# Submission to the ALRC on the National Classification Scheme Review

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This inquiry has been called upon to examine an area that is both vast and rapidly shifting. The subject matter includes the classification of publications, films and computer games as well as relevant online content. The current regulatory framework is complex. As the Issues Paper makes clear media content is regulated by the *Classification Act* 1995 (Cth) and complementary state and territory legislation, reinforced by the Intergovernmental Agreement on Censorship. Online content is currently regulated by a co-regulatory scheme, reliant on industry codes. Concern has been expressed by many including the Senate Standing Committee Report on Classification, about the current regulatory approach and scope. Any attempt to regulate this space is going to require careful consideration of varied and innovative approaches as well as a transparent and honest attempt to articulate and prioritise the social and economic objectives of the regulation. This submission aims to discuss alternate regulatory approaches that may be useful to this inquiry.

**Regulatory Approaches**

There are four regulatory approaches that may be useful to consider here: state based regulation, self regulation, co-regulation and informational and participatory governance. Because this regulatory space is not homogenous, we are of the view that it calls for the implementation of a variety of approaches, borrowing from each of the above regulatory approaches. We have termed such an approach 'polycentric regulation' – regulation happening in many centres where there is a role for an institution or actor to orchestrate these multiple centres of activity. Here we see the state/regulator occupying that position and utilising a range of strategies to achieve the desired outcome.

1. State based regulation

State based regulation (conceived as top-down control using prescriptive legislation, detailed rules and judicial enforcement) has a number of advantages. One of these is its ability to impose sanctions severe enough to achieve generally wide ranging and strict observation of a given set of rules. Such sanctions comprise particularly those provided for by criminal law, implemented by state authorities. Thus, when stringent sanctions are deemed necessary to ensure conformity with a set of rules, public regulation seems to be

the appropriate form of regulation. [1]

Nevertheless, regulation is not necessarily the only or best way of solving a given problem. The setting of rules by a centralised government body is often a slow and expensive process, especially if requirements such as consultation processes or impact studies must be met. In fields where technology is fast-paced or where for other reasons (e.g., social developments) the factual basis for a future regulatory reaction changes rapidly, the time necessary for public regulation may compromise its effects.[2] Further, the heavy reliance on centralized knowledge (bureaucracies and agency expertise) to set detailed and uniform rules has been widely criticized as ineffective, because this approach is by definition insensitive to local conditions and variations between industry types. In addition, adversarial forms of state driven governance, characterized by stick-waving government agencies, can very often encourage counterproductive resistance from both individuals and businesses. An added complication in this area is the difficulties associated with monitoring and enforcing such conduct, such as online sales or the sales at suburban video shops, which makes reliance solely state based governance strategies impractical.

We note that the Senate Standing Committee has called for the introduction of a new national classification scheme and for having greater uniformity of enforcement powers and processes. Here the Committee points out the cooperative scheme is 'a particularly disjointed and fractured arrangement'[3] and calls for a uniform approach. In this context the experiences with both the *Trade Practices Act 1974* (Cth)[4] and the *Corporations Act 2001* (Cth) are relevant. There are a number of ways in which such legislation can be passed: via the trade and commerce power and corporations power[5] ; or by a referral of powers under section 51(xxxvii) of the Constitution. However given the expanding global issues of carbon tax, security and immigration that face our government, it is unlikely that such an approach is going to be prioritised. Further it is also clear that national legislation, without commitment from industry is unlikely to deliver improved regulatory outcomes, given the difficulties of policing and enforcing the conduct of the myriad parties.

There is a role for the state in this area and it is an important one. However rather than being a prescriptive one, the role is for more nuanced: encouraging business, co-enforcing through industry associations, and employing a multiplicity of strategies including monitoring of complaints systems and providing for data collection. Some of these strategies are discussed under the heading of polycentric regulation.

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[1] Carmen Palzer and Alexander Scheuer, *Self-Regulation, Co-Regulation, Public Regulation,* UNESCO Clearing House p 2.

[2] Ibid 2.

[3] Senate Standing Committee Report on Classifications 2011, 175.

[4] Now repealed and replaced by the *Competition and Consumer Act 2010* (Cth).

[5] See: Senate Standing Committee Report on Classifications, 174.

## 2. Self Regulation

Self regulation has many supporters foremost being industry participants. Industry is perceived as most experienced and best placed to evaluate the risks of their products and services. Professionals may react to new challenges in an easier and faster manner than do the makers of public regulation. Another positive aspect is the voluntariness of the system. The members, voluntarily submitting to the system, are willing to comply with the rules. Normally (when the system is running well) they obey without coercion; they are convinced that conformity of their behaviour with these rules is the best way to solve the given problems. [6] Additionally, some parts of the media sector – especially online conduct over the internet – are unsuitable for state regulation approaches and voluntary self- regulation, implemented ideally by all, if not by most of the stakeholders, may provide for a solution.[7]

However self regulation has its problems: the voluntariness of the system may be seen as its weakest point and stakeholders cannot really be forced to comply with the rules. [8] Further self-regulation suffers from a lack of democratic legitimation. It originates from economic players or groups with their own specific interests – interests that may contribute to or even is partly congruent with the general interest; nevertheless these special interests do not necessarily coincide totally with the general interest. [9] Thus, there will always be a tendency to allege that self-regulatory organisations pursue their own policies rather than general policy goals.[10]

These weaknesses may be mitigated by combining self regulation with other new governance approaches to produce effective synergies. New governance strategies, such as co-regulation and polycentric regulation try to do just that. All these approaches attempt to incorporate layers of reflexivity or audit. The key principles of audited self management are:

- Establishment of objectives for performance which are benchmarked to best practice and agreed with the department;
- A management system, with third party or government accreditation, which ensures continual improvement in performance;
- Auditing of performance with third party involvement and verification; and
- Public reporting of performance and incidents.[11]

Such strategies have been particularly important in the fields of compliance with environmental regulations, consumer protection and in the area of corporate governance

[6] Palzer and Scheuer, 2.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid 3.
[11] B Jenkins and P Hine, 'Benchmarking for Best Practice Environmental Management' (2003) 85(2) *Environmental Monitoring and Assessment* 115.

and corporate social responsibility. We believe that incorporation of such principles is essential to make self regulatory systems work effectively and to adequately reflect the concerns of community and stakeholders.

3. Co-regulation

Co-regulation has been important in the areas of competition and corporate regulation for over twenty years and its growing relevance has been described as follows:

> "Due to new technological developments, especially their speed and the growing convergence, public regulation is deemed to be no longer able to solve some of the problems at issue…The more stakeholders take the initiative for responsible handling of relevant concerns, such as the protection of minors, the more efficient and prompt the regulatory framework can react to new technologies".[12]

Co-regulation strategies have been essential to regulate the internet as well as most global activities, mainly because of jurisdictional problems and enforcement reach. This may often require the state/regulator to act as a norm entrepreneur, overseeing industry and developing strategies that vary from the manner we have perceived administrative law and the role of the state.[13] Co-regulation will be much more effective when the state/regulator plays a significant role in setting the legal framework, monitoring the functioning of the system by monitoring self-regulatory bodies and setting up other monitoring and reporting systems and keeping a constant eye on proceedings with the view of requesting adaptations when needed. The state would need to establish sufficient incentives (negative or positive) to both drive regulated actors to improve performance and/or ensure their commitment to using and following the process. Legislation or administrative guidelines should establish criteria according to which co-regulatory systems should work, addressing such issues as complaint procedures, sanctioning powers in view of members, organisation and representativeness, conditions for accreditation.

Generally the Australian Competition and Consumer Commission's (ACCC) strategies are well worth noting here and the manner in which its regulatory strategies focus on educating industry participants, monitoring industry codes of conduct, promoting self regulation and encouraging a commitment to core competition principles, is applicable to this inquiry.[14] The ACCC has embraced the notion of co-regulation, defined as a supported form of self regulation, since the 1980s and has used industry codes as market-sensitive mechanisms for

[12] Ibid 6-7.

[13] Weiser P, The Future of Internet Regulation, Working Paper Number 09-02, Legal Studies Research Paper Series, University of Colorado Law School.

[14] See: Nagarajan V, From 'Command and Control' to 'Open Market Coordination': Theorising the Practice of Regulatory Agencies', (2008) 8 *Macquarie Law Journal* 5.

delivering consumer protection rules.[15] It has published guidelines for the development of such codes[16] and has stated that it is appropriate for self-regulatory codes to replicate or exceed legislative requirements if they encourage better practice and behaviour from industry members.[17] It has also attempted to provide for adequate participation for all stakeholders in the development of Codes of conduct which is relevant to this inquiry. Two specific ways in which the ACCC has attempted to incorporate responsive practices into Codes is worth noting for the purposes here:

- Strengthening the complaints processes within Codes of Conduct in order to give voice to consumers and stakeholders. Such process are aimed at enforcing these Codes of conduct, making industry participants accountable and ensuring that the decision is transparent and fair. While authorising Codes of Conduct, the ACCC incorporated complaints process and dispute resolutions systems into the By-laws and constitutions of the associations. The mere presence of a complaints or dispute resolution system within a code of conduct may not be enough to ensure that it is effective. Other important factors include that these systems be independent; the decision making be transparent and complaints and dispute resolution panels be accountable; there be appeal processes available; and access to these systems be available at reasonable cost. In the authorisation of the Royal Surgeons Code of Conduct the ACCC required that a number of the members of the Appeals Committee had to be nominated by the Australian Health Ministers reflecting the public interest issues involved in the determination.[18]
- Promoting external monitoring of the industry by providing for external monitoring. In the authorisation of the Surgeons Code of Conduct, the ACCC was concerned with the exclusive role of the College of Surgeons in setting the standards for accrediting hospitals and training positions within hospitals. The conditions imposed included a requirement that the College establish a public independent review of the criteria for accrediting hospitals for the provision of various surgical training positions.[19] This condition was supplemented by others involving the participation of the State Health Ministers in the nomination of hospitals for accreditation[20] and another condition required the College to establish an independent chaired committee to publicly review the tests that medical colleges use to assess overseas trained surgeons.[21] In

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[15] Australian Competition and Consumer Commission. 'Submission to the Financial System Inquiry (Wallis Inquiry)', September 1986. Also see: Graeme Samuel, 'Industry regulation – can voluntary self-regulation ever be effective?' (Centre for Corporate Public Affairs 2003 Oration), Melbourne, 20 November 2003, 5-6.

[16] See: Australian Competition and Consumer Commission, *Guidelines on Codes of Conduct* (2005); See also Australian Law Reform Commission (ALRC ), Parliament of Australia, *Compliance with the* Trade Practices Act 1974, Report ALRC 68, (1994) at 3.7, Introduction of Part IVB of the *Trade Practices Act* in 1998.

[17] *Australian Direct Marketing* authorisation (2006) A90876, 17–18.

[18] *Royal College of Surgeons* authorisation (2003), A91106, 217.

[19] *College of Surgeons authorisation*, (2003) A90765, 166.

[20] Ibid 167–8.

[21] Ibid 172.

another instance dealing with the Code of Conduct of the Australasian College of Cosmetic Surgery, a condition required the Code to be amended for an independent auditor to be appointed by the College to report findings of annual audit checks which included checking the manner in which the Complaints Panel of the College dealt with complaints made to it. The results of these audits are to be reported to the ACCC as well as the College's Code Administration Committee.[22]

4. Information and Participatory Governance Strategies

Informational regulation, which is of central importance in the governance of financial services and credit industries, is relevant to this inquiry. The exposure of non-government stakeholders and the wider community to relevant information can empower local citizens and groups, encouraging them to act as "surrogate regulators". By using their new-found knowledge, local citizens and groups can bring alternative forms of pressure on industry and enterprises, be it through lodging formal complaints, using citizen's rights at general law and/or bringing social pressure to bear on an enterprise through protests and social action. Such action can be unlocked, for example, by requiring industry to publicly report on their performance against established benchmarks. The importance of information flows is evident in the ACCC's regulatory strategies: in the market economy information, clearly considered the key to decision-making by consumers, competitors and regulators, is not always easily available and many strategies are aimed rectifying this market failure by funnelling relevant information to appropriate audiences. For example in the Code of Conduct for the Australasian College of Cosmetic Surgery the ACCC required the College to provide a brochure to all persons at their first consultation or where the first consultation is by telephone, video, mail or email, particularly given the increasing demand for telemedicine, prior to this first consultation.[23] The previous Code only required for such a brochure to be given before a procedure was agreed to. Further the conditions mandated that the practitioner was required to provide a written summary of their own training and experience at the first consultation. The existing Code only required members to have such information available for distribution.[24]

However where the information is inappropriate for, or is perceived to be irrelevant by the intended audience, the subsequent use of that information will lead to misguided or ineffectual regulatory outcomes. A paramount challenge for informational approaches is thus ensuring the types of information to be released and the intended recipients are appropriately complimentary. An example from the ACCC's activities is again relevant here. In approving the Code of Conduct for Agsafe, the ACCC required information on the industry association website to be corrected in order to clearly indicate that it would be possible to

[22] *Australasian College of Cosmetic Surgery* authorisation (2009) A91106, 57, 79.
[23] ibid, 31.
[24] Ibid, 30.

procure accreditation through alternative sources.[25] Such governance strategies require constant vigilance by the state/regulator or other monitoring bodies.

The Senate Standing Committee Report on Classifications points out there the various states and territories adopt different approaches to how classified material should be dealt with, adding further complexity of the current regulatory scheme. This Committee calls for the establishment of national standards for display of Restricted publications.[26] The establishment of standards would improve information flows adding to the regulatory effectiveness and there is a role for the state/regulator in steering such standards.

A related participatory approach to governance seeks to engage users and the wider public directly in regulatory decision making. Participatory governance innovations have opened up new points of public input into many levels and stages of legal process, including legislation, promulgation of rules, implementation of policies and enforcement. Examples of such initiatives are evident across diverse policy areas, including policing and school reform, work place law, environmental law and heath care. This approach relies heavily upon participatory dialogue and deliberation in setting standards and targets. Such approaches can deliver effectiveness and legitimacy in circumstances where traditional approaches cannot. For example, prescriptive regulatory standards depend upon a degree of centralized knowledge (e.g. in order to set suitable standards) that is often not available. In contrast, collaborative, participatory and deliberative approaches can lead to problem solving that is able to capitalize on the unique local and other knowledges and capacities of multiple public and private actors. Direct involvement of these actors in deliberative styles of governance can also foster stakeholder ownership and buy-in and can give greater voice to marginalized interests (as contrasted to an exclusive reliance on science in prescriptive regulation or on price and competition in markets).

Straightforward examples of participatory governance include encouragement to alter the composition of committees by involving external stakeholders which can bring about a cultural shift in decision making.  Less straightforward examples would include industry to consult with stakeholders on an annual basis in order to reflect on the manner in which information flows are organised, revise the standards that are used or rethink the success of its complaints processes.

Such approaches may benefit for standard setting and monitoring by establishing community based forums. However, despite the fact that collaborative approaches can help to leverage government expenditure by mobilizing the resources of others in implementation, monitoring and enforcement roles, the success of this approach will depend on significant public funds (to cover transaction costs and provide assistance). Further, any decision making forum must be supported by legitimate process for selecting

[25] *Agsafe* (2010) A 91234, A 91242, A91243 and A91244, 30.

[26] Senate Standing Committee Report on Classifications 2011, 176.

and appointing representatives. The Senate Standing Committee Report on Classifications points to the need for greater information sharing between the Commonwealth and states and territories in relation to breaches of the legislation and the enhanced capacity for the Classification Liaison Scheme[27] which requires greater funding commitment by government.

## Classifications as the space for Polycentric Governance

The area of Classifications is already wide and there are many calls to bring a range of other activities including sales of games or film online, the use of You Tube which facilitates uploading, watching and sharing content as well as exhibitions of art work. Each of these sites requires different governance strategies that include spaces for deliberative practices as well as a place for the state/regulator. We propose that Polycentric defined as 'many centers of decision making that are formally independent of each other'[28] may provide a suitable framework to view this regulatory space.[29]

Polycentric governance has three distinctive dimensions which make it a perfect fit for analysing this space: organisational, functional and conceptual dimensions.[30]

- First at the organisational level, this site is not dominated by one specific body such as a state department or a government funded regulator. Rather than the government taking control to implement and enforce laws, it is multiple non state actors that facilitate regulation, sometimes with the same objective in mind and sometimes for other ends.
- Secondly at the functional level, this site is a lucid example of hybrid regulatory strategies involving both hard law and soft law. Hard laws have a number of characteristics: they are usually state mandated, deterrence oriented, buttressed by an enforcement regime and supported by sanctions that are attached to breaches. Soft laws are voluntary, can be made by either state or non-state bodies, rely on persuasion and are usually rolled out in the form of recommended guidelines or standards that may or may not be monitored. These laws are multi-faceted (using different strategies), involving multiple actors (both state and non state actors) and both direct and indirect.
- Thirdly at an conceptual level, it is an example of a changing conception of regulation, where the notion of the state being at the centre of regulation has given

[27] Senate Standing Committee Report on Classifications 2011, p 176.

[28] Vincent Ostrom, Charles Tiebout and Robert Warren, The Organization of Government in Metropolitan Areas: A Theoretical Inquiry' (1961) 55(4*) American Political Science Review* 831. Also see: Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100(3) *American Economic Review* 200.

[29] For a discussion of polycentric governance in the Australian context see: Vijaya Nagarajan, 'Regulating for women on corporate boards: polycentric governance in Australia;, forthcoming in (2011) Federal Law Review.

[30] These three dimensions have been used by Julia Black. See: Julia Black, 'Legitimacy and the Competition for Regulatory Share' (Working Paper 14/2009, London School of Economics, 2009). It is acknowledged decentered governance can also apply here. However as discussed by Black, decentering seeks to draw attention away from the state as having a central role whereas polycentric governance draws attention to the multiple sites in which regulation can occur. On decentred regulation see: Dimity Kingsford Smith 'Beyond the Rule of Law? Decentred Regulation in Online Investment' (2004) 26(3) *Law and Policy* 439 and Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems*, 103.

way to a polycentred notion of governance where a range of actors are involved in different facets of the regulatory regime.

Polycentric governance sees quite a different role for the state/regulator than the traditional administrative law may propose. Rather than passing laws and enforcing them directly the state seeks to steer actors. The role of the state is to act as a fulcrum that connects with all the participants, be they associations, companies, networks and stakeholders and try to weave commitment to the objectives of the classification regulation. This requires that these legislation's objectives be clearly articulated. Although we acknowledge that generally the notion of the fulcrum point, which steers others towards the regulatory outcome, can be occupied by either the state or a non state institution, in this case we see that the state is best placed to perform this role.

Under such an approach the state would play three key roles: provide guidance, use participatory incentives to steer conduct and increase enforcement capability.[31] Each of these roles are discussed in further detail –

- *Definitional guidance*: this refers to the state describing and defining the nature of the co-governance arrangement. These might include - what issues are to be addressed; who is able to participate in the arrangement; what is its legal nature; what performance outcomes are expected; and what is the operational relationship to other existing institutional structures. For example the development of standards for classifications of all games and film, the processes for consultations with stakeholders and community in developing industry self regulatory codes, the elements of an appropriate audit self management programs which may be mandated in codes, are all areas where definitional guidance would be useful.

- *Participatory incentives*: this refers to the state providing incentives, which may be positive (in the form of various economic inducements) or negative (in the form of punitive sanctions), for targeted actors, be they companies, communities, individuals or NGOs, to participate in the particular form of co-regulation being established. A process whereby industry could request a specific classification category for their product and liaise and work with regulatory body (or indeed a community forum) in meeting that classification including the process of making cuts/edits before the final decision is made, is one example.[32] In other regulatory sites, federal and state governments have indirectly preferenced businesses that comply with standards when tendering for procurement a contract which are another example of this strategy. There can also be encouragement for participation by other non-state bodies in policing the behaviour of actors.

[31] For further on these roles see: Cameron Holley, Neil Gunningham and Clifford Shearing, *New Environmental Governance* (Earthscan, forthcoming, November 2011).
[32] D Mac Sithigh, 'The regulation of video games : past present and Future' (2010) 8(21) *Ent Law Review* 298.

- *Enforcement capability*: this refers to the state fulfilling an enforcement role in ensuring that co-regulatory arrangements deliver on their obligations. Such a role may apply to individual participants in these arrangements, or to an industry group as a whole. In either case, this entails the presence of performance indicators or criteria against which success or otherwise can be judged. Participating in the collection of data and making this available to stakeholders to improve enforcement is relevant to this inquiry. Further auditing the compliance and dispute resolution systems in place to ensure they are transparent and accountable may be necessary to strengthen trust in the industry compliance and private enforcement.

Polycentric governance is focussed on outcomes and relies on steering all the parties towards this outcome. However the steering has to be collaborative, thoughtful, site based, and always reflective.

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