
BY EMAIL: - classification@alrc.gov.au

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Australian Law Reform Commission

Level 40, MLC Tower

19 Martin Place

SYDNEY NSW 2000

SUBMISSION ON THE AUSTRALIAN LAW REFORM COMMISSION'S DISCUSSION PAPER ON THE NATIONAL CLASSIFICATION SCHEME REVIEW

Thank you for the opportunity to make a submission in response to the Australian Law Reform Commission's Issues Paper on the National Classification Scheme Review.

Introduction

AFACT supports the "root and branch" approach to reform demonstrated by the framework for classification of media content in Australia proposed in the NCSR Discussion Paper and the ALRC's "8 Guiding Principles for Reform". AFACT congratulates the ALRC on the professional and comprehensive approach they have taken to the review of the classification scheme.

Generally, AFACT endorses the broad parameters of the proposed new framework especially:

- Greater industry involvement in classifying content;
- Adoption of the principle of same content, same rating, single system, different platforms;
- Harmonisation of state and federal laws; and
- A single regulatory focus for the new classification system.

AFACT has chosen to address only four (4) of the forty three (43) proposals for reform made by the ALRC in the NCSR Discussion Paper as being the relevant and important to its members and which, in its view, require additional clarification.

Australian Federation Against Copyright Theft

AFACT was established in 2004 to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia. AFACT works closely with industry, government and law enforcement authorities to achieve its aims. AFACT acts on behalf of the 50,000 Australians directly impacted by copyright theft including independent cinemas, video rental stores and film and television producers across the country.

AFACT members include: Village Roadshow Limited, Motion Picture Association, Walt Disney Studios Motion Pictures Australia, Paramount Pictures Australia, Sony Pictures Releasing International Corporation, Twentieth Century Fox International, Universal International Films, Inc., and Warner Brothers Pictures International, a division of Warner Bros. Pictures Inc.

AFACT Submission

The **NCSR Discussion Paper** was released on 30 September 2011, seeking community input on the proposals put forward by the ALRC with respect to the new classification system. AFACT's submission in response to the Paper is set out below.

In addition AFACT has seen and endorses the submissions of the Australian Home Entertainment Distributors Association (**AHEDA**) and the Motion Picture Distributors Association of Australia (**MPDAA**).

A. Benchmark Classification – Proposals 6-1, 7-1, 7-2

AFACT endorses ALRC proposal 6-1 that the Classification of Media Content Act should provide that feature films and television programs produced on a commercial basis be classified before they are sold or otherwise made available in Australia.

However, in Chapter 7, the Paper makes the assumption that the theatrical platform will be the first to show a new release feature length film. In fact, only a minority of films that are produced get a theatrical release. Recent announcement by some US studios indicate that they will experiment with a premium Video on Demand offering, which is essentially a streamed or downloaded digital version of the film offered prior to the traditional DVD release date and may even be before the theatrical release.

AFACT agrees with the AHEDA and MPDAA submissions that the benchmark classification be made at the first release window regardless of the release platform. This supports the principle that a classification given to a program on the first platform on which it is released can be carried across to any other platform providing that no modifications have been made that may alter the benchmark classification (proposal 6-7).

Where theatrical distribution follows another type of release platform, AFACT suggests the responsibility lie with the distributor to consider whether the film should be classified anew. This obligation should be monitored and enforced by the proposed Regulator (proposal 5-3) under a Code of Practice that will ensure a consistent and transparent framework for such determinations.

B. Reclassification - Proposal 6-7

As outlined above, AFACT endorses ALRC proposal 6-7 that reclassification only occur when modifications have been made that may alter the classification.

This requires introducing a definition of *modify* into the proposed Classification of Media Content Act. There is no definition of *modify* in the current *Classification Act*; section 21(2) lists criteria for content that does not need to be reclassified, but is not exhaustive. This position has led to situations such as the addition of captions/subtitles for the hearing impaired as a special feature on a DVD release requiring the DVD to be reclassified, at significant expense for both distributor and the Classification Board.

While this particular issue has been addressed through the insertion of s 21(2)(d), a clear definition of modification is necessary. The ALRC has suggested the definition of *modify* be 'modifying content such that the modified content is likely to have a different classification from the original content'.

AFACT believes that it is important that only content modification, not format variations – such as 2D or 3D – require a new classification, and that the perceived impact of the format is not a relevant factor in considering modification.

AFACT also believes that the proposed definition may raise some issues in practical application since it lacks any objectively verifiable criteria. The inclusion of examples of modification for different programs in an Industry Code may be a useful way to provide practical guidance on the interpretation of '*modify*' while retaining the flexibility of the Proposed ALRC definition.

AFACT supports further industry consultation and discussion around this issue prior to adopting any recommendations.

C. Review of Classification Decisions – Proposals 7-6, 7-7

AFACT endorses ALRC proposal 7-6 that the Classification of Media Content Act give the Classification Board the power to review its own classification decisions as well as industry classifier decisions.

However, as the ALRC has recognised, moving responsibility for review of Classification Board decisions from a separate Classification Review Board under the present regime to the Classification Board itself, is potentially problematic - the primary decision maker will review its own decisions.

To avoid any possibility for bias, we support MPDAA in its recommendation that the Act stipulate that the majority of the assessors on any review panel must not have been involved in the classification decision being appealed.

AFACT also believes the Act should ensure that those whose decisions are under review are given a fair opportunity to present their views. To this end, we support MPDAA in its Submission that the Act prescribe that distributors have the opportunity to present their case for a new classification decision in person to the review panel.

In addition, AFACT also support ALRC proposal 7-7 regarding the powers of the Regulator under the Classification of Media Content Act to ensure Industry Classifiers meet appropriate Standards. We suggest that the Commission consider graduated response mechanisms in any sanctions regime directed at Industry Classifiers, as suggested by AHEDA. Such mechanisms should start with educational notices and escalate to warnings and then sanctions, which could include suspension of the self-assessor's ability to make authorisations for a certain time period.

D. Classification Categories – Proposal 9-1

AFACT supports a revised set of classification categories under the National Classification Scheme applicable across all platforms, as outlined in ALRC proposal 9-1.

We share the concerns of AHEDA and MPDAA over the Teen 13+ classification.

The introduction of categories delineated by particular age groups, in particular the Teen 13+ category, have the potential to cause confusion in the market by sending a message that the content in question is suitable only for those within that age group, as opposed to those within that age group and above. In addition this method of categorisation is not harmonious with the existing categories, most of which the ALRC has proposed to retain in the new classification scheme.

AFACT believes that the number of years between the proposed T 13+ and MA 15+ category is too few, and does not reflect a significant enough increase in maturity to function as a classification marker. AFACT agrees with the recommendation of MPDAA that that age should be lowered to 12, and the category should be named PG 12+. This keeps the age increments of the categories more uniform while conforming to both community standards and the international market. As cited in the NCSR Discussion Paper, the Pan European Games Information System has a 12 classification, and the British Board of Film Classification has 12 and 12A classifications.¹ It is worth noting that naming the category PG rather than Teen would remove the need to set the age limit at this level.

AFACT welcomes the removal of mandatory access restrictions on media content classified as MA 15+ outlined in ALRC proposal 8-3. We do believe however that renaming the MA 15+ Mature Accompanied category to "*Mature Audiences*" or "*MA*" may lead to misunderstanding, due to the subtlety of the change. In order to avoid any confusion, we support the MPDAA recommendation that the category be renamed M 15+, with the M standing for "*Mature*". This will clearly distinguish the new category from its legally enforceable predecessor.

¹ Paragraph 9.18

The recommended MPDAA categories which AFACT endorses are as follows:

- C (Children)
- G (General)
- PG 8+ (Recommended for people over 8 years of age with Parental Guidance)
- PG 12+ (Recommended for people over 12 years of age with Parental Guidance)
- M 15+ (Mature – Recommended for people over 15 years)
- R 18+ (Restricted)
- X 18+ (Restricted)
- RC (Refused Classification)

AFACT is of the view that further industry consultation and discussion around this issue is required prior to adopting any recommendations.

Conclusion

AFACT applauds the extent of the reforms to the National Classification scheme proposed in the NCSR Discussion Paper and offers its support in any further industry consultant and refinement of the framework in the interests of a robust, effective and flexible classification scheme for Australia.

Thank you for considering AFACT's submission.

Yours faithfully



Neil Gane

Executive Director

Australian Federation Against Copyright Theft