

Submission by the

Australian Home Entertainment Distributors Association

to the

Australian Law Reform Commission's

Discussion Paper on the

National Classification Scheme Review

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Introduction

About AHEDA

The Australian Home Entertainment Distributors Association (AHEDA) represents the \$1.3 billion Australian film and TV home entertainment industry covering both packaged goods and digital content.

In 2010, AHEDA members moved over 76 million titles worth \$1.29 billion in wholesale sales. These figures do not include members' digital sales.

The Association speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement, classification, media access, technology challenges, copyright and media convergence. AHEDA works closely with a range of stakeholders to achieve its aims including government, media and industry. AHEDA is also increasingly looking to work with members and broader industry participants to conduct relevant channel campaigns and activities to promote the home entertainment film and TV sector.

The Association currently has 12 members including all the major Hollywood film distribution companies (Disney, Paramount, Sony, Twentieth Century Fox, Universal and Warner Bros) through to wholly-owned Australian companies such as Roadshow, Madman, and Hopscotch Entertainment, Fremantle Media Australia and Anchor Bay Home Entertainment.

AHEDA is also proud to support the Starlight Children's Foundation and is the force behind the annual Starlight Movie Month campaign.

The ALRC Review

AHEDA is supportive of the review into the classification system and agrees wholeheartedly with the reasons given as the drivers for "the need for fundamental reform" in the ALRC Discussion Paper Summary. Likewise, AHEDA is also supportive of the eight "guiding principles for reform" and sees these as uncontroversial.

AHEDA in previous submissions to the ALRC and the Senate Inquiry has gone to some length detailing the urgent need for reform and some of the important issues to consider. These arguments will not be revisited here and instead this submission will focus on a number of areas that in our view require further consideration or clarification leading to the final report to government. Where we make no specific comment, the ALRC can assume support for the recommendations and approach put forward in the Discussion Paper.

Finally, the ALRC should be congratulated for the professional and inclusive consultative way they have run this far reaching enquiry into classification reform.

Kind regards



SIMON BUSH
Chief Executive
AHEDA

Specific responses to the Discussion Paper

6.80 Modification (Proposal 6-7)

AHEDA is especially sensitive around the word “modification” in the existing Classification Act as it has in the past led to poor outcomes for industry and consumers. The word “modification” has been open to various definitions and legal interpretations by government. In some cases, the government has changed its own interpretation as to what is considered a modification to suit the agenda of a new Classification Board.

Further, legal advice the government cites is often convenient in our view to legitimise certain requirements on industry. For example, it was once considered that all DVDs of a film previously classified theatrically would be deemed modified if captions/subtitles for the hearing impaired (or audio descriptions) were added as a special feature to the DVD. When it was pointed out this was discriminatory and rather ridiculous, the government’s position on the interpretation of “modification” thankfully changed.

This is but one example of the confusion this word has created in the past so the new system needs to carefully consider this issue as it is currently a matter for conjecture around 2D and 3D films.

AHEDA suggests that examples of “modification” for home entertainment be included in an Industry Code so as to provide guidance and the Code is an easier place to change definitions than legislation in the future.

AHEDA does support the reference in defining modification in the Discussion Paper where it says: “..the Act should also define ‘modify’ to mean ‘modifying such that the modified content is likely to have a different classification from the original content’.”

AHEDA would like clarification on the regulatory side of the self-assessment of home entertainment content where a distributor deems no modification has been made. In other words, what paperwork will a distributor of a previously classified theatrical film when released on DVD that is deemed not to have been ‘modified’ under the proposed definition (as any new materials for the DVD won’t change the original theatrical rating) be required to keep as evidence as to the assessment of no change?

AHEDA proposes that the only regulatory paper work required under such a scenario is if the content in question is the subject of a complaint, that the distributor provides an assessment as to the impact of the modified content and how this is the same or different from the theatrical version.

7.102 Sanctions Regime (Proposal 7-7)

AHEDA recognises the need for a sanctions regime for any (unlikely) serial flouters of the system. It is widely known that many current smaller distributors of films (DVD) don’t even bother with classification ratings at all as they know that the chances of getting caught and or penalised is virtually nil.

The sanctions regime should therefore not penalise distributors who are active users of the Scheme and “do the right thing” but inadvertently make an honest mistake. Thus the sanctions regime should involve graduated response mechanisms starting with educational notices, escalate to warnings and then finally some sort of sanction.

AHEDA would support a sanction of suspension of the self-assessors’ ability to make authorisations for a certain period of time.

Proposal 8-4 Restriction of Adult Content

AHEDA has major concerns with Proposal 8-4 (c) regarding the “advertising, package and display of hardcopy adult content”.

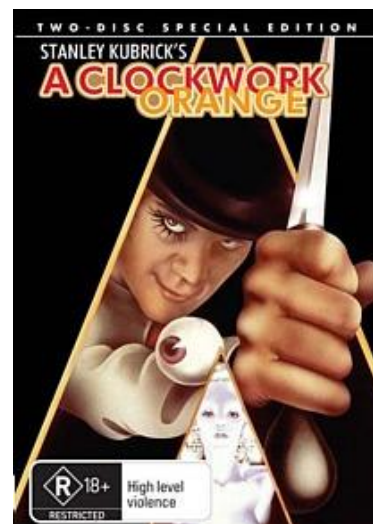
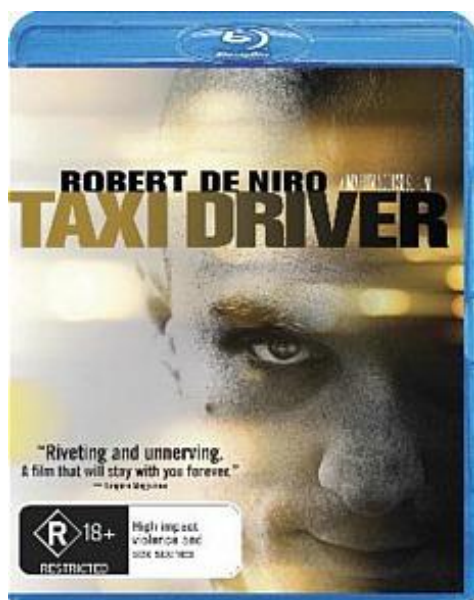
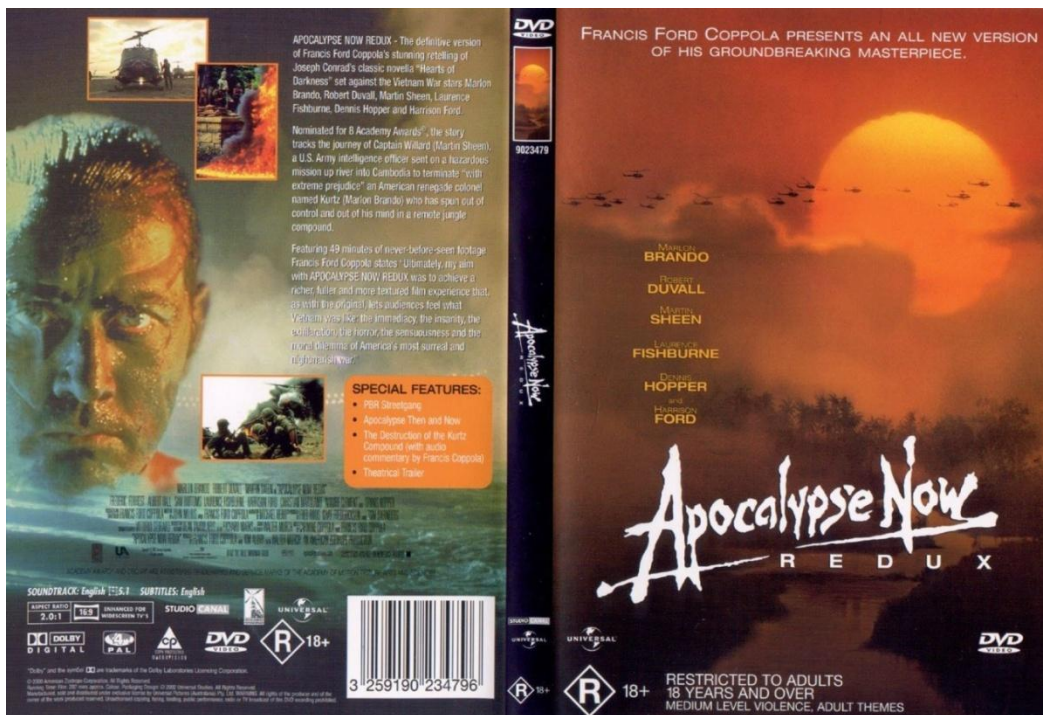
AHEDA would support certain restrictions to the viewing of advertising and packaging of content that had sexual or overtly violent imagery at the retailer level so that children are not unwittingly exposed.

This should be also appropriately dealt with in Codes rather than by legislation as recommended by the ALRC.

However, concerns relate to what AHEDA has seen as the unintended consequences of such legislative attempts to regulate adult content R18+ retailing of DVDs in South Australia. SA efforts aimed to target soft porn R18+ which is available in some DVD rental stores (noting that such titles are generally not available to buy at retailers).

The unfortunate result has been that quality R18+ films that are not soft porn have been caught up in the scheme resulting in major retailers simply not selling this product any more due to difficulties in compliance. They are not selling these products nationally - not just in South Australia - given the national catalogues they produce and distribute to consumers. For example, a physically separate area with clearly marked signage is difficult to provide in many mass merchant retail environments and may only be workable in specialist DVD retailers of which there are few (and they don't in any case sell soft porn).

Below are but a few examples of Oscar winning or quality films rated R18+ which have no imagery that a child would find offensive that may be completely removed from sale in Australia by major retailers should this recommendation in its current form be adopted and would restrict consumer choice of purchasing legitimate content:



Proposal 8-6

The definition of advertising that may be subject to a new classification scheme should not apply (as it currently does not) to children's clothing, toys and other merchandise that may be produced around a film. For example Spiderman, Batman or Superman children's clothing and toys should not be classified even though the films may have PG or M ratings.

Proposal 9-1 New Classification Categories

AHEDA has some reservations about the proposed new ratings. In particular, AHEDA has concerns around replacing the existing M category with T 13+ (Teen). The word 'Teen' seems to imply that the content is suitable only for a teen audience when in fact many mature adult films may be classified Teen 13+. This could create unfortunate confusion in the market which is not what a new rating should set out to do. The 13+ age recommendation is also curious to AHEDA as why was 12 not chosen which would correspond to that of numerous other markets.

We also question the need for (another) voluntary category being created in that of C (Children) to provide a more useful rating than is currently the case in G (General). We don't believe there is market confusion in this area for the DVD category in particular however we don't feel strongly about this.

We understand and support the reasoning behind the change in meaning of Mature Accompanied to Mature Audience and welcome the removal of the legally restricted nature of this content due in part to the unfair enforcement burden this placed on retailers and theatrical exhibitors.

AHEDA therefore proposes that should the ratings be changed at all (other than the MA15+ definition) the Government should engage in further industry consultation and discussions specifically around this issue prior to adopting any rating change recommendations beyond MA.

Other Issues

No retrospectivity

AHEDA believes that the final report to Government should make clear that any adopted recommendations should not be retrospective and only apply after a certain sensible notice period after the passage of legislation (so that advertising and manufacturing processes can be adjusted – AHEDA recommends a minimum period of 6 months).

Further, as in previous changes to the scheme, a distributor can choose to use the any new ratings proposed on re-released product, or simply use the old rating as is currently the case. All new released content would be required to adopt any new ratings.

Devil is in the detail: regulations to match intent of legislative changes

AHEDA has experienced the unfortunate situation with respect to legislative changes we have lobbied to update the Classification Act has led to unworkable regulatory interpretation at the agency level so that many distributors did not use the new and improved legislative changes.

The regulatory paperwork that may be required by industry to comply with any changes to a new or existing Act must not place undue burden on distributors. Self-assessment paperwork on classification decisions, for example, should not include for home entertainment every classifiable element by way of an example but rather the highest classifiable element that would give it a certain rating. For example, a TV series on DVD running into the thousands of minutes as you can imagine would be unworkable if every classifiable element was required to be recorded.

AHEDA would be pleased to work through such regulatory details with the new regulator should the Government adopt the ALRC recommendations to ensure a smooth implementation of a new Scheme.

Assumption surrounding theatrical as first release platform

The Discussion Paper makes the assumption that the theatrical platform will be the first to show (and classify) a new release film. This is not always the case in other markets and in order to create a future proof and flexible model, AHEDA suggests that this issue be clarified so there is no ambiguity.

AHEDA proposes that the guiding principles to reform need to be kept in mind, namely principles seven and eight.

If a film is released prior to the theatrical platform, the same principle should apply in that the first platform to rate the content can carry across providing no modifications have been made that may alter the classification rating. The theatrical distributor of course can reserve its right to have the Classification Board assess the film if it so chooses.