# Submission by
# Free TV Australia Limited

Australian Law Reform Commission

National Classification Scheme Review
Discussion Paper

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## EXECUTIVE SUMMARY

- Free-to-air television is the primary way Australians consume classification information. Free-to-air television viewers and broadcasters will be the stakeholders most affected by any changes to the current scheme.
- The current television classification system is working well, with a high level of consumer awareness and an overall low level of complaint.
- Free TV supports the overall co-regulatory structure proposed by the ALRC, with its focus on industry autonomy underpinned by a common set of high-level principles.
- Free TV also supports consistent classification of content across media platforms.
- The case for widespread changes to the current system has not been made. The proposed changes to classification categories would be highly disruptive to viewers, would have a significant cost impact on broadcasters, and are not warranted.
- Whilst the proposed scheme purports to be technology neutral, it will in fact impose an unfair regulatory burden on television broadcasters. Some industries will be subject to significantly less regulation (such as the games industry), whilst greater regulation will be placed on free-to-air television (through audits, changes to the classification categories and a requirement to classify online content).
- Under the proposals, commercial free-to-air television broadcasters will be among the few entities required to classify all of their online content, regardless of level or impact. For most online content providers, classification will be voluntary. This is inequitable.
- Classification time-zones, which only apply to free-to-air television, are no longer a meaningful way of regulating content and should be abolished.
- Any framework for complaints and enforcement must be proportionate, and give the Regulator discretion to deal with complaints. A low-cost review mechanism must be available to industry participants who are aggrieved by a decision of the regulator.
- Overall, Free TV supports a model which:
    - represents the interests of government, industry and users across all platforms, using a co-regulatory model
    - establishes one set of guidelines containing common, universal principles
    - enables different industry bodies to create their own in-house interpretations and practices which reflect the common principles
    - is simple to understand, apply and regulate
    - uses research and complaints to monitor effectiveness
    - educates users
    - ensures that the decision makers responsible for complaints assessment have appropriate experience and expertise
    - establishes a cost-effective and efficient means of review, through an Independent Review Body.

# 1 Introduction

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. In 2011, commercial free-to-air television has been the most popular source of entertainment and information for Australians. At no cost to the public, our members provide nine channels of content across a broad range of genres, as well as rich online and mobile offerings.

The popularity and reach of commercial free-to-air television means that it is the preeminent provider of classified content to Australians. Australians consume more classified content from commercial free-to-air television than from any other source, with 78,840 hours of content broadcast in 2011. Free TV therefore welcomes the opportunity to provide a submission to the Australian Law Reform Commission's National Classification Review Discussion Paper.

As noted in the submission in response to the Issues Paper, Free TV welcomes the review of Australia's classification system. Free TV agrees that there is a need for some reform of the system, to properly reflect and accommodate the changing media and communications landscape.

Commercial free-to-air television broadcasters welcome the recognition of the effectiveness of their current regulatory framework. A co-regulatory framework based on high level principles and implemented at an industry level results in a system that is dynamic, responsive and practical.

However, Free TV is concerned at the significant social and economic impact that a number of the proposals in the Discussion Paper will have, as well as the disruption and confusion that those proposals will cause their audiences. These concerns are outlined below. In particular, Free TV has concerns about the revised age-based classification markings and their impact on audiences and time-zones, the treatment of online content produced by its members, and the proposed role and structure of the Board and Regulator.

It is important to ensure that all Australians can continue to make informed choices about media content, in light of increasing access to media across a growing number of platforms. Viewers rely on accurate, practical and clear information when making choices about the material they want on their screens. Recent research conducted by the Australian Communications and Media Authority confirms that the classification system as it applies to television programs is reflective of broad community standards.[1]

Free TV Australia supports a number of features proposed as part of the new Scheme. In particular, we agree with a system that incorporates both high level principles and detailed industry codes, a focus on co-regulation and industry autonomy, and a complaints system that essentially reflects our existing situation.

A national scheme should regulate the classification of content so that it is consistent across media platforms and readily understood by consumers.

Free TV has significant reservations about aspects of the proposed Scheme. Commercial free-to-air broadcasters see only the need for minor changes to the present system, which is working well. These changes include the removal of specific TV-only categories (AV15+), the simplification of time-zones and changes to the review process. Commercial free-to-air television broadcasters will be the group most affected by any changes, given the volume of classified content we provide.

[1] Australian Communications and Media Authority *Digital Australians – Expectations about media content in a converging media environment* October 2011, p 53

The proposal concerning the kinds of material which must be classified imposes a significant and unfair burden on commercial free-to-air television broadcasters, who will be one of the few entities required to classify all of their online content, regardless of impact. For most online content providers, classification will be voluntary. In an online environment, commercial free-to-air television broadcasters should be treated in the same way as any other online media content provider.

Free TV does not support the proposed arrangements for the Regulator and Classification Board, and has proposed an alternative regulatory structure. As part of this structure, the Classification Board should be considered the "industry body" for the classification of films, computer games and publications, rather than a body which can review and audit the decisions of other industry classifiers.

Free TV Australia recommends the abolition of time-zones, which are no longer meaningful as a tool for regulating media content in an environment where content is increasingly on demand. As more and more content is viewed online (and over the National Broadband Network (NBN)), time-zones will do nothing more than hamper the ability of commercial free-to-air television broadcasters to compete on an even regulatory playing field. Initiatives such as parental locks and dedicated "safe" children's channels mean that time-zones will not have relevance in the future as a means to restrict or regulate viewing.

Any complaints and enforcement framework must be proportionate, and give the Regulator discretion to deal with complaints. A low-cost review mechanism must be available to industry participants who are aggrieved with a decision of the regulator.

Free TV's previous submission dealt with the existing classification rules as they apply to commercial free-to-air television and addressed relevant questions from the ALRC's Issues Paper. This submission deals with the proposals and questions posed by the ALRC in its Discussion Paper. Both of these submissions should be considered in the development of any recommendations by the ALRC.

Many aspects of the proposed Scheme are not set out in specific detail, which is understandable given the complexity of many of the issues involved. Free TV looks forward to engaging on the finer details of the Scheme as part of any future consultation process.

# 2 Responses to Proposals and Questions

## Chapter 5 – The Proposed Classification Scheme

**Proposal 5-1: A new National Classification Scheme should be enacted regulating the classification of media content**

Free TV supports the establishment of a National Classification Scheme (Scheme), supported by legislation that clearly sets out the classification framework for all media. Harmonisation and common classification markings across all regulated media will ensure the communication of clear and consistent information on content, regardless of the delivery method or platform.

The proposed co-regulatory Scheme represents a sensible balance between commercial interests and community safeguards. In particular, Free TV supports the development of a single set of classification criteria, underpinned by common high-level principles which can then be specialised for each industry as appropriate.

However, Free TV does not agree with all aspects of the form and content of the Scheme proposed in the Discussion Paper. These concerns are addressed in the relevant responses throughout the submission, in particular, the matters addressed at Chapters 6 and 9.

It is also unclear how the framework will function in relation to different components of the current television classification regime – for example, whether time-zones (if retained) will sit with the Regulator, or whether this responsibility will be retained by the ACMA. The goal of simplification and the establishment of a single Scheme should mean that all classification-related regulation should be administered and overseen by the one body.

**Proposal 5-2: The National Classification Scheme should be based on a new Classification of Media Content Act. The Act should provide, among other things, for:**

**a) what types of media content may, or must be classified;**

**b) who should classify different types of media content;**

**c) a single set of statutory classification categories and criteria applicable to all media content;**

**d) access restrictions on adult content;**

**e) the development and operation of industry classification codes consistent with the statutory classification criteria; and**

**f) the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.**

Free TV is very supportive of a number of the proposed features of the Scheme, in particular the recognition that the existing system as it applies to commercial free-to-air television is an effective way to deliver classified content in a way that is both responsive and accountable.

Free TV supports the introduction of a Scheme for the regulation of classification across all media. It is important for key aspects of the proposed co-regulatory scheme to be enshrined in legislation, so that those key elements have the imprimatur of the government. The details of the Scheme, incorporating a single set of classification criteria, should be formulated by a co-operative forum of government, industry classification professionals, users, and other stakeholders. These could be called National Media Classification Guidelines. Industry sectors would then create their own in-house interpretations using

industry codes. This mix of common criteria and industry specific codes is the best way to ensure practical, equitable and consistent implementation across platforms.

Providing for key elements of the system (including markings) in legislation will deliver a degree of certainty and stability to the relevant industries. Industry participants will feel comfortable about investing in marketing and education campaigns, where required. The framework will be protected from regular, unilateral changes from government bodies which are not elected and are not accountable.

The certainty and inflexibility of legislation can also create disadvantages, such as an inability to adapt to new or unexpected circumstances. To mitigate this problem, Free TV recommends that any universal regulatory framework take a measured approach to overall change and make allowances for flexibility by way of industry codes.

**Proposal 5-3: The Classification of Media Content Act should provide for the establishment of a single agency ('the Regulator') responsible for the regulation of media content under the new National Classification Scheme.**

The establishment of a Regulator to assume responsibility for compliance under the Scheme is supported by Free TV. Critical to the success of any new Scheme will be the expertise and credibility of the Regulator. Proposals concerning the detail of the structure, staffing and powers of the Regulator are addressed in Free TV's responses to Chapters 6, 7 and 12.

**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.**

Free TV agrees that any legislation supporting the new Scheme will need to clearly define the content that it proposes to regulate. The current definition of media content in Schedule 7 to the *Broadcasting Services Act 1992* (BSA) is very broad and will catch most online and offline content. Definitions that will form the basis of a technology- and platform-neutral Scheme will need to be developed in a consultative manner. Free TV would seek to provide feedback on the appropriateness and practicality of any proposed draft as part of any consultation process.

Although nothing material turns on it in this instance, Free TV is somewhat concerned that "television content" has been singled out as a specific inclusion category, even though it is captured in the scope of "offline" content. Free TV submits that as a general principle, television should not be subject to specific treatment unless certain circumstances justify that treatment. Presently, commercial free-to-air television broadcasters face greater regulation than most similar services as a result of a regulatory compact that involves the provision of public goods (such as Australian content) in exchange for access to certain public resources (the broadcasting services bands of the radiofrequency spectrum).

Different and inequitable treatment for television programs is also an issue in relation to the definition of "a television program" in relation to the must-classify proposals in Chapter 6. These are addressed below.

## Chapter 6 – What content should be classified?

**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).**

Free TV appreciates that this approach is intended to result in equal treatment across platforms of commercially produced media content that contains both audio and visual elements – what is colloquially understood as a television program. This definition is key to the platform-neutral nature of the proposed Scheme, and it is clear that it is intended to include content produced on a commercial basis that is distributed online (as distinct from amateur or user generated content). However, there are a number of problematic elements with "television programs produced on a commercial basis" which will unfairly impact on Free TV members. This is an example of an unintended consequence referred to on page 49 of the Discussion Paper, regarding convergence.

The "television program" definition, combined with the platform-neutral approach, means that in practice, the only online content that will require classification is content produced by Free TV members and similar established Australian content providers. This is recognised at page 96 of the Discussion Paper, where it is noted that the definition is not intended to capture other film-like internet content.[2] The result is in an unfair regulatory impost on Free TV members and other traditional television content providers.

It is also not explicitly stated whether advertisements screened on television and online are covered, though it is expected that they would be. Currently television advertisements must be classified, but online advertisements that are similar to television advertisements (such as advertisements appearing on Australian news sites) are not.

*"Television"*

The first key problem is the inclusion of the word "television" as part of the definition.

In the convergent media environment, the traditional concept of "television" is quickly becoming inadequate. In a real-world sense, the only undisputed providers of "television on a commercial basis" in Australia are free-to-air television and pay TV providers.

"*…on a commercial basis"*

Similar problems arise with the "on a commercial basis" part of the definition. Free TV understands the definition to apply where there is some commercial benefit to a party, but it is unclear whether this is the producer, others involved in the production (such as actors, stage hands), the distributor, or some other person.

In an online environment, this definition will clearly cover all content produced by Free TV members, including catch up content and online only content such as webisodes, behind the scenes material, extras and other special content. The Discussion Paper clearly indicates that the definition is intended to apply to the Australian Broadcasting Corporation and the Special Broadcasting Service, although it is not clear how this interpretation is achieved.

Other providers of linear free-to-air television, such as community broadcasting licensees, are prohibited from providing their services for profit, or as part of a profit-making

[2] While the intent is noted, the actual wording of the definition, if carried over to the proposed legislation, may result in differing interpretations in practice or by the Courts. See also paragraph 7.85 of the Discussion Paper, regarding classification of online television content.

enterprise.[3] Many producers and presenters providing content to these services do not receive any consideration. It is not clear how this definition will apply to content on those broadcasting services. There is a reasonable community expectation that such linear broadcasting content provided using the broadcasting services bands spectrum will be required to carry classification markings.[4]

*What is "commercial"?*

For less traditional forms of content, there will also be a number of arguable interpretations of the term "commercial". Presently the line the between some user-generated content and professional content is blurred. These distinctions will only become more difficult to discern with the proliferation of Connected TVs, the continued evolution of the online environment and greater access to high speed internet via the NBN.

For example, YouTube earns money from advertising, even though the producers of the content often receive no financial benefits. Some YouTube "vloggers" receive financial benefits from their content, even though their material may not initially be produced on a commercial basis. Such content will often have millions of views worldwide, more than the highest rating programs on commercial free-to-air television, or even the population of Australia. By way of example, Australian vlogger Natalie Tran reportedly earned in excess of US$100,000 in 2009-10 through her postings on YouTube, and her most popular clip *How to fake a six pack* has more than 34 million views.[5]

*Proposed definition only targets traditional television content providers*

In practice, the composition of the definition and the realities of the online regulatory environment mean that, in an online context, only a few content providers will unambiguously satisfy the criteria. Jurisdictional issues will mean that Australian businesses are the only ones who can be subject to enforcement and compliance activities.

Industry competitors (whether user-generated or commercial content providers in other jurisdictions) will, in practice, be able to avoid these obligations. The recommendations also fail to recognise the game-changing impact of the government-funded NBN which the Minister for Broadband, Communications and the Digital Economy has said will deliver "hundreds and hundreds and hundreds" of IPTV channels.[6] It will simply not be feasible to enforce a must-classify requirement on all television-like online content across each of these channels. This additional regulatory impost will impact on the Australian providers' ability to compete with overseas or user-generated content providers. This will have knock on effects to the other public benefits provided by these services, such as investments in Australian content.

Free TV understands the motivation and underlying rationale for defining the relevant content as "television" and applying it in a platform neutral setting. However, the practical reality is that online content is nearly impossible to regulate, principally as a result of jurisdictional issues. A desirable theoretical framework will not be effective if it unfairly targets certain Australian businesses and is not practically enforceable.

In practice, any regulation and enforcement of the "must classify" provisions on online or mobile platforms will only be applied to identifiable organisations or individuals with a

[3] See subclause 9(2)(e) of Schedule 2 to the BSA.
[4] Currently, community television broadcasting licensees must ensure that all material broadcast is classified according to the *Guidelines for the Classification of Films and Computer Games:* see Code 4 of the *Community Television Broadcasting Codes of Practice, June 2011*
[5] McMahon, Neil "Riding the Tube" *The Age* 14 November 2010: http://www.theage.com.au/technology/technology-news/riding-the-tube-20101113-17rzy.html
[6] Senator Stephen Conroy, AIIA, June 2009 http://www.arnnet.com.au/article/310712/conroy_nbn_bring_hundreds_tv_channels_australia/

traceable Australian presence. These content providers are Free TV members, Australian-based pay TV services (ASTRA members), and large Australian producers of television content whose shows also have a strong online presence[7]. The result will be that the small, identifiable group of Australian businesses will face additional regulation and oversight, with a minimal net benefit for the community.

The imposition of a "must classify" rule which, in effect, will realistically only be enforced in relation to a small group of Australian content providers, means that the Free TV members and those other identified groups will be subject to a discriminatory framework that applies rules unevenly on certain platforms. Such an obligation will also incur additional costs (for example, the employment of additional classifiers to classify online-only content).[8]

Online content provided by Free TV members should not be treated differently to other online content. In an online environment, Free TV members are just like any other content provider – they are not licensed, or using spectrum, and the content in question is non-linear "pull" content, as opposed to traditional linear broadcasting.

*Solution*

If the aim is to achieve a greater rate of classification for online content that is substantially similar to television content, then there are two possible alternatives.

The preferred alternative is to remove online content from the scope of must classify and make it a voluntary classification category, with a requirement to classify high level material likely to be MA15+ or greater. This approach is similar to the proposed framework for computer games. Although this approach will suffer the same jurisdictional issues as the original proposal, it will remove the regulatory imbalance that the original proposal places on traditional Australian television content providers.

This approach also creates scope for opportunities and incentives for Australian providers to voluntarily classify their online content. The availability of a marking or accreditation system for those online providers who do classify content will provide assurances to audiences and parents about the safety of certain content and the reliability of information available on certain sites. This is similar to the suggestion proposed by Telstra in its response to the Issues Paper.[9] Under this proposal, classifications online for low level material become an asset to be advertised, rather than an obligation subject to enforcement action.

In this proposal, a must-classify requirement would remain on traditional linear broadcasting services. The must-classify definition could restrict the class of services to those services using the broadcasting services bands spectrum (or all spectrum, if it is also intended to include providers of content to mobile devices – however this is likely to be problematic as these services are not closed networks).

An alternative way of restricting the class of "must classify" content would be to limit the regime to services holding a broadcasting licence under BSA, those covered by the Subscription and Open Narrowcasting Codes of Practice, and content that is provided on those services. If the intention is also to regulate services such as Fetch TV, then the definition could be expanded to include commercially available linear services where a

[7] See for example, www.masterchef.com.au co-branded Network Ten and Shine Australia, including "web exclusive" content.
[8] It is acknowledged that this will not be necessary for content such as catch-up TV, which will replay content that has already been classified. Additional work will be required in relation to content that has not previously been classified, or is not required to be classified under existing arrangements. The addition of a must classify regime for online content will also require Free TV members to classify all existing online material, which will incur significant costs.
[9] Telstra, *Submission CI 1184* 15 July 2011

regular subscription fee is paid. In recognition of the must-classify obligations and the availability of parental lock technologies, there should be a commensurate relaxation of existing time-zone restrictions on these services (where they apply). This is discussed further in the response to Question 8-1.

If this proposal were implemented, Free TV would recommend a review of the framework within three to five years of its commencement, to see if there is any scope for change and to enable any developments in technology or viewer behaviour to be integrated into the overall approach.

A second solution would be to reshape the definition to remove any discriminatory effects on the traditional Australian television content providers. However, this is unlikely to involve any resolution of the jurisdictional enforcement issues and will still result in Australian providers facing additional regulations compared with their overseas competitors. The definition would need to be carefully crafted with a number of criteria to determine the status and nature of the content. This is inherently difficult (as recognised at page 96 of the Discussion Paper) and Free TV notes the issues raised with proposals using measures such as audience reach, or covering content produced by companies or corporations. If this option is selected, Free TV would welcome the opportunity to participate in the development of a new definition.

**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.**

This proposal does not directly affect Free TV members. However, we note that the new system purports to be technology-neutral but imposes significantly less regulation on certain industries (such as the games industry) while increasing the regulatory burden on free-to-air television (through audits, changes to the classification categories and requirement to classify online content).

The only other comment relevant to this proposal is that the same approach should be applied to television content online, as set out in our response to Proposal 6-1.

**Proposal 6-3: The Classification of Media Content Act should provide a definition of 'exempt content' that captures all media content that is exempt from the laws relating to what must be classified (Proposals 6–1 and 6–2). The definition of exempt content should capture the traditional exemptions, such as for news and current affairs programs. The definition should also provide that films and computer games shown at film festivals, art galleries and other cultural institutions are exempt. This content should not be exempt from the proposed law that provides that all content likely to be R 18+ must be restricted to adults: see Proposal 8–1.**

Free TV supports the proposal to retain existing categories of exempt content, while still ensuring certain safeguards for high level material.

Free TV supports the current exemption for news and current affairs on the grounds that it is critically important for media content providers on all platforms to be able to accurately report news events in a timely and informative manner.

It is recognised that some submissions to the Issues Paper noted the distressing impact that certain news and current affairs programs may have on small children. However, Free TV members currently take steps to limit any such impact. For example, the Commercial Television Industry Code of Practice contains an obligation for 'special care' when broadcasting news material in 'G' time-zones and requirements for warnings before distressing news material. Restrictions also exist for material likely to distress or offend viewers and certain material is deemed 'not suitable' for television.

These provisions demonstrate that appropriate safeguards for the community can be put in place as part of the proposed industry codes process.

**Proposals 6-4 to 6-6: Proposals concerning classification, distribution and restrictions around material that is rated X18+ or likely to be RC.**

This proposal does not directly affect Free TV members. Free TV members do not produce or distribute material of this nature. However Free TV is generally supportive of the principle that adults should be able to watch most material of their choosing, provided that there are appropriate safeguards in place to ensure that minors are not exposed to inappropriate content.

**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'.**

Free TV is supportive of this proposal, although we note there is still some ambiguity in the Discussion Paper regarding the "double handling" of certain classifiable material.

The proposed definition of "modify" is supported and will, to a degree, reduce double handling of material. At present, the system in relation to television programs is fairly informal, with classifiers relying on informal networks to ascertain earlier classification decisions. As the Issues Paper recognises, problems also arise when content is reclassified for different platforms, leading to inconsistency for consumers and difficulties for industry participants in the event of a complaint.

The Scheme as proposed will require parties providing classified content to be able to access original classification decisions (made by authorised industry classifiers) in a central, reliable form. Free TV recommends that the existing Classification Database be expanded to become a central database administered by the Regulator, where all authorised industry classifiers could enter their decisions, which can then in turn be accessed by other authorised industry classifiers. The database would need to include adequate information to enable users to clearly discern whether any modifications had occurred, or whether the classified content was in its original form.

The assertion that identical content should retain its classification across platforms is welcomed, however the Discussion Paper still leaves the door open for identical content to be classified differently if the content distributor so chooses. While this will lead to some ambiguity in the future, Free TV agrees with the statement in the Discussion Paper at page 115 that it is not appropriate to compel a content provider to use a classification marking that they do not agree with. This is of particular importance to Free TV members because of the restrictive nature of the classification time-zones.

For these reasons, it needs to be clear that the database is for informational purposes only, and that classification decisions on the database will not be binding on content providers, both in regards to the use of the classification and in relation to the assessment of complaints. The availability of the database will result in increased information sharing across platforms, greater consistency overall and reduce at least some of the double handling that currently exists.

**Proposal 6-8: Industry bodies should develop codes of practice that encourage providers of certain content that is not required to be classified, to classify and mark content using the categories, criteria, and markings of the National Classification Scheme. This content may include computer games likely to be classified below MA 15+ and music with explicit lyrics.**

Free TV agrees that a co-regulatory framework incorporating codes of practice administered by industry bodies is effective and practical. This proposal is supported by Free TV.

Classification standards are at their very core an information service for consumers, telling them about the content they will be viewing. It is this information that will assist consumers to control their own content consumption in the new information environment, whether it is on an ad hoc basis or through tools such as parental locks. Consumers must therefore be able to rely on classification standards to provide them with the information they need, regardless of the platform from which the material is sourced.

However, the responsibility for industry codes in relation to content provided online is a little unclear. A number of content providers (including Free TV members) will provide content across a range of platforms, and those platforms may be covered by different industry bodies. Will all online content be covered by the Internet Industry Association (IIA), or will content providers (such as Free TV members, ASTRA members, etc) be covered by their legacy or "primary" industry bodies?

Free TV recommends that where a content provider is subject to a "must-classify" obligation and associated code of practice, then this will be the only code of practice that they are required to adhere to. These codes can still contain encouragement for providers to classify material on other platforms where classification is voluntary.

## Chapter 7 – Who should classify content?

Free TV supports the co-regulatory framework proposed by the ALRC in the Discussion Paper.

Although the Discussion Paper calls for promotion of any new Scheme by industry bodies and content providers, it is not clear whether this is intended to include funding of education campaigns within the relevant industries. This is an issue that is relevant to many content providers (especially smaller ones) and should be dealt with in the Final Report. Such a campaign will be significantly more costly for industry if there are substantial changes to the classification markings, as per Proposal 9-1.

**Proposal 7–1: The Classification of Media Content Act should provide that the following content must be classified by the Classification Board:**

a) **feature-length films produced on a commercial basis and for cinema release;**

b) **computer games produced on a commercial basis and likely to be classified MA 15+ or higher;**

c) **content that may be RC;**

d) **content that needs to be classified for the purpose of enforcing classification laws; and**

e) **content submitted for classification by the Minister, the Regulator or another government agency.**

Free TV agrees that the Classification Board (Board) should classify the material at a), b), and c). However, Free TV does not support the Board reviewing the decisions of other industry classifiers for the purposes of enforcing classification laws or if requested by another government agency. In Free TV's view, these tasks should be undertaken by the Regulator.

*Concerns with ALRC proposal*

Free TV has significant concerns with the proposed role of the Board.

Currently, in appointing members of the Board, the *Classification (Publications, Films and Computer Games) Act 1995* requires the Governor-General to have regard to:

> *'…the desirability of ensuring that the membership of the Board is broadly representative of the Australian community.'*

Similarly, the *Guidelines for the selection of members of the Classification Board* state that the overriding principle when making recommendations for appointment to the Classification Board is that the proposed appointment will ensure that the Board as a whole is broadly representative of the Australian community.[10] Board members are appointed for a limited term only.

Under the proposed Scheme, the Board would be responsible for *inter alia* classifying material which is the subject of complaints, auditing classified material from content providers, and classifying content for the purposes of enforcement.

In Free TV's view, it is essential for these tasks to be undertaken by people with relevant expertise and experience in classification or a relevant field such as content production,

[10] Australian Government *Guidelines for the selection of Members of the Classification Board* June 2008: http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~O_Guidelines+for+the+Selection+of+Members+of+the+Classification+Board+-+June+2008.pdf/$file/O_Guidelines+for+the+Selection+of+Members+of+the+Classification+Board+-+June+2008.pdf

media regulation or media law. The decision makers should not be replaced after a short term, as this has the potential to jeopardise the consistency of decision making.

Free TV submits that these tasks should be undertaken by the Regulator, which should be staffed or at the very least advised by individuals who have relevant training and expertise in classification, content or the media industry. This will promote consistency and respect for the Regulator among the community and the relevant providers of media content.

Under the Free TV proposal set out below, the Board effectively becomes an industry body of classifiers, focusing on the classification of film, computer games and publications.

*Bench-marking*

Appropriate training and adequate complaints management should abrogate the need for the Board to take on a bench-marking role. In any event, Free TV submits that such a role is inappropriate, given the composition and nature of the Board.

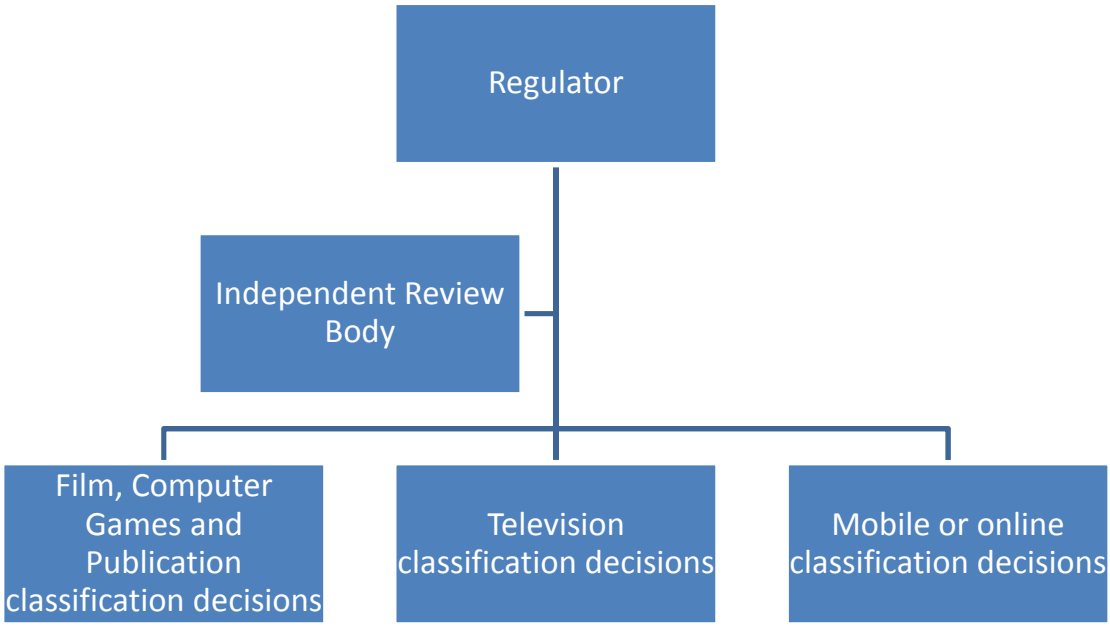
*Proposed regulatory structure*

Under Free TV's proposed structure, complaints would be investigated and assessed by the Regulator, meaning that the Regulator would make the classification decision on the contentious media content. The decision makers within the Regulator should be people with appropriate expertise and industry experience.

The Board would occupy the same tier as other industry classification bodies. Under Free TV's proposal, no industry sector is given primacy or the ability to "over-rule" the classification decision of another industry sector.

An Independent Review Body would hear appeals by aggrieved industry parties against complaint findings and disputed classification decisions (the Advertising Standards Board provides one model for this). The Independent Review Body should be comprised of people with industry experience and broadly representative of all platforms.

Free TV's proposed structure can be illustrated as follows:




This structure more appropriately reflects the status of the Classification Board, and ensures that the Regulator is responsible for the same level of review for all industry sectors.

**Proposal 7–2: The Classification of Media Content Act should provide that for all media content that must be classified—other than the content that must be classified by the Classification Board—content may be classified by the Classification Board or an authorised industry classifier.**

Free TV agrees that authorised industry classifiers should be able to classify television programs. Other material in the "must classify" category is not relevant to Free TV members so we have not expressed a view on the classification of such material.

The volume of material in the "television programs" category is such that it would represent a significant burden and cost to the government if such material was to be classified by the Board. Free TV members alone screen over 78,000 hours of classified content on an annual basis. Classifying this material in-house, using qualified and experienced authorised industry classifiers is the most efficient approach.

The effectiveness of the existing Commercial Television Industry Code of Practice in regulating the classification of material on television is reflected in the low number of complaints received and upheld (including advertisements). Commercial free-to-air broadcasters are transmitting content twenty-four hours a day, three hundred and sixty five days a year across nine channels – an annual total of 78,840 broadcast hours. In 2010 Free TV's average daily reach was 13.8 million people.[11] In 2010-2011, the ACMA conducted 96 investigations into commercial television broadcasters, of which only 13 related to classification matters. Only 1 of those investigations resulted in a breach finding.[12]

In-house classification also has a number of other notable advantages:

- The immediacy of viewer feedback provided to television stations allows in-house classifiers to be responsive to audience concerns, both generally and in relation to particular issues.
- In-house classification can be undertaken quickly to enable "fast-tracking" of overseas shows to Australian audiences.
- Due to their experience and understanding of audience expectations, in-house classifiers are able to modify content and remove material which may be inappropriate for a particular classification or time-zone.

The retention of in-house classification for television content and the co-regulatory codes system should be an essential component of any new Scheme.[13]

**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.**

Free TV members do not produce or distribute any media content that is likely to fall into this category. As a general principle, Free TV supports a co-regulatory Scheme that enables most material to be classified by authorised industry classifiers.

[11] Source: OzTAM & RegionalTAM, 5 cap cities, 4 aggregated regional mkts plus Tasmania, total ppl, survey wks 7 –48 2010 (ex Easter), metro & regional combined for Free TV total
[12] Source: ACMA Annual Report 2010-11, Appendix 6
[13] See comments regarding Proposal 7-4 on industry training.

**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.**

Free TV provides no comment on this proposal. However, Free TV has some concerns regarding the current practice of distributors' agents making decisions which are then ratified by the Classification Board. Any system that replicated such a process would be undesirable.

**Proposal 7–4: The Classification of Media Content Act should provide that an authorised industry classifier is a person who has been authorised to classify media content by the Regulator, having completed training approved by the Regulator.**

Free TV agrees that there needs to be a central agency (in this case, the Regulator) which is responsible for the development of training, authorisation and monitoring of authorised industry classifiers.

The main function of the classification system in Australia is to provide consumers with clear, accurate and consistent information about media content, so they can make informed choices. Training and authorisation of classifiers must therefore be sufficiently comprehensive to ensure that there is consistency and accuracy in classification decisions. This in turn will benefit consumers and audiences.

In Free TV's view, the form and content of the training is a matter that should be the subject of consultation and development with experienced classifiers across a range of media content industries. It should not be developed in a vacuum or simply replicate the existing training provided for industry assessors by the Classification Board. We note that the Classification Board conducts an intensive three-month program which includes mentorship and practical experience for its own classifiers. By comparison, its training programs for certified industry assessors are very brief (half-day or one-day). There is anecdotal evidence which suggests that this could be contributing to inconsistencies in classification decision-making, which in turn undermines the effectiveness and integrity of the National Classification Scheme.

Free TV strongly recommends that the authorisation process comprise a short training period, followed by 100 hours of practice under the supervision of an authorised industry classifier.

As part of the transition to a new Scheme, it is essential that there be some recognition of prior training and experience for classifiers currently working in the industry.

**Proposal 7–5: The Classification of Media Content Act should provide that the Regulator will develop or authorise classification instruments that may be used to make certain classification decisions.**

Free TV supports the use of classification instruments for material the subject of voluntary classification, provided that they are developed in a consultative way and subject to regular review.

Alternatively, Free TV would support a system where the authorised classification instruments are developed by industry and form part of the relevant industry codes, which would be approved and enforced by the Regulator. This is an option that is likely to result in instruments that are more tailored to specific industry needs, as flagged in paragraph 7.70 of the Discussion Paper.

The Regulator is the logical body to administer these instruments.

**Question 7–2: Should classification training be provided only by the Regulator, or should it become a part of the Australian Qualifications Framework? If the latter, what may be the best roles for the Board, higher education institutions, and private providers, and who may be best placed to accredit and audit such courses?**

Free TV does not support the training becoming part of the Australian Qualifications Framework. The training regimen overall should be administered and provided by the Regulator, with input from industry stakeholders.

**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.**

Free TV does not agree with this proposal.

*Review*

As noted in our response to Proposal 7-1, the Classification Board does not have the appropriate training or expertise to review decisions or provide advice to the Regulator. Consequently, the Board should not have any role in reviewing or auditing the decisions of other classifiers. This should instead be undertaken by the Regulator. This solution also means that the Board will not be reviewing its own decisions.

One aspect that is lacking from the current co-regulatory scheme applicable to the commercial television industry is a cost-effective access to a review of a decision of the ACMA. As part of its proposal outlined at the response to Proposal 7-1, Free TV strongly recommends the inclusion of a review mechanism for Regulator decisions. The review process should be available to industry participants who are aggrieved by a decision of the Regulator.

*Audits*

Free TV does not support the introduction of an audit system for industry classification decisions. This represents an increase in regulation for commercial free-to-air television broadcasters, who are already highly regulated. The scope and frequency of audits is not clear from the Discussion Paper, however any additional compliance measures would result in an increase in administrative burden and costs for Free TV members. A co-regulatory framework where unresolved complaints go to the Regulator is a far more responsive, efficient and effective means of monitoring compliance. An effective complaint mechanism combined with adequate training should eliminate the need for an audit system.

The need for a system of audits has not been established and it is not clear what purpose is served by mandating review of content which has not attracted public concern (by way of complaint). As noted in our response to Proposal 7-2, Free TV has a very low level of complaints, taking into account the audience reach and the volume of content provided. In 2010-2011, only one breach finding was made by the ACMA against a network in relation to a classification investigation. Submissions to the Issues Paper generally indicated that the commercial free-to-air model is working well, and it is not an area of concern. The proposed Scheme does not recommend substantial changes to that system. Under these circumstances, it is not clear why an additional regulatory measure should be applied to the commercial free-to-air television broadcasters.

If the ALRC is minded to recommend an audit system, then Free TV recommends that an audit should be an extraordinary, rather than a regular event, and should only be triggered if

an industry participant has had a number of similar complaints upheld over a specific period of time (for example, 6 complaints upheld in a 6 month period).

**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.**

Free TV supports the proposed powers of the Regulator, noting the similarities to the sanctions in the current *Classification Act*. However, as with any government decision that affects the interests of a person or corporation, procedural fairness must be afforded by the Regulator, particularly in relation to parts a) and b) of the proposal.

## Chapter 8 – Markings, advertising, display and restricting access

**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.**

Although these two proposals do not directly affect Free TV members, we agree that such restrictions are appropriate for content that has been classified, or is likely to be classified, R18+ or X18+.

**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+.**

Free TV agrees with the ALRC's comments in the Discussion Paper that the restrictions as they currently apply to MA15+ are not practical or effective. For commercial free-to-air television, access to material at the MA15+ level is limited by market-driven community expectations and time-zones set out in the Commercial Television Industry Code of Practice. As noted in the Discussion Paper, content at the MA15+ level is available on most other platforms without any meaningful restrictions.

For the reasons raised in the Discussion Paper, Free TV agrees with the proposal to remove mandatory access restrictions for material rated MA15+.

**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.**

Free TV agrees that industry codes are the appropriate mechanism for restricting access to adult media content. Such a system has worked effectively in the commercial television free-to-air industry. The inclusion of such matters in industry codes means that each industry can apply the relevant high level principles in a way that is practical, effective and commercially viable.

**Question 8–1: Should Australian content providers—particularly broadcast television—continue to be subject to time-zone restrictions that prohibit screening certain media content at particular times of the day? For example, should free-to-air television continue to be prohibited from broadcasting MA 15+ content before 9pm?**

Free TV recommends the removal of time-zone restrictions for commercial free-to-air television broadcasters. The requirement to only show certain content at certain times of the day is out-dated and puts commercial free-to-air broadcasters at a competitive disadvantage in terms of their scheduling strategies. Removal of time-zones would address the current regulatory imbalance across media and communications platforms and allow a more even regulatory playing field.

Any such deregulation would be supported by the widespread availability of parental locks and consumer advice as means of protecting children from potentially harmful material. Following digital switchover in 2013, the availability of the parental lock features will be

almost ubiquitous. This justifies a significant shift away from the paternalistic approach to television classification and time-zones that has characterised this area of regulation until now. Further, the sort of content that the time-zone system was designed to promote (such as content suitable for children) is now readily available on two advertisement-free, dedicated, government funded children's channels (ABC2 and ABC3).

The effectiveness of time-zones as a means to protect audiences is also questionable given that content comparable to that on free-to-air television is readily available on alternative platforms which are not subject to time-zone restrictions (such as pay TV). The increasingly on-demand nature of content delivery also undermines the rationale for time-zones.

In particular, the growing popularity of Connected TVs and the introduction of the NBN with its "hundreds" of multicast channels will mean that audiences will be accessing content from a range of platforms on a single device. Commercial free-to-air television will be seen alongside internet content from overseas which is not subject to any time-zone restrictions at all.

Time-zones can also be seen as contrary to the strong trend in media consumption towards viewers accessing what they want, when they want. The ability to time-shift programming and the growing prevalence of 'on demand' content services place real pressure on a time-of-day approach to regulating content. As noted above, technology (in the form of parental locks) allows us to consider new ways of meeting community standards.

A further consideration in relation to time-zone restrictions on commercial free-to-air television is the fact that the television content market essentially self-regulates. Commercial free-to-air television broadcasters' goal is to maximise revenue, which is driven by high viewer numbers. This means that commercial free-to-air broadcasters must necessarily align with prevailing community standards and expectations when broadcasting material at any time of day.

It should be noted that incremental change to time-zones has already been successfully implemented on the digital channels, with no significant community concern. For programs on digital channels a simplified time-zone system has been implemented under which programs up to a PG classification may be shown between 5am and 9pm. The existing time zones for M, MA and AV remain in place. The net effect is that during the day PG programs may be shown at any time.

If a complete deregulation of the classification time-zones is not seen as desirable in the short term, Free TV proposes extending the digital channel time-zones (which extend PG time zones throughout the day) to the main channels. If the changes in Proposal 9-1 are adopted, Free TV would also recommend that material rated M (or T13+) be allowed from 7.30pm, and MA15+ from 8.30 pm. However, as set out below, Free TV is opposed to these proposed changes to the classification markings.

Under either approach, legislative amendment to subsection 123(3A) of the BSA will be required.

**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.**

Free TV agrees that this issue should be included in the new legislation, with the details to be set out in each relevant industry code. This will enable each industry to develop a regime that is suitable for the content delivery environment. Because industry codes can be amended more easily than legislation, such an approach will also provide more flexibility. If

there are changes to the content delivery environment, the codes can be amended accordingly. Free TV supports the adoption of consistent symbols by all industry participants.

Consideration should also be given to the role of consumer advice in addition to the marking, as foreshadowed in Proposal 9-3. In the experience of Free TV members, many audiences find the more detailed consumer advice to be the most valuable aspect of classification information. Commercial free-to-air broadcasters are subject to extensive requirements for classification of content, display of classification symbols and consumer advice. The Commercial Television Industry Code of Practice includes strict requirements for when and how consumer advice is to be given, with requirements on precise wording and display of text-based advice. Brief textual advice must also be provided after breaks for relevant programs.

**Proposal 8–6 The Classification of Media Content Act should provide that an advertisement for media content that must be classified must be suitable for the audience likely to view the advertisement. The Act should provide that, in assessing suitability, regard must be had to:**

**a) the likely audience of the advertisement;**

**b) the impact of the content in the advertisement; and**

**c) the classification or likely classification of the advertised content.**

Free TV agrees with this proposal, noting that the details surrounding the regulation of such advertisements will be set out in industry codes and any suitability determinations will lie with authorised industry classifiers. In particular, Free TV supports the proposition that the focus will be on the suitability and classification of content in the advertisement or promotion, rather than the classification of the media content that is being advertised.

## Chapter 9 – Classification categories and criteria

Free TV is strongly opposed to any changes to the existing classification categories set out at subsection 7(2) of the *Classification (Publications, Films and Computer Games) Act 1995.* These categories form the basis of the commercial free-to-air television classification system. The potential negative impact of the proposed changes far outweighs any potential benefit (indeed, the need for change has not been made out). Free TV does however support a harmonisation of classification categories across all platforms and the removal of certain categories that are specific to television. Our preferred position is for legislation to specify that the current classifications for films should apply to media content across all platforms.

**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.**

*No basis for change*

In Free TV's view, the Discussion Paper does not make a clear and sustainable argument for a change to the existing classification categories. The exploration of negative aspects of the current scheme in Chapter 2 of the Discussion Paper does not identify the classification categories or markings as a cause for concern, or as an area that is in need of reform. Rather it is noted that the problems arise from aspects of the Classification Act[14], and systemic and organisational issues, and that many submissions did not see the current classification categories as a significant problem.[15] These matters are dealt with as part of the proposed Scheme, which is generally supported by Free TV.

It is understood that there are no proposals to change the Guidelines associated with categories, rather the intention is to simply rename the existing categories in order to make them more informative. However, Free TV believes that the new category markings will lead to consumer confusion and a great variation in community expectations, with content needing to reclassified (into different categories) as a result.[16] This will have a significant effect on Free TV members, including substantial expenses that will be incurred a result of any changes. Changing the classification markings as proposed will have a fundamental and disruptive impact on both audiences and industry.

There is a very high level of understanding among audiences about the current classification categories. While there were some submissions citing confusion around the categories, a large number of stakeholders, encompassing a diverse range of interests, recognised the value of the existing categories and markings in their submissions to the ALRC Issues Paper. The retention of the current categories was supported by both the Australian Christian Lobby and the Australian Council for Civil Liberties.

Free TV reaches all Australian households, and in 2010 Free TV's average daily reach was 13.8 million people.[17] The vast majority of these individuals did not indicate to the ALRC that they were confused or dissatisfied with the existing classification regime. The proposed changes to the markings will have a substantial impact on the majority of Australians who are generally satisfied with the current classification framework and markings.

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[14] Paragraph 2.40 of the Discussion Paper
[15] Paragraph 9.6 of the Discussion Paper
[16] Confusion is also likely where there is overlap between the proposed new categories: see response to Proposal 9-2, regarding the overlap between G and C.
[17] Source: OzTAM & RegionalTAM, 5 cap cities, 4 aggregated regional mkts plus Tasmania, total ppl, survey wks 7 –48 2010 (ex Easter), metro & regional combined for Free TV total

This high level of understanding is a result of a comprehensive and sustained campaign to raise awareness and educate the public about the classification markings. Commercial free-to-air television broadcasters promote the classification regime frequently, and play a significant role in educating audiences about the markings. Each Free TV member has been running 360 on-air commercials a year for over 10 years, advising people of the current ratings and Code system.

Overall, there is limited evidence to demonstrate a need for the proposed changes, particularly having regard to the disruption to audiences that will occur as a result.

*Age markings do not align with community expectations or time-zones*

In particular, Free TV believes the introduction of age markings will mislead consumers into believing that content with a certain rating (such as PG8+) will be suitable for persons of that age to watch unsupervised. The inclusion of age recommendations will also reduce the significance of the accompanying consumer advice, which arguably provides audiences (and parents) with a more accurate and informative description of the content.

Under the proposed new markings, programs such as *Two and a Half Men*, *Beauty and the Geek Australia*, and *Rules of Engagement* would be broadcast with a PG8+ classification marking. These programs are for adults, but because the content is mild in impact, they have a PG classification. Similarly, programs such as *Underbelly: Razor*, *Offspring* and *Family Guy,* which are currently rated M and contain content of moderate impact, will be broadcast with a T13+ rating.

Audiences rely on classification and consumer advice to decide what they want to watch, and what they want their children to watch. The current categories are useful because they are descriptive without being prescriptive. Terms such as “Mature” and “Parental Guidance Recommended” require audiences (especially parents) to consider the likely content of the material and any accompanying consumer advice to determine whether the content is appropriate or desirable.

Maturity in children, especially in the 8-14 range, can vary dramatically. The age of a child will often not accurately reflect their capabilities in key areas such as reason, rationality or emotional maturity. Labelling each classification with an age marking will mean that parents may be less likely to apply critical thought processes to their children’s viewing, instead believing that, for example, “it says PG8+ so it must be okay for my 9 year old to watch”.

Audiences (especially parents) will not expect to see a marking indicating a program is appropriate for 13 year olds when the accompanying content contains material of the type and level that is currently in *Underbelly*. In particular, some parents and conservative elements of the community will not anticipate or agree with the T13+ rating as a direct substitute for M.

In Free TV’s submission, the age markings will almost certainly lead to bracket creep of the classification categories and a rise in complaints as people adjust to the new regime.[18] There will be an expectation that content currently at the higher end of PG will be classified T13+, and content at the higher end of M will become MA15+. Free TV is concerned that in practice, even material that is currently mid- or low- range M may have to be classified as MA15+. This could have a substantial impact on scheduling of very popular programs such as *NCIS*, *Bones* and *The Mentalist*, which may all have to be pushed back to 9pm if existing time-zones remain.

[18] If the new markings are enacted, Free TV recommends a complaint amnesty period, to enable commercial free-to-air networks to ascertain the community expectations and viewer comfort with the new markings.

These changes will have a significant impact on commercial free to air broadcasters, most notably in relation to time-zone restrictions, but also in relation to audience behaviours, ratings and advertising revenue.

*Significant costs for Free TV members*

Any changes will result in costs to industry, so this will be a consistent opposing argument. However, when assessing the regulatory impact of any changes, it is necessary to determine whether the costs of any change will outweigh the benefits. In this instance, Free TV believes that there is not sufficient evidence to support the proposed change, taking into account the likely benefits and costs. In recommending any changes, the ALRC should assess the cost of such a transition to the media content industry as a whole.

A significant cost for the commercial free-to-air networks will be the reclassification of the networks' existing back catalogue of content. This will be necessary because classifiers will have to review all content to determine a marking that will accord with audience expectations of the designated age recommendation.

Free TV is preparing some additional material in order to quantify labour costs associated with reclassification of content. There are also a number of other costs which will have to be borne by the commercial free to air networks if the classification markings are changed, including re-training classifiers, changes to marketing, voice-overs and billboards, and in some cases, a redesign of the mainframe systems.

Any changes to the classification ratings will also require a comprehensive and sustained education campaign for audiences, which will be expensive for both government and regulated industry groups. As the preeminent provider of classified content to Australians, the commercial free-to-air television networks will face significant costs in this regard.

*Proposed changes do not pass a costs-benefit analysis*

All in all, the total cost of changing the markings for Free TV members is likely to be very substantial. Similar costs will be incurred by the ABC and SBS. Given the high level of understanding of the current classification markings, the lack of evidence supporting any change and the disruptive and costly impact of the proposals, Free TV submits that the social and actual costs of the new classification markings far outweigh the benefits, which are limited at best.

*Solution*

Free TV recommends that the ALRC recommend retaining the current film classification markings, with harmonisation across platforms to eliminate inconsistencies (such as removing the AV classification for commercial free-to-air television broadcasters).

If a more informative regime is desirable, the ALRC should consider mandating the provision of additional consumer advice above certain classification categories (advising viewers on the exact nature of the content, such as violence, language, or drug use). Free TV recommends that such consumer advice be mandatory for:

- all content that must be classified, and is rated R18+ or MA15+
- films, one-off television programs and short television series classified M (or T13+)
- films rated PG (or PG8+)
- any content that must be classified and is classified PG (or PG8+), and is likely to contain material of a strength or intensity which reasonably would not be expected by parents or guardians of young children.

As noted below in comments regarding Proposal 9-3, Free TV does not support the provision of mandatory consumer advice beyond these classes of content.

It will of course remain an option for content providers to include voluntary consumer advice for any material distributed. Commercial free-to-air broadcasters are already subject to these rules, although they will represent increase in regulation for most other content delivery platforms.

This additional information is significantly more useful and informative for consumers. For example, a person may have significant objections to material containing violence, but be fairly relaxed about viewing material containing strong language. Free TV submits that mandating the provision of this consumer advice as part of the classification is substantially more useful and informative for audiences than amending the classification markings.

**Proposal 9–2: The Classification of Media Content Act should provide for a C classification that may be used for media content classified under the scheme. The criteria for the C classification should incorporate the current G criteria, but also provide that C content must be made specifically for children.**

The proposal to introduce a C classification across all forms of media raises a number of questions for commercial free-to-air television broadcasters. Free TV support for such a proposal is dependent on a number of other, external matters that are not the subject of this review (although they are matters that may be dealt with by the Convergence Review).

As noted in the Free TV response to the Issues Paper, commercial free-to-air television is heavily regulated in relation to children's television. Under the Children's Television Standards (CTS) Free TV members are subject to pre-classification, significant advertising restrictions, content quotas and scheduling requirements. Different rules apply to programs that have been classified P.

The Discussion Paper does not provide detail or recommendations regarding consequential changes to the CTS following the introduction of a C classification. Without such detail, Free TV is unable to assess the likely impact of the proposed change.

Issues that need to be considered include:

- What, if any, advertising restrictions will apply to television programs or online material with a C classification? Currently P programs can not contain any advertisements, with advertisements in C programs heavily restricted.
- Will there still be content quotas for C programs on commercial free-to-air broadcasters? What about other platforms? How will this impact on Australian content quotas?
- What criteria or guidelines will apply to the C classification? Will these be carried over from the existing CTS or will there be new guidelines?
- How will the guidelines account for the broad range of content that is currently within the P and C classifications? Material aimed at 2 year old children in the P category is markedly different to material in the C category which is aimed at older children. Often the latter material is rated PG by the Classification Board.
- Will the CTS be substantially revised or revoked as part of the new Scheme? This may require legislative amendment to the BSA.

A number of observations may also be made about how such a classification would operate in the commercial free-to-air television context:

- Free TV would be concerned about the scope for audience confusion regarding the overlap between G, C and PG8+, recognising that the Board currently classifies some C content as PG.

- Currently content that is rated P or C is classified by the ACMA. The transfer of this responsibility to commercial free-to-air television broadcasters will give rise to the need for additional training and resources.

**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.**

Free TV supports this proposal, with some limitations. Under the Commercial Television Industry Code of Practice, commercial free-to-air broadcasters are already obliged to provide consumer advice on a range of content. These obligations should be carried over as the basis for industry-wide regulation. Many viewers find the consumer advice especially useful when making informed decisions about content.

As set out in Free TV's response to Proposal 9-1, consumer information should be required only in relation to certain classes of material:

- all content that must be classified, and is rated R18+ or MA15+
- films, one off television programs and short television series classified M (or T13+)
- films rated PG (or PG8+)
- any content that must be classified and is classified PG (or PG8+), and is likely to contain material of a strength or intensity which reasonably would not be expected by parents or guardians of young children.

A requirement to provide detailed consumer advice for all content classified PG (or PG8+) will have a very substantial impact on commercial free-to-air television broadcasters. The majority of material screened on the nine commercial free-to-air television channels is rated PG. Under the current framework, Free TV members provide consumer advice for the categories of material set out above.

Many multi-episode (or daily) series which consistently contain low-level content (such as *Kerri-Anne*) are rated PG. Such programs are usually given a classification based on the anticipated content, without viewing every program in a series. Requiring commercial free-to-air broadcasters to provide consumer information for such programs will require each one to be viewed. The volume of this material is enormous, and a requirement to provide consumer advice on all of the content will require significant resources. For example, a classifier will have to watch the entire back catalogue of programs like *Friends* and *A Country Practice* to provide consumer advice about the specific content in each episode. Other platforms do not have the sheer volume of material which will fall into this category, so the impact on them will not be as great. The solution proposed by Free TV ensures that any content in the PG range is still accompanied by consumer advice where the strength or intensity of the material is likely to be unexpected. This provides a balance between sufficient safeguards for viewers and the practical realities of the broadcasting environment.

Free TV submits that the specific details of consumer advice be determined by industry codes, and not by the Classification Board, as flagged in paragraph 9.43. Because of their relationship with audiences and familiarity with the means of distribution, industry bodies will be better placed to develop consumer advice that is practical and appropriate to their consumers.

Consistency and relative harmonisation of common terms can still be applied via the Regulator's role in approving the industry codes.

**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.**

Free TV agrees with this proposal, including the development of a single set of classification markings with consistent thresholds across platforms. It would be anticipated that criteria and thresholds would be developed through industry consultation, taking into account existing approaches across platforms.

Free TV also supports setting out the guidance for applying the criteria in industry codes. This will enable the industry to develop guidelines to suit the range of content shown in their respective mediums (which includes drama, documentary, sport, news and current affairs, light entertainment and variety).

As noted in our response to Proposal 9-1, Free TV does not agree with the proposed markings.

**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.**

Establishing "community standards" is a difficult task. Commercial free-to-air television broadcasters are in a unique position in determining, assessing and reflecting community standards. This is because viewer feedback through ratings and complaints is very immediate. Commercial free-to-air television broadcasters will always be responsive to these concerns in order to maximise ratings and advertising revenue. In this way, the market ensures that commercial free-to-air television reflects community standards.

Free TV agrees with the principle of regular research into community standards, however it has some reservations about the detail and use of the research.

Some of the areas that the ALRC needs to consider in recommending such an approach include:

- Who will undertake the review, and who will administer it? Will this be the Regulator?
- Should a review be conducted before any new markings or legislation are introduced?
- What will the results of the review be used for? Will this mean that there will be consequential changes to the classification markings or guidelines every 5 years?

Overall, Free TV is of the view that it may be unnecessary to conduct such research. Instead, a breakdown and assessment of unresolved complaints data is a more accurate and efficient way of determining whether content providers are adequately reflecting community standards.

## Chapter 11 – Codes and co-regulation

**Proposal 11–1 and 11-2: 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.**

**Industry classification codes of practice may include provisions relating to:**

1. **guidance on the application of statutory classification obligations and criteria to media content covered by the code;**
2. **methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;**
3. **duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;**
4. **the use of classification markings;**
5. **methods of restricting access to certain content;**
6. **protecting children from material likely to harm or disturb them;**
7. **providing consumer information in a timely and clear manner;**
8. **providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and**
9. **reporting to the Regulator, including on the handling of complaints.**

Free TV supports this proposal, which essentially expands the co-regulatory system that currently applies to commercial free-to-air television broadcasters to other sectors. As noted in our response to the Issues Paper and reflected in the submissions received by the ALRC, the classification regime for free-to-air television content is working well. The list of issues to be covered by the industry code is comprehensive and reasonable.

One issue that may arise in the converging media environment is the potential for content providers to be distributing media across a range of platforms, which will mean they may be subject to more than one industry code. As noted in our response to Proposal 6-8, there needs to be some guidance in relation to this issue.

**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.**

Free TV agrees with the proposed criteria for the approval of an industry code by the Regulator. The requirements set out are achievable, practical and flexible. In particular, Free TV supports the exclusion of subjective elements (such as the criteria currently included in the BSA), which can result in difficult and protracted code approval processes.

**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.**

Free TV agrees that the Regulator is the appropriate body to enforce compliance with the relevant industry codes. Given that the majority of our members' content is in the "must classify" categories, the enforcement regime is of particular relevance to Free TV. Enforcement action should only be taken by the Regulator where a breach is proven following an investigation, and the party concerned has been given the opportunity to address both the allegations and the proposed enforcement action.

In general, proportionality must be the overriding principle in the application of the Regulator's enforcement powers. Free TV also supports the inclusion of additional guidance on the thresholds and criteria which would guide the Regulator's approach to enforcement, as well as an explicit requirement for the Regulator to consult with broadcasters when considering the use of its enforcement powers.

Free TV recommends that a range of graduated enforcement actions be available to the Regulator, including:

- acceptance of a voluntary undertaking, for example, in relation to training or quality assurance;
- acceptance of an enforceable undertaking;
- in the event of a repeated failure to comply with a Code, the imposition of a Standard or Rule; and
- in the case of repeated egregious breaches, the issue of an infringement notice.

Free TV has set out its preferred mechanism for complaints handling at its response to proposal 12-1. In addition, Free TV recommends that an accessible means of merits review be available for industry participants aggrieved by regulatory decisions.

## Chapter 12 – The new Regulator

**Question 12–1: How should the complaints-handling function of the Regulator be framed in the new Classification of Media Content Act? For example, should complaints be able to be made directly to the Regulator where an industry complaints-handling scheme exists? What discretion should the Regulator have to decline to investigate complaints?**

Under Free TV's proposal, an independent, expertly-staffed adjudication panel or review board would be constituted to hear appeals of classification and investigation decisions. Whilst there is presently an appeals mechanism for film, DVD and computer game classifications, there is no ability for television broadcasters to appeal the findings of the ACMA.

Free TV agrees with the ALRC position that, under the proposed Scheme, complaints should only be dealt with by the Regulator if they have not been handled satisfactorily by the content provider or industry body (depending on the complaints mechanism under the relevant industry code). The complaints scheme should reflect the current situation for commercial free-to-air television broadcasters under the existing co-regulatory arrangements.

Complaints should, in the first instance, be directed to the relevant content provider (or industry body).

Free TV also supports the proposal that the Regulator be given discretion to deal with complaints. The current rules which apply to the ACMA are overly prescriptive and give rise to absurd investigations, such as those into the accuracy of statements regarding the size of a snake which featured in a news story about a 'big snake'.

This is not a criticism of the ACMA, which is obliged by the BSA to investigate all complaints. If Regulator has the power to prioritise certain complaints, serious or systemic complaints can be dealt with in a timely manner and frivolous or minor complaints can be declined.

Free TV also suggests that there be a complaints amnesty period as industry transitions to the new Scheme, particularly if there are changes to classification markings or guidelines. This will enable industry to adjust to community expectations associated with the changes.

**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.**

The breadth of responsibilities proposed for the Regulator are appropriate, however Free TV has the following comments:

- Item b) should clarify that complaints are only handled by the Regulator if they are not resolved directly with the content provider or industry body;
- Item d) includes the "promoting the development of industry codes". It is not clear what is meant by "promoting". However, Free TV notes that the Regulator playing an active role in code development does not accord with the general co-regulatory principles underpinning the proposed Scheme.

Given the responsibilities of the Regulator, particularly in relation to complaints handling and training, Free TV recommends the introduction of a requirement for the Regulator to be staffed by people with professional experience in the media industry. See recommendations on training in comments on Proposal 7-4.

## Chapter 13 - Enacting the New National Classification Scheme

**Proposal 13–1: The new Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.**

**Proposal 13–2: State referrals of power under s 51(xxxvii) of the *Australian Constitution* should be used to supplement fully the Parliament of Australia's other powers, by referring matters to the extent to which they are not otherwise included in Commonwealth legislative powers.**

Free TV supports both of these proposals. In particular, Proposal 13-2 will deal with the problematic inconsistencies that currently exist between Commonwealth and State legislation. A single Commonwealth system is also more appropriate in the current media environment, where content is not usually subject to geographic boundaries or restrictions.

## Chapter 14 - Enforcing Classification Laws

**Proposal 14–1: The new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.**

**Proposal 14–2: If the Australian Government determines that the states and territories should retain powers in relation to the enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification laws with respect to publications, films and computer games.**

Free TV agrees that any enforcement provisions should be set out in Commonwealth legislation. A single set of central and uniform laws more appropriately deals with the realities of the content distribution environment and will eliminate inconsistencies that currently exist. Proposal 14-2 is supported in the event that states are to retain their enforcement powers.

**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.**

Free TV agrees that certain failures to comply with the Classification of Media Content Act should be offences, however this should only be reserved for acts that are particularly serious or likely to cause significant harm to the community. It is important that the compliance and enforcement regime is proportionate, and framed to punish the most damaging breaches. While the Discussion Paper makes it clear that the offence and penalty provisions are designed to deal with matters of this nature, the proposal itself does not make this clear.

Free TV therefore recommends the proposal be refined so it is clear that that offences only apply to a failure to comply with a statutory obligation to classify content (clause b)) where that content is likely to be rated R18+ or above. It should not apply in cases where the "must classify" rule may be arguable – for example, in relation to a current affairs program on commercial free-to-air television, where there is some dispute over whether the content satisfies the description of "current affairs". Limiting the offence provision to instances where exposure to the content may cause harm to minors is supported by the underlying rationale of the classification regime, and means that the consequences will be commensurate with the breach.

Similarly, the failure to comply with an industry code should not be a general offence. Industry codes will contain a range of provisions which will have a varying degree of impact on the community. Because of the volume of material broadcast on television, occasionally errors are made where an unedited version of a program is aired, or a program is broadcast prior to being classified. This should not constitute an offence under the new Scheme.

Offences should be limited to the distribution or publication of material that will have a significant impact on the community, such as high-level or RC material. Low level industry code breaches, such as a failure to provide adequate consumer advice, should not be included as an offence.

Offences contained in the new Classification of Media Content Act should not be strict liability offences, but should require intention as the fault element attaching to the physical element of sale, screening or distribution of content.

**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).**

This proposal should be clarified by the inclusion of a statement that the penalties from Schedule 7 to the BSA will only be applied in the Classification of Media Content Act to breaches or offences relating to content of the type currently covered by Schedule 7 to the BSA. That content is mobile or online content that must be subject to access restrictions, or is prohibited or potentially prohibited. Such offences should only apply to content that is illegal or potentially harmful to minors.

**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.**

Free TV submits that infringement notices should be implemented as a penalty for a serious breach of the classification law that involves material at the lower end of the classification range (such as MA15+ and below). This accords with the principle of proportionality, reserving more serious penalties (such as criminal sanctions) for breaches that are likely to cause harm or involve material at the higher end of the classification range.

Alternative sanctions, such as the acceptance of voluntary undertakings, should be considered appropriate for minor breaches involving lower level classification material.

# 3 Additional issues

## Deeming

Although it is not a matter that is directly addressed in the Discussion Paper, the ALRC has raised the possibility of classifications overseas being applied to content in Australia.

While Free TV agrees that this sounds efficient and sensible in theory, the practical application is likely to prove difficult and unsustainable. Aside from the lack of correlation between the classification categories (even if the proposed new markings are implemented), the community standards that exist in Australia will be different to other nations. Issues such as religion, violence, ethnicity, drug use and homosexuality are examples where laws and community attitudes differ greatly across different countries, even countries that are considered similar to Australia such as the United States and the United Kingdom.

Free TV therefore does not support any proposals to allow classifications to be deemed across jurisdictions. The introduction of the online classification instruments should serve to alleviate any difficulties faced by content providers in other jurisdictions who are required to classify material for distribution in Australia.