them off the internet". Although circumvention of the Customs Regulations may be one of the positive spin-offs of the National Broadband Network, that action is not really available for the downloading of high quality masters for the purposes of editing and copying at this point in time. This inability of Customs to accommodate a long standing arrangement with a public company, which has clear benefits for the community in increasing the numbers of classified adult films in circulation, is yet another example of the inflexibility of the current scheme. It also suggests the need to relax the RC guidelines to fit in with the censorship schemes and entertainment choices of

the USA and European countries and the need for both the Customs Act and the Classification Act to be better attuned to those processes, which the industry uses to maximize classification.

## **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?***

In our opinion the current classification scheme belongs to another era and cannot be improved. Only a completely new approach will work for adult retailers and distributors. This approach is consistent with the fact that the Internet is a completely new approach to media and information from what we have known before. The move from printed matter to video was also a big step in technology however the consumable products were still ‘things’ that one purchased and took home to view. The Internet offers information and entertainment in a completely different way. Products are not necessarily purchased in the traditional way, the range of material far exceeds what would be found in any shop or library and because the world wide web takes content from all 197 countries in the world, community standards online become capable of accepting almost anything.

## **Why classify and regulate content?**

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

Given the age in which we live and the technology used to deliver information and entertainment, the primary objectives of a classification scheme should be to inform people about the content of material they are about to view – as much as is possible. We believe that with the multiplicity of media on line, a major new objective of a classification scheme would involve a shift away from classifiers viewing and labeling material to a more consultative framework where government officers liaise with industry groups, ISPs, content providers and others to help them correctly label the material they are dealing with. In the future, a cooperative approach with industry rather than the current ‘policeman’ approach is the only one that will see the majority of content correctly labeled.

## **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?***

With millions of websites, Virtual Private Networks, mobile services and games it is simply not possible to classify everything on line. So the question has to be asked, if only a tiny fraction of content on line can be classified, why try to enforce 100% compliance with DVDs and magazines in the real world? This is illogical, creates an unlevel playing field, is discriminatory and quite probably contra to the Competition

and Consumer Act. In arguing that material on line should not be classified while the same material in a shop should be, government would only be concerned about costs. This is not a valid reason to justify this sort of discrimination.

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

Yes. If a seller is marketing product that fits its intended demographic, it is unlikely to offend anyone. X18+ films sold at a church fete will cause huge offence. But when sold in an age restricted adult shop will cause no offense at all - unless someone is not being genuine about his or her reasons for being in an adult shop. However a bestiality or child abuse film will be found to be offensive in both situations and will generate complaints. Classification at this point allows a prosecution or an explanation to flow.

If the system is largely a self-regulatory one then there needs to be a stick for those that do not apply appropriate advice to classification to their product. However there will be vexatious complaints. To avoid this the complainer should pay for the classification unless the producer was found to have not applied advice or classification appropriately or was selling in an inappropriate way.

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

As above, high impact content is only problematic when it is sold outside of its intended demographic. 'Slasher' movies are not offensive when seen or purchased by aficionados of the genre. If adult content is being sold only to adults, then classification is largely unnecessary. Content designed for children should have appropriate advice and classification. However we need to bear in mind that a lot of children are making content themselves to share with friends so this should not be too onerous.

***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?***

No. On the Internet it's *all* mass marketing. The potential audience is in the millions if not billions and on You Tube a small 10-minute clip made in someone's lounge room can generate more viewers than a Hollywood movie that has cost millions.

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

No. Art should not be classified or restricted. Most people who visit an art show will know what the theme of it is and if they find that a certain genre or theme is offensive to them, then they just don't go. We believe that most complaints about art are self serving and vexatious. This is a modern trend that has hardly ever been seen before the millennium. Governments should not pander to hard line morals campaigners on

this issue. A new framework for classification would involve liaison with the art community about the need for any warnings or special advice about confronting themes to be included in reviews or at the gallery door. The caveats around art that have existed for decades in the state Enforcement Acts are being repealed. In their place is the hard line dogma and ideology of certain Attorneys General. In 2010 NSW Attorney General John Hatzistergos changed the Crimes Act to remove artistic merit as a defense to a charge of child pornography. How far do we go in pursuing people with weird and wicked thoughts? Art is one step on from thinking and is a spontaneous and creative process. Producing a film or making a magazine is about 10 steps on and involves profit motive.

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

Yes. If there is to be a level playing field and an unbiased approach to classification why should these areas, which have the same ability to offend, be exempted? But the question has to be asked, where does this process of dividing and classifying end? How many areas of life should human beings be expected to offer up for the process of classifying? At some point it all starts to look like 1984 or some ultra communist state having control of people's lives at every stage. After music and audio books why not include scripture like the Bible and the Koran? All manner of sex and perversion is talked about in Leviticus and suicide bombers gain courage from the words of their prophet. Logic and non-discriminatory judgment says some religious texts have an ability to offend just as much as an adult film but this is never recognized or acknowledged. Common sense should prevail throughout this if producers or retailers think that the product may offend some people – just provide consumer advice and do it yourself.

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

No. The size of an audience seems irrelevant if one complaint is enough to cause a review or even political interference in the classification process (Salo for example). And on the Internet it is almost impossible to gauge the make up of the audience because they do not need to identify themselves. However if the intended audience for a film or book is homogeneous then it is impossible for it to cause offence. If a media item that is marketed causes offence to its correct audience, either the labeling is incorrect or misleading, or the complaint is vexatious.

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

No. These divisions are becoming blurred anyway. A mobile phone in the bedroom might be private one minute but when it is in a party situation a few minutes later, it is very public. The portability as well as the ubiquitousness of the new technology means that terms like private and public media are fast stepping out of their old boundaries.

***Question 11. In addition to the factors considered above, what other factors should***



*influence whether content should be classified?*

Material should be classified if there is a reasonable suspicion that people were harmed in the making of the media; that laws were broken during the production of the media; or that the content contained depictions of actual illegal acts. Most other depictions and descriptions should be self-regulated by the producer or distributor.

**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?***

Banning the sale of computers perhaps? It's just as ridiculous as banning the sale of X rated films in an attempt to control access to them.

Seriously, there are no effective methods. Governments have to give up this notion of absolute control on information. The genie will not be put back in the bottle.

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

The world's adult industry has created a Meta tag called Restricted to Adults (RTA), which is embedded into the home page of participating adult sites and is recognized by all major filter software programs like Net Nanny. This campaign has been extremely successful overseas. It has also been successful here although it could be more successful if government repealed aspects of the 1999 Online Services Act, which outlawed adult sites from being hosted with Australian ISPs. This was a classic case of government refusing to work or even consult with the adult industry before censoring its products. By forcing Australian adult sites to use off shore servers, the government forced them to become de facto foreign companies who were outside of the reach of Australian laws but alas also outside the reach of industry associations like Eros.

Insistence on credit cards by online adult sellers is the most widespread form of age verification and although there are no doubt some minors who sneak through the system it appears to work pretty well.

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

By ensuring that retailers are aware of classification restrictions. When these magazines are sold in age restricted premises there is no problem. Unfortunately state laws vary in this regard. Some states require Category 2 publications to be sold in restricted premises while others do not.

The most publicized concern is about adult magazines being sold in unrestricted premises. To date we are not aware of a single unrestricted outlet (service station, convenience store etc) being prosecuted for selling unclassified or Category 2 Restricted publications. Adult stores in QLD are regularly prosecuted for this offence

only adding to the perception that there is one law for mainstream media outlets and another for adult ones. The onus needs to be on the retailer to ensure that any adult material is appropriately classified and displayed.

In the immediate future, lowering classification fees for small adult magazine imports would also help. This problem has been completely created by government making classification fees on magazines too high and too rigid. The majority of importers of adult magazines might bring in 200 copies of a particular Category 2 Restricted publication. They are forced to pay \$800 for a classifier to flick through this magazine (roughly 10 minutes work) and classify it. To recoup the \$800 an importer must now load the cover price of each of the 200 magazines by \$4. When the cover price is only likely to be \$10 -\$12 this means an extra 30 – 40%! This business is just not viable anymore. So what happens is that most importers simply do not classify which means that the classification information is not correctly displayed on the cover and consequently a soft cover can often mean that these publications end up in plastic bags in service stations and newsagents.

Of course Senator Barnett when he raised this issue in Senate Estimates, just blamed the sellers of adult publications for having no moral standards. As did lobby groups like KidsFree2BKids. They needed to look a bit deeper for the real cause or just admit that they wanted to ban adult magazines altogether.

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

We believe that ideally, all media should be labeled as to what the general content of the material is about. Online, most adult websites open up with a page which says that the content within shows explicit sexual acts between consenting adults and if this offends you, click here to leave the site. Once someone has made this decision it is overkill to demand that each film, game or photo within that site should have to display markings or warnings.

We are generally happy with the current position on labeling of DVDs, games and publications, although we are of the opinion that mainstream book publishers are never brought to the same level of censorship as adult industry producers are. The submittable publication scheme introduced in the mid 1990s made it an offence for the producers of publications which were 'mainly about sex' to not send them in for automatic classification. None of the major book publishers ever abided by the scheme and none of them was ever prosecuted even though there were potentially thousands of books that dealt 'mainly with sex' being published. A good example is Penguin's classic *Delta of Venus* by Anais Nin. The first story, the Hungarian Explorer, is an explicit tale about a sexual romp between a 40-year-old man and two sisters aged 12 and 14. One of the sisters is even raped in the story and the descriptions leave nothing to the imagination. The whole book is dedicated to sex of all types and kinds and clearly fell into the category of a submittable publication. This book however we would define as having a high degree of artistic merit and therefore should be exempt from these classification rules. At law, it is one of many submittable publications, which the Classification Board, the Classification Liaison Service, Senator Barnett and KidsFree2bKids all choose to ignore. Many of Taschen's books and of course art books like David Hamilton's and many others, also fall foul of this law. All of these books should be labeled and have consumer advice attached for the level playing field to be achieved.

## **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?**

Within a couple of years most of our members will be selling their media products almost exclusively online. We have lived with a fractured censorship system that allows legal trade in our products at a federal level and in the two territories but not in the states. Our members have gone to jail and been heavily fined for aligning with the federal interpretation of community standards over the past 28 years, rather than the backward-looking and highly politicized state interpretations.

Up until the late 1990s most of our members classified all their films. A cursory check of old OFLC records will show that in the mid 1990s, classifications of X films were the largest category of classifications averaged just fewer than 2,000 per year. Now that figure is down to less than 600 a year and from basically one company only. And yet there are more X-rated films being sold in the market place than ever before. Soon there will be no classifications of adult films in Australia and yet they will be consumed in greater quantities than ever before. The failure of this scheme is one of the most monumental censorship blunders ever presided over by government.

We currently have a system of classification that has been adhered to by one public company only and then only because it has to under the listed company rules – not the classification rules. For the rest of the industry, classification is not an issue. Eros members generally run with the spirit of the classification scheme, (i.e. they sell material that would be X rated if classified,) even though they have boycotted the system. Outside of our association members, a number of criminal elements exist in the sale of adult films, often hiding behind the veneer of appearing to do the right thing but often selling bestiality and sexually violent films that Eros members will not. This is the price you pay for persisting with a scheme that does not work anymore.

So government should relinquish their role in classifying adult films and hand it over to industry to do themselves. The role of government should be to liaise and monitor and provide sanctions for industry to apply where necessary. The role of the consumer is to feed back into this loop if and when they get material that is contrary to what is stated.

### ***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?***

Yes. 100% support.

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

Adult material (X18+films and restricted magazines) is said to be the easiest and

quickest to classify because the majority of content is generally explicit sex and the guidelines are so strict that they preclude any serious plot development. Any deviations from the main theme stand out immediately and do not require great social discourse or debate to say whether they are in or out. Therefore adult content is the most likely genre to qualify for industry classification. This would of course include consumer advice.

## **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?***

Our preferred option of a self-regulatory scheme would not need any government subsidy although education and information would still need to be provided by government.

In the short term, the most pressing area is in the classification of adult publications. As stated in point 15, those businesses that import small quantities of adult magazines are being charged a fee that could in no way be said to be a 'fee for service'. Because they import small numbers of many titles they do not qualify for 'serial classification'. It takes a classifier five minutes to classify most adult magazines. It is simply unsustainable to allege that this requires a fee of \$800. However if government persists with this nonsense then they should subsidise this section of the scheme so that they do not fall foul of the NCC's rules around unfair competition\* and neither do they simply 'tax' out of existence a legitimate business model that has been operating in Australia since 1971.

Small independent films should also be subsidised. So should the ridiculous fee of \$10,000 to challenge a classification. If you look at the records concerning adult films we cannot find even one appeal. That covers well over 20,000 classifications. To say that the industry has been happy with all those decisions is untrue. Many decisions have been considered poor, politically motivated or based on unfair interpretations of the Guidelines and the Code. However at \$10,000 it's simply not worth it. Even for a multi million dollar production like *Pirates: Stagliani's Revenge*, which was set to be a best seller in Australia, the public company that had the rights to it simply found it uneconomical to challenge the decision. Economic censorship is different to classification and if the Classification Board finds that it costs so much in airfares and up market hotel rooms to accommodate the Classification Review Board when it meets, then it has a responsibility to find a fairer and more equitable way. Haven't they heard of Skype or business conferencing?

## **Classification categories and criteria**

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

The X18+ classification is most misunderstood. It is the only category that has had the consumer advice working to confuse people. It is the only category that has state Attorneys General publically denouncing it as 'obscene' and 'harmful'. It has morals campaigners calling it 'filth' and 'excrement' in the media and it is the only category that is often sold on the black market with false R18+ labels or no labels at all. On the other side, X18+ films are extremely popular, are legal to possess and purchase in all jurisdictions and have been the subject of more newspaper headlines than any other category. A 2003 Newspoll showed that the majority of people in NSW thought X-rated films were legal to sell. In 2001 the Eros Association met with the Attorney General, Phillip Ruddock, to ask him to force the states to come on line with the Commonwealth's national classification categories. He was confused and told us that X rated films were already legal in NSW because he had seen them everywhere. A quick check with his two advisors in the room quickly revealed his lack of understanding to which he quipped, "I suppose you'll print that in your Eros magazine". We didn't because we did not want to embarrass him but it shows just how high up the ladder the confusion around X18+ films goes. A straw poll of federal MPs on the difference between X18+ and R18+ films will reveal widespread ignorance.

***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?***

In 2001/2 the Australian Research Centre in Sex, Health and Society at La Trobe University did interviews with 20,000 people in what was the largest survey of sexual culture in Australia. They found that 25% of their interviewees had watched an X18+ film within the last 12 months. That figure is likely to be much higher. In 2005 academics from the Queensland University of Technology (Alan McKee et al) published The Porn Report. They found that over 30% of Australians were regular watchers of X18+ films.

Anyone who understands human nature knows that a lot of that 25% or 30% will also have watched it with a partner. The partner's participation goes unreported. So that actual figure in 2001/2 would likely have been more like over 40%. With participation rates like this, the Senate Committee's recent call to ban the X classification from the federal schedule is completely out of touch with reality. They may as well try and ban football because people get hurt in it.

In 2000 the Standing Committee of Censorship Ministers signed off on a revised set of guidelines for the X 18+ category and agreed to rename it Non Violent Erotica (NVE). So the states have demonstrated that they can agree on allowing a sexually explicit category.

However with reference to the below question and answer, we believe that the R18+ category and the X18+category should both be merged into one AO (Adults Only) classification with appropriate consumer advice.

***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?***

In the online environment the differences between R18+ and X18+ disappear. The only issue is that viewers be over 18. So why have two adult categories? The only reason would be to differentiate between non-violent, sexually explicit films (X) and (often) very violent but sexually simulated films (R). It is hard to see someone who gets onto a movie site with the intention of getting a 'slasher' movie making a complaint about the fact that they got a sexually explicit one instead. Notwithstanding our views in Question 21, as it relates to the immediate issues with the X rating in the real world, we believe that the two age-restricted categories should be merged in the online platform. Perhaps the NVE rating might serve as an interim measure to get uniformity amongst the states on adult material before adopting one over 18 adult classification simply called AO or Adults Only. This raises questions about how to deal with the other age-restricted category of MA15+ online. Clearly material suitable for 16 year olds is different from 18 year olds however this demands input from those who deal in these products.

***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?***

In 2006, a member of this association, Adultshop.com, set out to expose the disconnect between the Code and the Guidelines in a case which ended up going to the Federal Court. The company made a feature film called Viva Erotica, which showed explicit sex in a stylish and consensual environment. They submitted it with the intention of getting an R rating rather than an X rating and in so doing demonstrating the flaws in the relationships between the Code and the Guidelines.

The Classification Act stipulates that classification decisions must take into account various matters, including the standards of morality, decency and propriety generally accepted by reasonable adults. That is, classification decisions **MUST** reflect current community standards.

The Code prescribes that classification decisions are to give effect, as far as possible, to a number of principles including a key principle that: adults should be able to read, hear and see what they want. The Code also prescribes that for a film to be classified X18+ it must contain real depictions of actual sexual activity between consenting adults ... "in a way that is likely to cause offence to a reasonable adult". **In other words, the actual sex in the film must be offensive to a reasonable adult for the film to be classified X18+.**

The X18+ classification was first introduced in 1984. Films classified X18+ are banned for sale in each of the States of Australia, and have been since 1985. Since community standards change over time, the Office of Film and Literature Classification (OFLC) periodically commissions research to understand community sentiment in relation to the classification of films. Since 1984, little to no research has been undertaken by the OFLC with respect to gauging community standards regarding sexually explicit films.

In September 2006, AdultShop.com commissioned independent research, which was

carried out by ACNielsen. The key finding of the research was that only 30% of Australian adults claim to be offended by sexually explicit films. The results of this research confirm that community standards are such that sexually explicit films do in fact not offend the majority of Australian adults. If the OFLC was to apply current community standards with respect to the issue of what offends the reasonable adult, films like Viva Erotica would not be classified X18+, but rather R18+, as the majority of Australian adults are not offended by sexually explicit films.

The Federal Court failed to uphold the logic and commonsense in this position and handed down a judgment that left many in the community extremely hostile to the current classification system. The court basically said that because the Attorneys General of Australia had approved the Classification Guidelines, they were representative of and the embodiment of community opinion. No debate. The Attorneys' General including the one who had told the Eros Association that X rated films were legal in NSW, including the one who admitted he was a 'high Anglican' and driven by God on these matters and including the one who enjoyed watching X rated films, were omniscient and by virtue of nothing other than their public office were able to channel the exact nature of community opinion. No appeal was possible. The precedent set in this case is an important one to consider in moving to a new framework.

It is our experience that when our members are busted and raided for selling X rated films in the states or for restricted magazines in Qld, that most lawyers will call us for a briefing. During those sessions it becomes very clear that unless they have been working in this area of law for a while they will know very little about the complexities of censorship law. If lawyers find it this hard and as we have shown, even Attorney Generals do not know the laws, how much more difficult it would be for the average consumer trying to understand it or the average business operator who wants to do the right thing.

Consolidation would appear to make interpretation easier and understand greater. As it is at the moment having an Act of parliament, a Code and then Guidelines makes classification of media appear to be this huge and complicated process. In 10 years time when the online environment will be everything to media, these three areas of referral will appear to be ridiculous. Everything will be there for anyone and all the regulation in the world will not mean much unless it can be agreed to and sorted by the people who put the media up.

Media producers need a few pithy Guidelines to work from, common sense and some decent penalties for breaches.

### **Refused Classification (RC) category**

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

Content that can be proved or reasonably argued was made by breaking the criminal code and that was not part of an educational or news report should be the only content entirely prohibited. This would include depictions of real murder, rape and serious assault; child sex abuse; bestiality; illegal offensive behaviour (defecating in a public

place), instruction in terrorism and maybe one or two other things. Depictions of legal sex acts between consenting adults should never be subject to censorship or bans. This means that if two people want to tie themselves up and be tickled on their genitals or they want to slap each other on the backside in a sexual way, they should be able to legally depict that. Artistic depictions of any kind should never be entirely prohibited. If it is legal to do then it should be legal to show.

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

No. The current RC classification includes legal acts. Why would you have images of legal acts Refused Classification? What does that say about the legal acts? That they are only legal to view while you are doing them? This is not logical and sets up a disconnect in the mind of the viewer between the reality of the law and the perception of the law. Not healthy. There are some acts that are illegal that are currently Refused Classification like euthanasia. In many parts of the world, euthanasia is legal. There are some categories like this that do not fit this model in our mind but we believe that the basis for a revised RC should start from the premise that legal acts are legal because they do not obviously and at face value, harm people.

**Reform of the cooperative scheme**

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

Yes. It is crucial to the survival of a properly regulated scheme. The notion that states have different censorship laws is rooted in the old belief that each colony was fiercely independent and had different moral beliefs... e.g. High Anglicans in South Australia; Protestant v Catholics in Victoria etc. These days the morality of the Australian states has been leveled by five waves of immigration and the interactive nature of technology, which does not respect international boundaries let alone state ones. There is only one reason that the states ban X and that is that they claim a different morality for their citizens from the ACT and the NT. This is palpable nonsense which state A-Gs will not acknowledge.

Inconsistency between state and territory laws on X rated films has led to the complete breakdown in the classification of these films as well as the establishment of a thriving black market in unclassified adult films. No matter how hard the state Attorneys try to police prohibition they cannot change the marketplace. It resists change for many reasons. Police and magistrates do not like busting adult shops because they can and do legally buy these films themselves from the same shops they bust. But it is the average 72% support around Australia (see attached polling info) for the legalized sale of this material that means it will defy current state laws and will continue to defy any future laws that try to wipe out this market. Alongside these arguments and figures, the Senate Committee recommendation to ban X is farcical.

Consistency of state and territory laws should be promoted firstly by aligning all the currently available classifications in all media through all jurisdictions. Penalties should also be consistent as well as consumer advice.



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

A self-regulatory scheme that involves representatives of all users of the current scheme. Self-regulatory schemes for adult content are in place in the USA, Japan and throughout Europe and the sky has not fallen in on them.

***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?***

Clearly this is the most important aspect of this whole review. Given that most media will soon be online and will come under the aegis of the federal Minister for Communications, we would suggest that the states cede their censorship powers to the Commonwealth now and let them get on with the job of making a truly national scheme.

**Other issues**

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

Built into the new scheme should be automatic and regular public opinion polling to determine community standards. Neither Attorneys General nor Classification Board members are sole arbiters of this. Focus groups, political pressure and lobby groups should all stand aside and public opinion should reign supreme in determining content limits.

The adult industry feels this most acutely. State bans on sale of our member's products over the last 25 years have resulted in millions of dollars of lost revenue, countless court cases and wasted police resources, denial of people's rights to "see, hear and read what they want" and an almost complete boycott of the censorship system resulting in lost federal government revenue.

If the Classification Board and before that the OFLC had a program of regular polling by Morgans or McNairs, the state government bans would year after year have been seen to be against the will of their constituents and a time would have come when one state Attorney could not maintain the lie any longer and broken ranks.

We did that opinion polling for them over the years using pollsters that both major parties use at election times so they could not dump on the messenger when the unpopular figures came back. Because the bans on adult films were politically motivated in the first place, not one Attorney General ever made a public statement for or against the findings in these polls. They wanted to be able to 'crack down on porn' at the next state election as they always had done without reference to how popular porn was in their state.

We attach a list of all the polling we conducted over the last 20 years in support of the notion that it is a cheap and reliable way under a new scheme, to accurately gauge public opinion which has to be the mainstay of 'community standards'.

**\*National Competition Council 2004, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume one: Assessment*, Melbourne.**

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**Box 9.1: Competition and non-violent erotica**

In the past 12 months the Council received a considerable volume of correspondence from several businesses involved in the production and sale of non-violent erotica. While the Council has no role in relation to the censorship objectives of governments, the matters raised relate to competition impacts in state and territory legislation. In one state, nonviolent erotica is prohibited in book form whereas identical images can be sold in video form. The two forms are substitute products, yet producers of non-violent erotica in book form are disadvantaged. In another jurisdiction, the exact converse situation arises: sales of the moving image are banned and sales of the image in book form are permitted. What should be a censorship matter is manifested as an arbitrary restriction on competition that distorts consumption patterns and production decisions for a legal product with a large market presence. Other such anomalies occur across Australia. None of this legislation is subject to scrutiny under the NCP and, although the Council does not consider this to be a high priority, a national approach could provide some consistency for this not insignificant sector of commerce.

**Official Polling Results On Adult Classifications: 1984 — 2007**

**ACNielsen Poll, 2006**

*Question: Do you support the legal and restricted availability of explicit non violent erotic (X rated) films?*

Yes: 76%

*Question: Do you find explicit erotic films offensive?*

No: 70%

**Newspoll, December 2004**

*Question: Are you personally in favour or against, X-rated, non-violent erotic videos, being sold or hired to people aged 18 years and over, through controlled and restricted adult retail shops?*

In favour: 71%

**Newspoll, August 2003**

*Question: Are you in favour of the sale of X rated videos nationally?*

In favour: 68.8%

**Roy Morgan Research, May 2000**

*Question: Would you be more likely to oppose or support a politician who advocated for further censorship and restriction of the sex industry?*

46% more likely to oppose 27% more likely to support 27% neutral/can't say

**Roy Morgan Research, April 1999**

*Question: In your opinion, should non-violent erotic videos be available to adults in Australia from properly licensed adult book stores or should they be banned?*

Should be available: 76.3%

Should be banned: 19.1%

Can't say: 4.6%

**Roy Morgan Research, October 1997**

*Question: Should state governments ban the sale of sexually explicit non violent erotica to people over the age of 18 from a licensed adult shop?*

No: 68%

**AGB/McNair, April 1996**

*Question: Under current law, X rated videos can only show actual depictions of consenting non-violent sex between adults. In which of the following ways do you think X-rated videos should be available? (Respondents could choose more than one)*

Available from restricted adult shops: 64%

Shown in restricted adult cinemas: 26%

Available by mail order: 23%

Available from ordinary video shops: 9%

Banned: 19%

**Roy Morgan Research, October/November 1992**

*Question: Next, about non violent videos and films of an erotic nature with some X rating or the equivalent. Which way best describes how you think X rated non violent videos or films of an erotic nature should be available? (Respondents could choose more than one)*

Purchased from restricted adult bookshop: 53.8%

Shown only in restricted adult cinemas: 38.3%

Purchased through mail order: 31.6%

Purchased from family video stores: 3.3%

Should be banned/not available: 1.9%

Can't say: 6.5%

**Saulwick/Age Poll, August 1988**

*Question: Do you support the legalisation of Non Violent Erotica?*

Yes: 97%

**Roy Morgan Poll, June 1987**

*Question: Which way best describes how you think X rated non violent videos or films of an erotic nature should be available.*

In restricted adult sex shops: 77%

**Morgan Poll, September 1986**

*Question: Do you support the sale of X rated films?*

Yes: 77%

**McNair Anderson Poll, September 1985**

*Question: Do you agree with legalising X rated, non violent videos?*

Yes: 63%

**Morgan Poll, December 1984**

*Should X rated videos be legal in Australia?*

Yes: 66%

**Academic & Government Surveys**

**La Trobe University (Vic) Sex In Australia Survey (19,307 people), 2002**

Finding: 25% of Australians (4,000,000) are regular watchers of X rated films

**Australian Bureau of Statistics/Office of Film and Literature Classification:  
Australian Perceptions of Films, Videos and Computer Games, April 1994**

*Question: Do you think that adults should have access to X classified videotapes?*

Yes: 66%

**Office of Film and Literature Classification: Exploring Attitudes Towards Film,  
TV and Video Classifications, September 1992** *Question: Do you think that X rated  
material should be available to adults aged 18 + years?*

Yes: 71%

**Media Polls 1994 — 2007**

**Sydney Morning Herald Readers Poll, Feb 2007**

*Question: X rated films and adults; Should they be legal to sell?*

Yes: 86%

No: 14%

**Age Readers Poll, March 2006**

*Question: Do you agree with Labor plans to block violent and pornographic material  
before it reaches home computers?*

No: 62%

**Sydney Morning Herald Readers Poll, July 2003**

*Question: Censorship – Should X-rated films be legal to sell in NSW?*

Yes: 85%

No: 15%

**Herald Sun, May 2000**

*Should politicians who use prostitutes be ousted?*

Yes: 80%

No: 20%

**4 Corners ABC TV, May 2000, Program — Sex and Censorship (1,195 voters on the online forum after program)** *Question: Who's view do you support?*

Eros Association: 96%

Senator Harradine and Deanne Kelly: 4%

**60 Minutes, April 1999**

*Question: Should pornography be available outside Canberra, only in Canberra or not at all?*

Everywhere: 65%

Canberra: 2%

Nowhere: 33%

**ABC TV/AGB McNair, June 1994 — Youth Attitudes**

*Question: Should pornographic material be available to people 18 years and over?*

Yes: 69%

**Industry Surveys 1989 — 2007**

**Eros Association Industry Survey, 2006**

42% of adult shop customers in Australia are women Australian women buy over one million vibrators every year

**Durex Global Sex Survey, 2003**

58% of Australians use pornography (movies or magazines) in lovemaking

**Opinionmeter: Brisbane Sexpo, Feb 2003**

69% of attendees were aware that it is illegal to sell X rated films in QLD. 92% think the regulations should change

**Cleo Magazine, October 1989**

64% of readers report that pornography plays some part in their sex life