Submission to the National Classification Review - response to Discussion Paper (supplementary)

The following is a supplement to my earlier submission to the review. It discusses and clarifies some issues that my submission didn't address properly and that have not been explored in great depth in many of the other public submissions, although I am grateful to Irene Graham for the points made in her discussion of a number of these issues.

1. Platform neutrality and industry codes

Existing Australian approaches to content regulation, in particular the Commonwealth Classification Act, the State and Territory Enforcement Acts and the Broadcasting Services Act (BSA), generally regulate specific acts involved in the *publication* of specific forms of content, and are designed to apply almost exclusively to commercial acts of publication. As such, they are designed to be enforceable against specific entities engaged in these acts.

For example, BSA Sch 7 applies specific rules to specific types of "designated content/hosting services", some of which are referred to as content service providers but could be better described as content publishers or distributors (the very broad Sch 7 concept of "content service provider" is only used as a starting point for definitions of more specific types of regulated entities). Sch 7 certainly isn't perfect, but its rules are designed with Australia's enforcement jurisdiction in mind and target only entities that could be reasonably expected to be capable of complying.

The Commission's proposed platform-neutral approach does away with this specificity. Instead, the DP's proposals are expressed to apply to "content", not to particular acts involved in the publication and distribution of content. It is unclear whether many of the proposals are intended to apply only to publishers and distributors, or to content producers as well. For example, the discussion of industry codes in Chapter 11 seems to be referring to the same general kinds of "content service providers" covered by Part 4 of BSA Sch 7 (basically, specific types of online content hosts and distributors who satisfy the "Australian connection" test) but then Proposal 11-1 refers to codes covering the production of content as well as its distribution.

To add to the confusion, paragraph 11.58 says that "compliance with a code of practice that relates to media content that is not subject to statutory classification obligations should be voluntary", while Proposal 11-4 suggests that codes will be mandatory in respect of media content "to which access must be restricted" regardless of whether the content is required to be classified.

There are very good reasons for applying content regulation only to acts of publication and distribution and not to separate acts of creation. It is publishers and distributors who determine the form that content takes, the context in which it is presented and the audience to whom it is shown. Publishers may modify content themselves, or combine it with other content with the result that the combined content would receive a higher classification. Publishers have control over any access restrictions applied to content. It is unlikely to be acceptable practice in any industry for content producers to retain a right to police the way their content is published, and content producers should not be required to do so.

If the proposed new scheme is to have any application to the *production* of content, it should not be assumed that the same measures that have traditionally applied to publication can simply be carried over and expected to work in the same way. What acts would be covered – possession with intent to license for distribution? Failure to prevent a contravention by a publisher? Licensing content to a publisher who for technical or jurisdictional reasons is unable to implement a compliant RAS?

This would be an entirely new scheme which would need to be designed from the ground up, and could only be justified by considerations very different from the considerations that are used to justify the regulation of acts of publication.

An example of what can go wrong if the relationship between regulated entities and regulated content is poorly chosen is Division 4 of Part 4 of BSA Sch 5 ('Action to be taken in relation to a complaint about prohibited content hosted outside Australia'). By assuming that ISPs have a relationship to content that in fact does not exist (i.e. that they have the technical capability to prevent user access to any specified piece of 'prohibited content' hosted anywhere in the world, a capability that they do not have and could not conceivably develop without totally crippling their services) and attempting to regulate this non-existent relationship, Division 4 fails completely. As far as I can tell, ACMA has approved an industry code for ISPs which redefines the obligations in Division 4 into meaninglessness. Now all that these provisions do is sit there near the end of the BSA and give anyone who reads them a nice 'what were they thinking?' moment.

> **Submission**: The Commission's final report should express its proposals for regulation in terms of specified actions performed by specified entities, and not in terms of content.
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> **Submission**: All regulation under the new scheme (including classification obligations, access restriction obligations, offences, industry codes etc) should apply only to acts of *distribution*. It should not apply to acts of creation or production, even if the content created or produced is being distributed in contravention of the scheme, and should not apply to the provision of content-neutral carrier services.

2. Broad definition of 'content'

I think the proposed broad, platform-neutral concept of 'content' proposed by the DP is likely to cause more problems than it solves.

Consider, for example, clothing. Can clothing be regulated as 'content'? In 1991 the ALRC thought so – recommendation 19 of its report on censorship procedure was:

> 19. Clothing should be made classifiable. It should be included in the definitions of 'publication' and 'advertisement' (para 3.22).

Would content embodied in clothing be covered by the proposed new scheme? If so, how would it be regulated? And to whom would these regulations apply – designers, manufacturers, importers,

distributors, retailers, individuals wearing the clothes in public?

Could a speech delivered in public (or private, for that matter) be content? A live performance of a play? How about graffiti? Or does 'content' only cover content that is delivered electronically, printed on paper or, possibly, displayed on billboards? The extremely broad definition of 'content' used in BSA Sch 7 works to the extent it does only because Sch 7 is so specific about the acts and entities that it applies to.

> **Submission**: Platform-neutrality sounds nice, but I am not sure that it will work in practice.

Speaking of the 1991 review, it correctly anticipated many of the problems that would be involved in classifying games in the same way as films, and proposed that they be treated as publications with only adult games likely to be classified Restricted 1 or 2 or RC needing to be classified – a proposal that would have prevented a lot of problems that we have seen with the present scheme and would also prevent some of the problems likely to occur under the proposed new scheme. From paragraph 3.23 of the 1991 report:

> There are two forms in which computer games are available. First, games are available on computer software purchased over the counter. Second, they can be accessed over the telephone from a 'bulletin board' by using a modem attached to a computer. The sale of computer software over the counter is comparable to the sale of videos and magazines and could be regulated within the existing classification scheme. The provision of computer games via telephones does not, however, fall so easily within the scheme, mainly because of difficulties of enforcement. The transmission of programs over the telephone is governed by the *Crimes Act 1914* (Cth). Section 85ZE makes it an offence knowingly or recklessly to use the telecommunications service in a way that would be regarded as offensive. The technical difficulties of detection, however, make enforcement difficult. A requirement that the games provided on bulletin boards be classified would be virtually unenforceable. It must be acknowledged, therefore, that any requirement that computer programs be classified would, in practice, probably only fall on distributors and retailers in the 'over the counter' market.

Other than the references to bulletin boards, telephones and the repealed section 85ZE, this is still pretty accurate.

3. Application of the proposed scheme to individuals

It's not clear that anybody really understands what the Commission's proposals mean for individuals, especially for individuals communicating online. But it is clear that taking a scheme designed to regulate specific acts engaged in by commercial publishers and imposing it on a wide range of private, semi-private and public but essentially personal online communications, and establishing new administrative structures to ensure that the scheme is actually enforced, would be a radical change in the way state censorship is applied to personal expression.

If the Discussion Paper had said up front that the new scheme should apply (minus requirements for pre-classification which do not presently seem to be enforced against individuals anyway) to the online publication of blog posts, short stories, news, opinion articles, student films, flickr photos, home-made games etc, I think the Commission would have received many more submissions with much stronger arguments. Instead the Discussion Paper left it to readers to guess at these unstated implications.

> **Submission**: If this is what the final report is going to propose, the consultation process engaged in so far will have been inadequate. The Commission should state its position clearly and seek further comment from the public.
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> **Submission**: Alternatively, if this is not actually what the Commission has in mind, the final report should propose clear exceptions for individual expression.

To clarify: this is not just an issue for individuals who are intentionally producing or publishing material aimed at adults. The process of self-censorship that the proposed new system seems to require before any particular piece of content can be published – an assessment of what classification or classifications the content provider suspects the Regulator could think a majority of the Classification Board would be likely to give to the content – is so complex and subjective that it's hard to imagine anyone being able to use it, especially individuals without access to industry codes or industry assessors.

To some extent this is an issue with existing laws, but I understand that these laws are rarely if ever enforced against individuals (in respect of non-criminal content) even if they could be. I assume that the new administratively streamlined Regulator, though, will be expected to actually enforce the new scheme. There doesn't seem to be much point in giving it enforcement powers on the assumption that it won't use them.

4. Proposal 6.6

In writing my submission, I somehow managed to misread proposal 6-6 as proposing that no enforcement action be taken in respect of any content until the content had been classified by the Board. The actual proposal, that no enforcement action be taken in respect of content on the basis that it would be likely to be RC until it is classified by the Board, is insufficient for reasons that have been well explored in other submissions.

5. Symbolic regulation

Some of the proposals in the Discussion Paper are likely to do nothing to advance their stated objective while imposing significant costs and leading to unintended (although predictable) consequences, but are justified on the basis of their supposed symbolic effect. There does not seem to be any consideration given to the negative symbolism attached to ineffective but harmful regulation.

For example, the proposed Internet filter is often rationalised as a symbolic measure to indicate the Government's disapproval of RC content. But it also bears a heavy load of less positive symbolism about what the Government believes to be appropriate: costly regulation which will achieve no identifiable benefit; technological methods of surveillance and control imposed without reference to the potential for abuse; open contempt for any concerns about freedom of speech or anyone who raises such concerns; censorship carried out in secret, etc etc.

Similar considerations apply to proposals which are expressed to be for the purposes of restricting access to certain types of content but are in practice likely only to result in demand for the content being met by unregulated overseas content providers.

> **Submission**: Any proposals for "symbolic" regulation should be required to be justified with regard to *negative* symbolism as much as positive.

6. Industry assessors

The DP seems to set up industry classifiers as a kind of special class of privatised moral guardians: although employed within industry, their overriding duty will be to the classification criteria and they will be held personally responsible for any lapses. Presumably they will be expected to remain indifferent to the commercial interests of their employers in the performance of this duty. Meanwhile the Regulator will function as a kind of professional standards body, apparently obliged to prevent a qualified assessor from practising his or her profession if he or she has had too many disagreements with the Classification Board (or, I suppose, with majority votes of the Classification Board).

This isn't quite like the roles of various kinds of assessors under the present scheme, which generally involve bringing information to the attention of the Board, assessing the likely classification of material that the Board is going to classify anyway or operating in the separate universe of television classification, and I'm not sure that the Commission has really thought this one through.

Also, if there are to be sanctions for misclassifications, they should be no more serious for *under*classifications than they are for *over*classifications. Otherwise assessors, mindful of their livelihoods, will have a strong incentive to err on the side of caution. Over time this would lead to a kind of inflation of industry classification decisions.

> **Submission**: The Commission's final report should provide further detail about the circumstances in which industry assessors are to perform their work, and how the Regulator is to carry out its professional standards role.
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> **Submission**: Any sanctions imposed on industry assessors for classifications that the Board disagrees with should be the same regardless of whether the Board gave a higher or a lower reclassification

If industry assessors are to be useful, publishers will have to be able to rely on their classifications. A

publisher who, in good faith, relies on a classification given by an industry assessor should have absolute protection from any form of enforcement action while the assessor's classification remains in force. Any such enforcement action should require the Board to have reclassified the material, and the publisher's protection should last at least until it becomes aware of the reclassification (with an appropriate grace period to allow content to be withdrawn or an appeal to be made and determined).

> **Submission**: An industry assessor's classification should provide absolute protection to a publisher who relies on it.

To be honest, even with the changes described above I doubt the industry assessor system will see much use. Under the present scheme, a classification by the Board is pretty reliable – the only way it can be changed is by the Review Board, and the Review Board is expensive and inconvenient. But it seems that an industry assessor's classification will be subject to complaints (the numbers of which will no doubt increase if the Regulator starts investigating and acting on them) as well as audits and a streamlined review process. If this results in industry assessors' classifications becoming less reliable than Board classifications, there will be significant risks for any publisher who uses them. Different types of industries would deal with this in different ways, probably as follows:

- Regulated industries based on 'linear' media where content is broadcast or delivered once and often at short notice, like television, will continue to use industry-based classification. I imagine they will fight tooth and nail to keep the Classification Board or the Regulator from having anything to do with them, with good reason.

- Offline distribution industries face large costs if a classification is changed – recalling physical copies of content from shops, cancelling advertising campaigns, delaying launch windows etc – and will probably just pay the Board for a more reliable classification.

- Most online industries will move offshore or do whatever else they have to in order to avoid complying. A few online industries which provide services similar to broadcast TV might employ industry assessors, if they can afford to do so.

The only way I can see industry assessors being much used outside of TV or services very similar to TV is if their classifications have the same status as classifications given by the Board, and if reviews of their decisions are rare and difficult for anyone other than a licensed distributor to activate.

7. Restricted Access Systems

My submission referred to a number of problems with proposals to require certain content to be restricted to adults. Here are a few more, which will be of particular concern if RAS obligations are to apply to content producers without the "Australian connection" test that BSA Sch 7 requires before it regulates hosting activity:

- Content producers would in effect be prohibited from publishing material "likely to be R 18+" on

popular international content distribution platforms which do not support compliant RASs (which could well be all of them).

- The proposals seem to assume that Australians only publish content to other Australians. Will Australian content providers, however defined, be expected to prevent people from overseas who cannot prove that they are adults, to an Australian standard, from accessing restricted content? Or should RASs only restrict access by Australians? What kind of proof of age would a non-Australian be expected to provide?

- I disagree with the discussion of the R classification in paragraphs 8.7 and 8.8 of the DP. The guidelines reproduced in 8.7 do not set out a 'threshold' for R – the threshold that is relevant to 8.8 is the upper limit of MA, which is considerably more restrictive. I would also say that the lack of R ratings given by the Board probably has more to do with the difficulties involved in commercialising restricted films (especially films rated NC-17 in the US) than with any lack of demand for such material, which is highly prevalent online.

8. Consistency with Australia's international obligations

I assume that the final report on this review will include a consideration of the extent to which its proposals would be consistent with Australia's international obligations, in accordance with the ALRC Act. The most relevant obligations appear to be under the International Covenant on Civil and Political Rights, in particular Articles 17 and 19. I'm not an international law expert, but my understanding is that an ICCPR analysis would require at least some consideration to be given to the likely practical effects of each measure, and not just to the overall effects of the scheme.

I suggest that special attention be given to the requirement in Article 19(3) that restrictions on the right to freedom of expression be 'necessary'. This is especially important for any measures that require individuals to self-censor their public speech by anticipating the results of subjective administrative processes, and any measures that are expected to result in purely or mostly 'symbolic' benefits.

It may also be worthwhile considering whether any proposed measures applying to online content hosted overseas could be regarded as inconsistent with Australia's obligations under laws or agreements relating to international trade.

9. The general approach of the discussion paper

I think it's worth making the observation that the approach taken in the discussion paper – relaxing the treatment of content that can be officially labelled as appropriate for children while coming up with new forms of regulation to make it difficult for Australians to publish, to adults, types of content that will be freely available online anyway – seems guaranteed to make nobody happy, and not in a 'you know you've reached an appropriate compromise if you've given everyone something to complain about' kind

of way. If nothing else, it means that both sides of the child-protection/anti-censorship debate can quite reasonably claim that the discussion paper fails to give effect to its guiding principles.

Personally, as a parent I care about the differences between G, PG and M a lot more than I care about the differences between R and X; as an adult choosing media for myself I honestly have very little interest in the views of the Classification Board. And any Australian website that implements an annoying restricted access system will be quickly replaced by a foreign website that doesn't.

The Commission has had plenty of time to think since it released the Discussion Paper. I hope it has rethought this approach.

10. Public interest

In searching for material about this review, I came across a draft paper by the Commissioner: "Rethinking Regulatory Design: the Australian National Classification Review" (7 November 2011; retrieved from http://eprints.qut.edu.au/47138/). I am concerned that this paper indicates a misunderstanding of the philosophical basis for many arguments against censorship.

In particular, there is a suggestion (page 13) that 'progressive' arguments favour the 'market' at the expense of the public interest. While there certainly are arguments to be made against censorship from a libertarian perspective, there is also a strong case that many of Australia's existing censorship measures are not, when their practical benefits are weighed against concerns of freedom of speech and effective regulatory design, in the public interest.

There is also no contradiction in arguing on the one hand for appropriate, enforceable and well-designed regulation of forms of commercial media that are clearly within Australia's jurisdiction, and on the other hand against harmful, repressive and dishonest regulation that applies as much to the public sphere of speech and expression as it does to the 'market'.