Submission to the National Classification Review - response to Discussion Paper

Before I address the specific proposals in the Discussion Paper (DP), I would like to make some general comments.

First, it appears from the DP that the Commission has simply not had the time or resources necessary for a review of this scope. Many of the proposals in the DP are presented in the form of broad policy objectives with little discussion of how the objectives are to be achieved; in particular, most of the proposals for expanding the reach of the classification/censorship system to online content do not identify the content or entities to which they are to apply. This makes it very hard to work out what the Commission is actually proposing; a goal like "all content likely to be R18+ must be restricted to adults" could be attacked in many different ways, each with vastly different effects in practice.

This lack of detail makes it difficult to test the likely effects of these proposals against the guiding principles identified in the DP, and indeed there is little evidence in the DP of such analysis having been done. There is also little to distinguish the proposals in the DP from the many very similar earlier proposals to regulate online content that have always collapsed as soon as anyone tried to work out how they could be implemented, and, while the DP does acknowledge some of the problems presented by Australia's limited jurisdiction over content hosted overseas, many of its proposals simply wish these problems away. And many of them appear to confuse the objective of preventing Australians from accessing certain types of content with the (unstated) objective of preventing Australians from producing or publishing such content.

I suggest that the Commission ask for more time to complete this review, with at least one more discussion paper so that any further detail it has developed to fill out its proposals can be subject to public scrutiny and not just consultation with business and pressure groups. Failing that, the Commission's final report should make clear its limitations, and should refrain from putting forward proposals that the Commission has not been able to consider properly.

Second, I understand (from a statement by the ALRC legal team on the Commission's discussion page on restricted access systems) that the Commission regards its role in this review as limited to considering the "architecture" of the classification system. As far as I can tell, everyone other than the Commission was always under the impression that this review was going to be a comprehensive review of the entire classification and censorship system, and I cannot see how the terms of reference could be interpreted in any other way.

I suggest that the Commission's final report explain the scope of the review, and in particular the extent to which this scope is narrower than that indicated by the terms of reference.

Third, the DP taken as a whole proposes a vast expansion of Australia's classification and censorship system to the Internet. Although there are various measures for regulating online content in the present scheme, their coverage is patchy and few of them if any are consistently enforced. The new scheme will have to be designed and implemented very carefully, or there is a significant risk that we will end up with something that is much more repressive (of speech and expression) and stifling (for Australian

businesses setting up on the Internet) than what he have now, for little benefit.

Proposal 5–1 A new National Classification Scheme should be enacted regulating the classification of media content.

This is a good idea. It would be really hard to fix the badly broken present scheme; much better to start again.

Proposal 5–4 The Classification of Media Content Act should contain a definition of 'media content' and 'media content provider'. The definitions should be platform-neutral and apply to online and offline content and to television content.

The single most important factor in determining the success or failure of this new scheme for regulating online content will be the targetting of the various obligations and enforcement measures.

In established offline industries, it should be pretty obvious who and what to target: cinema operators, films, television broadcast licence holders, broadcast television programs etc. But for online content it will be much harder. Five options for identifying the entities and the content which will be subject to measures such as obligations to have content classified before publication, industry codes, "restrict or classify" notices from the Regulator, offences etc are as follows:

<u>1. Regulate content hosted in Australia only.</u>

This is the BSA Schedule 7 approach. DP 5.35, 8.14 and 14.50 suggest Schedule 7 as a model for aspects of the new scheme.

This approach has the advantage that it does not seek to overstep Australia's jurisdiction by targetting online content hosted internationally. It also effectively targets some content providers who rely on local infrastructure, for example IPTV operators using equipment in exchanges (e.g. fetchtv) or ISPs offering special content to their members that does not count towards bandwidth caps. It will meet community expectations as over time people will come to understand that only locally hosted material can be effectively regulated, if they do not already.

The disadvantages of this approach have been extensively discussed. Here are just some of them:

- It cannot deal with content providers who do not need to rely on local infrastructure. If the rules imposed on material hosted in Australia are onerous, most content can be easily shifted overseas;
- It does not affect content hosted overseas in any way;

- In the case of Schedule 7, because the restricted access system (RAS) requirements for R content are unworkable for most types of content service the scheme effectively forces anyone seeking R content to look to offshore providers, who are unlikely to provide any classification information and are likely to mix R content with X and RC content;
- It punishes Australian hosting providers, who already face an uphill battle because of the high costs of technology and bandwidth in this country. This offends against the principle of parity of treatment of domestic and international services mentioned in DP 4.52;
- It is likely to make all kinds of innovative business models difficult or impossible to develop here, including those that are not dedicated to adult content but could be faced with the administrative costs of compliance, or could be effectively shut down because of material in a user comment or a hacked page if they lacked the administrative or technical capability to comply quickly enough;
- It does not deal well with "cloud hosting", where the physical location of data is difficult to determine (see ACMA's *Broken Concepts* paper, p. 81);
- It offends against the ALRC's guiding principles 1, 5, 6, 7 and 8, and at least the second half of 2, while doing little or nothing to advance the remaining principles (because of the problems identified above);
- Its flaws are obvious and widely recognised, and having such a scheme in operation paints Australia as a backwater of the Internet and the Australian Government as irrationally hostile to communications technology.

<u>2. Regulate Australians who provide (not just host) content online, regardless of where the content is hosted.</u>

This approach may seem tempting considering the limitations of the first approach. Unfortunately, it would be a disaster. Here are some of the reasons why:

- It would be very difficult to enforce, as it may not be easy to determine who is responsible for content hosted overseas;
- It may be difficult for an Australian falsely accused of publishing content through an overseas hosting service to obtain evidence from the service that would disprove the allegation;
- Although an Australian content provider may have originally published the content online, they may not be able to arrange for it to be taken down or restricted. This could be because they have lost a password, the hosting provider is difficult to contact, the content was published under an irrevocable licence and the host refuses (or can't be bothered) to remove it, the content is being hosted illegally, the content is being published legally without the permission of

the Australian content provider under an exception in the intellectual property law of the host jurisdiction, the content has been republished by content aggregators etc.

- It would make it very difficult for Australian content producers to license material for international distribution if they could be punished for breaches by a licensee. This would be especially difficult for people who distribute content under licences expressed to be irrevocable (including open licences like Creative Commons licences or the GPL v3) as they would neither be able to revoke the licence nor use any defence of not having licensed the content for publication (see e.g. s 24(5) of the Commonwealth Classification Act);
- It would cause problems for multinational companies with enough presence in Australia to be subject to Australian jurisdiction if they could be punished for publishing content that is available in Australia only incidentally to its publication to a specific overseas market, or that is being published to the world at large;
- If the transition to the new scheme was not handled well, it could result in people being punished for content that they published years ago and have long forgotten;
- It would have no effect at all on content hosted overseas and available here, other than the miniscule amount produced by Australians;
- It would punish not just Australian companies providing content hosting or distribution services, but also Australian content producers who would have to compete with overseas content producers subject to much less regulation (offending against the principle of parity of domestic and international treatment). It would in effect be a kind of reverse cultural protectionism;
- It offends against the ALRC's guiding principles 1, 5, 6, 7 and 8, and at least the second half of 2, while doing little or nothing to advance the remaining principles (because of the problems identified above);
- It would be even more embarrassing internationally than the first approach, especially if the Regulator ever tried to actually enforce it.

3. Regulate all Internet content, no matter who published it or where it is hosted.

This approach was recommended by many submissions to the Issues Paper, but is obviously absurd.

4. Allow online content to be classified, but do not otherwise regulate it. Deal with material that is internationally recognised as illegal as a law enforcement matter.

Counterintuitively, this approach would probably result in the greatest amount of online content being classified under the proposed scheme, because it would not provide the strong incentives that other

approaches provide for removing material from Australia's jurisdiction. This is the only approach which is clear and workable without imposing harmful consequences on Australian hosting and/or content providers.

5. Regulate content providers that rely on local infrastructure to provide types of services that cannot easily be provided by overseas service providers. Otherwise, allow classification of online content but do not require it. Deal with material that is internationally recognised as illegal as a law enforcement matter.

This approach mixes approach 1 (BSA Schedule 7) for content that cannot easily escape Australia's jurisdiction with approach 4 (general deregulation) for content that is likely to move offshore if regulated. It is likely to have a stultifying effect on regulated industries, will require the targets of regulation to be carefully identified and will need constant monitoring to ensure that it remains relevant, but is probably the least bad approach after 4.

An alternative

A possible alternative to selecting from the above approaches would be a general rule imposing regulation only on whoever performs the final step in the publication/distribution chain - for online content, this would generally be the hosting provider. A content producer who licenses content to another entity for publication would not be made responsible for what the publisher does with the content; if the publisher is outside Australia's jurisdiction, so be it.

Proposal 6–1 The Classification of Media Content Act should provide that feature-length films and television programs produced on a commercial basis must be classified before they are sold, hired, screened or distributed in Australia. The Act should provide examples of this content. Some content will be exempt: see Proposal 6–3.

As I understand it, the substance of the proposal for films is as follows:

- Commercially produced feature-length films must be classified by the Board before they can be shown in cinemas in Australia (except at film festivals);
- Commercially produced feature-length films that are not to be shown in cinemas in Australia must be classified, but not necessarily by the Board;
- Films that were not produced on a commercial basis do not need to be classified at all;
- Films that are less than feature length (which I suppose is about 80 or 90 minutes) do not need to be classified at all;

- Rules about restricting access may apply to films "likely to receive" an R rating, whether they are required to be classified or not;
- However, films likely to be X-rated must be classified by the Board (I think this is regardless of whether they are commercially produced or not);
- The Commission has no view on whether sale or possession of X-rated or RC films should be legal.

The first four points are reasonable (this submission will address the other points in comments on later proposals). Producing and distributing a feature-length film is expensive, especially if it is to be shown in cinemas. The cost of classification is likely to be a tiny fraction of a commercially produced film's budget, so these rules seem unlikely to cause too much trouble for anyone caught by them. It would also be pretty hard to evade enforcement measures.

The proposal for television programs seems to be similar, although all classification would be done by industry. However, it is not clear from the DP what is meant by "television program". The traditional concept of a television program is a program transmitted by a broadcasting service (by terrestrial transmitters or satellites, or over dedicated pay-TV cable networks), but this has been challenged by the rise of alternative delivery methods such as IPTV. Indeed, "television program", "program" and "broadcasting service" are identified as "broken concepts" in ACMA's *Broken Concepts* paper. It may presently be possible to tell a "television program" from a "film" by whether it has been, or will be, broadcast by a broadcasting service, but as time goes on this distinction will become less and less relevant.

The situation is complicated by the rise of a new type of program: videos produced by individuals or small groups solely for publication on online video-sharing sites like Youtube. Although these are in a sense "user-generated videos" as referred to in DP 6.58, they are often commercial: the host (e.g. Youtube) will make advertising revenue that it may share with the producer, and the producer may enter into sponsorship arrangements. These kinds of programs are also unlikely to be hosted in Australia. Forcing them to be classified, including by "industry" if industry classification is to require approved assessors, would be prohibitive.

Any proposal that could lead to more types of programs being required to be classified must be framed with careful attention to the effect it would have on new forms of program production.

On the proposal to exempt content produced non-commercially from various classification requirements: this is an excellent idea, and must be implemented. However, it may not always be clear whether content is commercial or non-commercial, especially if content that was produced non-commercially is hosted by a commercial hosting provider (e.g. an advertising-supported provider like Youtube). I suggest that people who produce content non-commercially should not be subject to classification obligations, even if the content is hosted commercially (for the benefit of someone other than the producer). If any classification obligations apply in respect of the act of publication, they should not be enforceable against the non-commercial producer even if the host/publisher is outside

Australia's jurisdiction.

Proposal 6–2 The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA 15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6–3.

The proposal to only require commercially produced films intended for cinema release to be classified by the Board is reasonable because it targets only entities who should have little trouble affording classification fees. This proposal for games, though, makes no such distinction, and it is difficult to understand why the Commission has recommended an approach which will maintain the special, inferior status of games in the classification system. I can only guess that the Commission has identified a specific industry (apparently, online "app stores" for mobile devices which presently are known to self-censor) and developed this proposal to be workable for that particular industry without regard to its effect on other types of content service, or on content producers.

There are numerous services of other types selling games over the Internet (Steam, Desura, Impulse, Good Old Games etc) and many of them sell unclassified MA- or RC/R-level games (they may also sell classified games, but generally only titles that have already been classified for retail release in Australia). They are all, as far as I know, based overseas. Classification obligations applying to all commercial games likely to be MA or above could not be enforced against these content providers, but would make it difficult for any Australian equivalents to compete with them for reasons similar to the reasons why mobile device app stores are uneconomic under mandatory classification. If the new scheme allows for Australian game developers to be penalised for classification breaches by overseas distributors, this proposal would also make it difficult for these developers to license their material internationally.

This proposal interacts oddly with proposal 6-6 (that content must be classified before enforcement action can be taken in respect of it). If an unclassified game likely to be rated MA was being distributed, the Regulator would need to have it classified before doing anything about it - but the game would then no longer be unclassified and its distribution would be legal. I suppose the Regulator could prosecute the publisher for having failed to predict the classification the game would be given, but this seems unfair considering the relatively fine distinction between M and MA.

Proposal 6-3 conflicts with guiding principles 1, 4, 5, 6, 7 and 8 and the principle of parity of domestic and international treatment, without being necessary or effective for the purposes of the remaining principles, and should be rejected.

To bring games into line with the proposed classification rules for films, at most only commercially-produced games sold at retail should be required to be classified.

Proposal 6–4 If the Australian Government determines that X 18+ content should be legal in all

states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.

Proposal 6–5 The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.

This proposal, and the DP in general, appears to assume that the classification categories are a simple hierarchy with R, X then RC at the top in that order. This may be more or less true for sexually explicit material (subject to quirks like the oddly obsessive rules for depictions of genital detail), but the "instruction in crime", "use of proscribed drugs" and "advocacy of terrorism" classes of RC content are more subtle and it would be easy for untrained individuals to fail to even contemplate that material which the Board would be likely to consider RC might be problematic. In fact I doubt that many Australians are even aware that Australia censors material other than pornography.

This confusion is enhanced by the prevalence and general acceptance of some kinds of RC content online; at the time of writing a search for "responsible drug use" on Youtube brings up, in the first page of results, several videos that would probably be refused classification. A more detailed search finds many more, some of them uploaded by people who give their location as Australia. Much of it is at least in part political in nature. Searches of the web at large find vast reservoirs of this kind of material.

Also, if the classification standards for print publications are to continue to differ from the standards for online publications, it is possible that an unrestricted, R1 or R2 print publication could become "content that may be RC" simply by being scanned or transcribed and uploaded (BSA Schedule 7 deals with this in part through the awkward concept of "eligible electronic publication").

Content providers should not be expected to identify this kind of content in the same way that they might be expected to identify sexually explicit content likely to be rated X or RC. The general rule that "ignorance of the law is no excuse" should not extend to "inability to predict a decision of the Classification Board is no excuse", especially if Classification Board decisions about online content continue to be secret. Any enforcement measures taken against content providers on the basis of such lower-level RC content should provide the content provider with the opportunity to take the content down or stop publishing it, and should not apply any penalty if they do.

Of course, this problem arises mostly because of the overly broad scope of the RC category. If RC were substantially reformed to remove types of material that can be legally published in many other parts of the world, many of the problems of enforcement under the proposed scheme would become much less insoluble.

Another problem with the various proposals in the DP that rely on a publisher's assessment of the likely or possible classification that content would receive is one identified by Amy Hightower on the ALRC's discussion forum: it creates a new grey area of content that is not R, X or RC, or even *objectively* likely to receive such a classification, but must be treated as if it was because of the difficulties involved in

predicting decisions of the Board. This would be an undesirable result.

Proposal 6–6 The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:

(a) charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;

(b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or

(c) adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).

The proposal that no enforcement measures should be taken in relation to content before the content is classified is appropriate and necessary. If the content is being dealt with by a private individual and is not material that is illegal to possess, the individual should also be given a chance to stop publishing the material before any enforcement action is taken.

Content providers should not be charged for classification applied for by the Regulator or another law enforcement body.

Proposal 6–7 The Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. The Act should define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'.

This is much better than the present rule. However, "different" should be changed to "higher". Otherwise, someone who is concerned that modifying a piece of content might result in *lowering* its classification could have an incentive to throw in some gratuitous nudity or something if they are less concerned about the classification level than about having to pay or wait for reclassification.

Also, any obligations or penalties that apply to modified content should apply only to the publisher of the modified version, not the original publisher. For example, the publisher of a game should not be responsible for a mod created by a user unless the publisher is directly responsible for distributing it (some publishers host mods and user-designed levels on their own servers, but many do not and simply allow users to produce mods and publish them themselves).

Question 7–1 Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier? In

Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.

Possibly for offline publication and publication through dedicated online services like IPTV.

For online publication, there seem to be two options:

1. Require expensive official classification. This would mean that little or no material would be classified, and anyone seeking such content (which is not illegal to view) would simply go to unrestricted overseas sites where X content would be likely to be hosted alongside RC content and possibly also content that is illegal to view as well as publish;

2. Allow self-classification (and make such content legal to publish). This would allow the Regulator to police such content providers to ensure that they provide classification information, comply with any restricted access requirements and do not host RC content alongside X content.

The discussion paper suggests the first option. I think it is clear that the second option would produce results more consistent with the guiding principles of the review.

Proposal 7–3 The Classification of Media Content Act should provide that content providers may use an authorised classification instrument to classify media content, other than media content that must be classified.

This is a good idea. There should be no penalties for unintentional misapplication of these classification instruments, as they will be used by people with no training in or knowledge of the classification scheme. Ideally they would also be used by foreign content providers who are unlikely to have much understanding of the legal definition of Australian community standards.

Proposal 7–6 The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:

(a) reviewing industry and Board classification decisions; and

(b) auditing industry classification decisions.

This means the Classification Review Board would cease to operate.

The Board should not be given the function of reviewing its own decisions.

I'm not sure I understand the discussion in 7.92 and 7.93; the rule referred to (that an express statutory provision setting out how a decision-making body is to be constituted can override a judicial presumption of perceived bias if the body is constituted in accordance with the provision) does not provide a policy justification for proposing a decision-making process likely to be infected by perceived bias. I may be misreading the discussion, though. In any case, it would make more sense to have an

independent review body that is organised in such a way that it doesn't cost as much as the Classification Review Board. Surely teleconferencing or similar technology can be used to do this.

Access to an unbiased (and affordable) review forum would be especially necessary if there is any possibility of individuals being held criminally responsible for publishing unclassified material that is likely to be lower-level RC content.

Proposal 7–7 The Classification of Media Content Act should provide that the Regulator has power to:

(a) revoke authorisations of industry classifiers;

(b) issue barring notices to industry classifiers; and

(c) call-in unclassified media content for classification or classified media content for review.

The call-in power in (c) should be useable only when the content is not freely availably online, and there should be no charge for call-in unless the material is very clearly material that should have been submitted for classification by the Regulator (e.g. a feature-length film being shown in a cinema). Otherwise, a call-in notice might as well be an arbitrarily imposed fine for publishing unclassified content.

Proposal 8–1 The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.

Proposal 8–2 The Classification of Media Content Act should provide that access to all media content that has been classified R 18+ or X 18+ must be restricted to adults.

Proposals 8-1 and 8-2 suffer from the problem of identifying the content provider discussed in my response to proposal 5-4 above. It is difficult to comment on these proposals without knowing how the rules would work or who they would be enforced against, but I will try.

The idea of imposing access restriction requirements for online material was discussed at length by the NSW Parliament Standing Committee on Social Issues in its June 2002 report, "Safety Net? Inquiry into the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2001, Final Report: On-line Matters" (see http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/030e66805420d081ca256f1e0019e00a/$FILE/Classification%20Bill%20-%20Final%20Report.PDF). In its consideration of restricted access systems (RASs) the Committee concluded, "The Committee agrees with the view that the mandatory use of restricted access systems for R-rated material is likely to be ineffective in protecting minors from unsuitable Internet content as the use of these systems does not guarantee that minors are excluded from viewing unsuitable material."

The report simply acknowledged what was as obvious in 2002 as it is now: imposing RASs on web content hosted in Australia or published by Australians makes the content impractical to access and simply results in demand for the content being met by unregulated overseas content providers.

This means that RASs for web content cannot be justified on the grounds of child protection or of ensuring that content services available to Australians reflect community standards. They actively work against the principle that consumers should be provided with information about media content. The only objective that could justify web RASs would be that of preventing Australians from producing or publishing certain types of material (without making any practical difference to the availability of such material online!), but the Discussion Paper does not mention this objective in its discussion of these proposals and it is hard to imagine what policy goal would be achieved by simply pushing users towards unregulated material.

I submit that the Commission should carefully consider the likely practical effect of its proposed RAS requirement before making these proposals in its final report.

There are other serious problems with RASs:

- I understand that they prevent restricted content from being indexed by search engines. This may not be a problem for certain types of content providers who provide content to subscribers only but it would be a crippling blow for most web-based businesses, and this alone would be enough to force many of them to do what it took to evade the requirement;
- If the content provider is also the content host, the provider will have control over the RAS. However, content providers who do not host their own material may not be in a position to ensure that the hosting provider is complying with the RAS requirements (especially if the RAS requirements apply to content hosted outside Australia);
- To the extent that they require personal information to be collected, they increase the risk of identity theft either by the site operator or by someone gaining unauthorised access to the site's records;
- It is not clear that there is any evidence to support the use of credit cards as an age test (an interesting passage on page 28 of the "Safety net?" report is a quote from a representative of the then Australian Broadcasting Authority giving what seems to be a rather stretched justification for accepting credit cards as proof of adulthood).

At most, rules requiring RASs should apply to content hosts who rely on physical infrastructure located in Australia and do not compete directly with overseas content providers, such as IPTV broadcasters or ISPs who host unmetered content for their customers.

Proposal 8–3 The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA 15+ or likely to be classified MA 15+.

This is a good idea.

Proposal 8–4 The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. These codes might be developed for different types of content and industries, but might usefully cover:

(a) how to restrict online content to adults, for example by using restricted access technologies;

(b) the promotion and distribution of parental locks and user-based computer filters; and

(c) how and where to advertise, package and display hardcopy adult content.

This would at least allow the Regulator to tailor RAS requirements to specific types of content providers. But it is not clear how people who are not members of an "industry", but who would apparently be required to use RASs for certain types of content (see paragraph 6.2 of the Discussion Paper), would be covered. See below for a further discussion of industry codes.

This problem, and the problems identified in my comments on proposals 8-1 and 8-2, would be largely fixed if the default rule (in the absence of an industry code) was to not require a RAS, and if the Regulator only approved codes requiring RASs if satisfied that they would be effective and not harmful to the relevant industry.

Proposal 8–5 The Classification of Media Content Act should provide that, for media content that must be classified and has been classified, content providers must display a suitable classification marking. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be streamed or downloaded, and on advertising for the content.

For online advertising and distribution, this proposal suffers from the same problems of jurisdiction as the other proposals for regulating online content.

It suffers from the additional problem that an Australian content provider (or a multinational content provider with a presence in Australia) may want to advertise content to people in another country, in their language and possibly with classification markings from another classification scheme. It may not be possible for the content provider to prevent such content or advertisement being available to Australians.

Online content, including advertisements, should be required to carry classification markings only if hosted in Australia and intended to be viewed mainly by Australians.

Proposal 9–1 The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ and RC. Each item of media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.

The combined effect of this proposal and proposal 9-4 has been addressed by Irene G and Amy Hightower on the ALRC's discussion forum on "International classification systems" (http://www.alrc.gov.au/public-forum/classification-forum/4-international-classification-systems). I agree with their comments, in particular:

- That the Restricted 1 and Restricted 2 categories for publications do not fit well within the X ratings for films, at either the R end or the RC end;
- That if the RC standards for films etc were applied to publications, many R1 and R2 and even quite a few unrestricted publications would be likely to become RC (*Portnoy's Complaint* might have to go back to being sold out of the backs of trucks, for example);
- That if the RC standards for publications were applied to films, many RC films (or films that were never submitted for classification on the assumption that they would be RC) would become X or R (or possibly a lower classification, depending on the reason for the RC);
- That giving publications an X rating would be likely to result in these publications being banned, or at least further restricted, in many or all States or the entire country within a few years if not immediately.

I would add that it hardly seems less confusing to have material with the same rating treated differently depending on the form of the content (e.g. X-rated print publications permitted but X-rated films, games and online content prohibited in most places) than it is to have the separate Restricted categories for publications.

I suppose this could be dealt with by superimposing a concept like "impact" on top of the classification criteria, but this would be an even worse result - it would mean that the criteria actually applied to content would differ depending on the type of content, but in a way not discernible from the written criteria themselves. Also, this kind of subjective element would be a particular problem for anyone trying to work out whether content they intend to publish would be "likely" to receive a particular classification.

So, while it sounds nice in theory to have a single, unified set of categories, this proposal should not be made without serious consideration of the changes to the classification criteria that would be needed for it to be workable.

Proposal 9–3 The Classification of Media Content Act should provide that all content that must be classified, other than content classified C, G or RC, must also be accompanied by consumer advice.

This is reasonable, although it may cause problems if classified content is modified in a way that does not change its likely classification but would be likely to change the consumer advice accompanying the classification. In such a case the provider of the modified content should be able to provide new consumer advice without having the content reclassified. The Regulator could publish instruments to allow content providers to prepare new consumer advice.

Proposal 9–4 The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions must be made applying these criteria.

See the discussion of proposal 9-1 above.

Proposal 9–5 A comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, with a broad reach across the Australian community. This review should be undertaken at least every five years.

I agree with other submitters on the Issues Paper that the appropriate test for censorship should be harm, not community standards. Community standards may, however, be appropriate for use as a basis for classification rules that do not lead to censorship, even if the relationship between actual standards held by members of the community and the classification criteria has always been unclear. But it seems that the Commission does not agree with this view.

I am not sure what the proposed survey of community standards is likely to achieve. If the classification criteria are to be set out in the legislation (as in proposal 5-2) it would take other legislation to change them, and my understanding of the history of censorship in this country is that politicians have rarely paid much attention to surveys indicating that community standards are in fact not the same as their own personal standards. But if the survey is to be conducted, its results should be required to be made public so that there might be at least some pressure for reform. And there should be some consideration of surveying the kinds of media content that Australians actually consume instead of just their stated attitudes to content.

What if the community standards review is conducted and it turns out that the standards of the people surveyed actually require different criteria to be applied to different kinds of content?

Proposal 10–1 The Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content could be added to any blacklist of content that must be filtered at the internet service provider level.

If there is to be a mandatory Internet filter, the content described in this proposal is a much more

appropriate category of content to be filtered than all RC content, considering how common lower-level RC content is on the web (there is plenty of it even on Youtube, and it is unlikely that there is a single mainstream adult site that hosts X content but does not also host RC content).

But it is puzzling that the discussion of this proposal is focused entirely on the question of what material should be "entirely prohibited" online without any apparent consideration of what the proposed measure - adding the content to a blacklist of content to be filtered at the ISP level - would actually achieve.

I suggest that the Commission ask the following questions before it makes any proposals based on the assumption that adding content to the filter will result in it being prohibited online (I also provide some helpful answers):

- Will adding this content to the blacklist prevent anyone seeking this kind of content from finding it? (no; all filters can be easily circumvented. See Telstra's report "Blacklist Blocking Trial: Final Trial Report" for comments on how easy its proposed DNS plus Proxy filter is to circumvent)
- Will adding this content to the blacklist prevent inadvertent exposure? (unlikely; this kind of content is hidden in places where it is almost impossible to stumble across by accident. If it is present on mainstream sites as a result of hacking or vandalism it is likely to be removed long before the Regulator has a chance to do anything about it)
- Will people responsible for distributing this content respond to the filter by ensuring that the content is available in ways designed to evade it? (certainly)
- What does it mean to add "content" to a blacklist? Should this proposal instead refer to the URL of the content being added to the blacklist? (this is an important distinction; blacklisted content will only be filtered to the extent that it can be pinned down to a particular location)
- Is this kind of content hosted in static locations on websites that the Regulator will be able to access? (I don't know, but it seems unlikely)
- Is the proposed filter likely to result in overblocking of content? (probably, if the blacklist includes a wider range of RC content - see Telstra's report "Blacklist Blocking Trial: Final Trial Report" for a discussion of situations where the DNS plus Proxy filter would fail and all content on all filtered domains would be blocked)
- Does the idea of the government forcing all ISPs to install censorship devices raise legitimate concerns about the future use of those devices, including for the purposes of censoring or restricting access to other forms of content? (clearly yes - I think it's fairly safe to predict that within five years of filters being installed they will be used to enforce laws relating to intellectual property)
- Are there ways of preventing access to this content that are just as effective (or that are ineffective in the same ways) as adding the content to this blacklist but less invasive and

authoritarian? (probably)

- Could the effort proposed to be expended on filtering the Internet be better spent on law enforcement measures that target the source of the material? (probably)
- Having identified the costs and benefits of adding this content to the blacklist to be filtered at the ISP level, is it an appropriate measure to achieve the stated goal?

If the Commission does propose that certain content be added to the blacklist, it should also identify:

- Content that should not be added to the blacklist (I suggest all other content);
- Content that should not be blocked as a side-effect of the filter (I suggest all content that would be legal to host in Australia).

I also suggest that if the Commission is to provide a discussion of the filter proposal in its final report, it should be consistent. At DP 10.80, it says "The ALRC makes no comment about the merits or otherwise of such a filter", but then two paragraphs later it says "In a convergent media environment, this necessitates the filtering of such content so that it is not accessible from personal electronic devices such as computers and mobile phones". Unfortunately, the second statement exhibits the same problem as many of the DP's proposals for online content regulation - it identifies a broad policy objective without asking whether any of the proposed measures would be appropriate or even effective in achieving the objective. This is not how to design an effective regulatory system.

Proposal 11–1 The new Classification of Media Content Act should provide for the development of industry classification codes of practice by sections of industry involved in the production and distribution of media content.

Proposal 11–2 Industry classification codes of practice may include provisions relating to:

(a) guidance on the application of statutory classification obligations and criteria to media content covered by the code;

(b) methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;

(c) duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;

(d) the use of classification markings;

(e) methods of restricting access to certain content;

(f) protecting children from material likely to harm or disturb them;

(g) providing consumer information in a timely and clear manner;

(h) providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and

(i) reporting to the Regulator, including on the handling of complaints.

Proposal 11–3 The Regulator should be empowered to approve an industry classification code of practice if satisfied that:

(a) the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code;

(b) the body or association developing the code represents a particular section of the relevant media content industry; and

(c) there has been adequate public and industry consultation on the code.

Proposal 11–4 Where an industry classification code of practice relates to media content that must be classified or to which access must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.

I have a number of concerns about proposals 11-1 to 11-4:

- If new entrants to an industry are to be covered by a code formulated by incumbents without them having any say in the matter, the incumbents will have an incentive to develop the code in such a way as to disadvantage new entrants. To help prevent this, the Act should require the Regulator to obtain approval from the ACCC before approving a code. The ACCC should give its approval only if satisfied that the code does not impede competition, including the ability of domestic content providers to compete with overseas content providers.

- I imagine that individual content producers, especially various types of artist, would strongly resent having an industry code forced on them - not least if it imposed self-censorship by requiring them to anticipate what rating their art would be likely to be given.

- It may not be obvious to a particular content producer or provider what industry they belong to. For example, a game company might produce and publish a short "machinima" film using its game engine. Would the company be covered by the game developer code or the film producer code when it does this? If it hosts the film on its own website, would it be covered by a code for online film distributors? What if the company is an animation and visual effects company that does work for both films and games? If it is mandatory but difficult or impossible to comply with multiple codes at the same time, content producers and providers will be forced to remain in their own little niches. This is likely to stifle innovation.

- It is not clear whether these proposals envisage individuals who produce non-commercial work being covered by the same code that would apply to them if they were working commercially,

but this doesn't sound like a very good idea.

- The imposition of censorship measures on entire industries through this kind of non-Parliamentary quasi-legislation would be a bad idea in principle and, depending on what the codes actually say, could have serious consequences for freedom of speech.

Proposal 12–1 A single agency ('the Regulator') should be responsible for the regulation of media content under the new National Classification Scheme. The Regulator's functions should include:

(a) encouraging, monitoring and enforcing compliance with classification laws;

(b) handling complaints about the classification of media content;

(c) authorising industry classifiers, providing classification training or approving classification training courses provided by others;

(d) promoting the development of industry classification codes of practice and approving and maintaining a register of such codes; and

(e) liaising with relevant Australian and overseas media content regulators and law enforcement agencies.

In addition, the Regulator's functions may include:

(f) providing administrative support to the Classification Board;

(g) assisting with the development of classification policy and legislation;

(h) conducting or commissioning research relevant to classification; and

(i) educating the public about the new National Classification Scheme and promoting media literacy.

In order to help prevent censorship decisions becoming political footballs, the Regulator and the Board should both have clear statutory guarantees of independence.

Proposal 14–3 The new Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with:

(a) restrictions on the sale, screening, distribution and advertising of classified material;

(b) statutory obligations to classify media content;

(c) statutory obligations to restrict access to media content;

(d) an industry-based classification code; and

(e) directions of the Regulator.

It is not appropriate to punish people, especially individuals engaging in non-commercial publication, for an inability to accurately predict the decisions of the Classification Board. No offences should apply to people who publish unclassified content in an honest belief that it was not likely to be classified in such a way as to make their action illegal, even if their belief would not be regarded as reasonable by a person with a full knowledge of the classification criteria and the tendencies of the Classification Board (although higher-level RC content may be an exception).

I'm not sure what is meant by "directions of the Regulator", or why it is necessary to criminalise a failure to comply with such directions.

Proposal 14–4 Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the Broadcasting Services Act 1992 (Cth).

To the extent that these offences will apply to private individuals, the tight time-frames for compliance allowed by Schedule 7 are not appropriate.

Proposal 14–5 The Australian Government should consider whether the Classification of Media Content Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.

Any proposal for an infringement notice scheme must be considered very carefully. Infringement notice schemes are problematic in principle because they impose costs and risks on people who exercise their right to defend themselves in court. Any infringement notice scheme for classification offences should provide for infringement notices to be given only in relation to material that has already been classified by the Board, and not material that the Regulator has assessed as "likely" to receive a certain classification - it would be a denial of justice to force a publisher to weigh up the risks of a possible unfavourable classification decision in deciding whether to pay an infringement notice (considering how arbitrary classification decisions can be).