Australian Broadcasting Corporation and

Special Broadcasting Service

joint submission to the

Australian Law Reform Commission

National Classification Scheme Review

November 2011





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Introduction

The Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) welcome the opportunity to offer the Australian Law Reform Commission (ALRC) comments on its Discussion Paper "National Classification Scheme Review" and, more broadly, to contribute to the Commission's review of Australia's classification systems.

As public broadcasters, the ABC and SBS are sensitive to the needs of their audiences and recognise that their content offerings help to inform and reflect community standards. Accordingly, the national broadcasters recognise that classification is an important tool for assisting audience members to make informed choices about what they hear, see or participate in on any of the wide array of programs and services that the national broadcasters offer.

The ABC and SBS understand and support the broad objectives of the ALRC's proposals in the Discussion Paper, which seek to consolidate and harmonise classification policy and practices under a new National Classification Scheme. The national broadcasters recognise the merits of a principles-based and platform-neutral approach, such as the one proposed by the ALRC, in a media environment where the levels of content distributed over online and other non-traditional delivery platforms continues to increase.

However, a number of specific proposals in the Discussion Paper are of considerable concern to the ABC and SBS.

In particular, the strong implication in the Discussion Paper is that it is the ALRC's intention that the new classification regime apply to the national broadcasters in the same way as it would apply to any other media content provider. As detailed below, such an approach would run counter to established public policy, which aims to minimise the opportunity and potential for government to direct or otherwise interfere with the editorial decision-making processes of the public broadcasters. The ABC and SBS, in carrying out their respective Charter activities, are required to meet the standards set out in laws which have been purpose-built for each national broadcaster, namely the *Australian Broadcasting Corporation*

1983 ("ABC Act") and the *Special Broadcasting Service Act* 1991 ("SBS Act"). Standard-setting and enforcement of these standards is largely left to the public broadcasters who, as publiclyfunded statutory bodies corporate, operate within a wider accountability framework. Any supplemental regulation by external bodies has always been light touch and designed to ensure the editorial independence and institutional autonomy of the national broadcasters. As a result, the ABC and SBS are not subject to the current National Classification Scheme or the associated regulatory arrangements that apply to other bodies, such as commercial or community television broadcasters. Making them subject to the proposed new National Classification Scheme would thus represent a significant and historical change to the established accountability and governance mechanisms that apply to public broadcasters in Australia. The Scheme would significantly reduce their independence and increase the regulatory burden imposed on public broadcasters relative to other media participants.

The ABC and SBS believe that the benefits of consolidating and harmonising Australia's classification laws can be achieved without adversely affecting their independence if the established regulatory approach continues to be applied. The national broadcasters should therefore be excluded from the proposed new Classification of Media Content Act, just as they are excluded from the current National Classification Scheme. A harmonised approach can still be achieved by requiring the ABC and SBS, in developing their own classification standards, to have regard to the standards set for other media content providers.

In addition, the national broadcasters offer comments on a range of other aspects of the regime set out in the Discussion Paper, including: the appropriate level of generality for classification guidelines; the continued benefits of time zones for scheduled media, particularly while they retain significant audiences; the proposed changes to classification categories; and the respective roles of the Classification Board and Regulator, including in relation to audits, training and enforcement.

The National Broadcasters' Independence

The Discussion Paper proposes the creation of a new, platform-neutral National Classification Scheme ("the Scheme") that would apply to all media content and all media content providers (Proposals 5–1 and 5–2). The Scheme will be overseen by a government Regulator and the Classification Board. While the Paper does not state specifically that the new, unified Scheme would apply to the national broadcasters, there is a strong implication that that is the ALRC's intention.

Currently, the ABC and SBS are not subject to the National Classification Scheme, as oversight of their programming is a matter for their respective Boards. Any proposal to move the national broadcasters under the new Scheme and its attendant regulatory arrangements would mark a significant and worrying deviation from their established accountability frameworks and a potential threat to their editorial independence.

The ABC and SBS believe that the ALRC's final report should be explicit about their relationship to the proposed Scheme. For the reasons set out below, the national broadcasters believe that it is not appropriate that they be made subject to the Scheme. However, if it is the ALRC's intention that the national broadcasters be subject to the Scheme, the ABC and SBS request that the ALRC adapt the Scheme in its application to the national broadcasters so as to

ensure that their editorial independence and institutional autonomy are maintained. Any proposal to impose new regulatory obligations on the ABC and SBS in addition to those to which they are already subject should be clearly justified.

Public Broadcasting

While public broadcasters around the world differ widely in structure and remit, they share a number of defining characteristics, including universal availability, services catering for diverse interests and minorities, a commitment to quality and innovative programming, a special relationship with the nation and communities they serve, substantial reliance on public funding and independence from all vested interests, particularly those of the Government.¹ Of these, independence is of particular importance in democratic societies, as it prevents public broadcasters from being used as instruments of power by the Government of the day; it decisively separates them from state broadcasters, which can be used as mouthpieces for advocating government policies and disseminating propaganda, as well as controlled so as to constrain reporting that is critical of government or government interests. The legal framework in which public broadcasters' operate is designed to ensure their editorial independence and institutional autonomy and to proscribe governmental interference in the form of censorship or control of their activities. The Government's response to the Department of Broadband, Communications and the Digital Economy's 2008 discussion paper on the ABC and SBS, "Strengthening our National Broadcasters", recognised that "[i]ndependence is the foundation stone of national broadcasting in Australia".2

Public broadcasters have a privileged role in the media. They have access to spectrum and other scarce assets, as well as public funding. They are also required—in being asked to be innovative, to promote artistic endeavours and to meet the needs of diverse cultures and communities—to deliver public broadcasting services that carry a degree of risk-taking. Therefore, it is understood that they have high standards and levels of accountability applied to them. This has the benefit of reinforcing their role as independent, impartial and substantial voices in the media.

The ABC and SBS believe any dilution of their independence, however subtle, may have a chilling effect on their ability to deliver diverse, innovative and sometimes controversial content to their audiences.

SBS's Charter emphasises cross-cultural awareness by exposing audiences to a wide range of cultures, languages and perspectives. SBS acknowledges in its Codes of Practice that its programming can be controversial and provocative and may at times be distasteful or offensive to some. SBS takes care to ensure that it does not subject material reflecting diverse cultural values, alternative viewpoints and controversial content to a monocultural set of standards. The SBS Codes of Practice provide the flexibility to ensure that diverse cultural content is available to an Australian audience in a manner which provides reliable guidance.

The ABC's Charter gives legislative voice to the requirements to broadcast programs that

¹ An indicative list of the characteristics of public broadcasters can be found in: Broadcasting Research Unit. *The Public Service Idea in British Broadcasting: Main Principles*, 1985. Luton: John Libby.

² Department of Broadband, Communications and the Digital Economy. "Strengthening our National Broadcasters", Government policy response, 12 May 2009, p. 13.

contribute to a sense of national identity, inform and entertain, while reflecting the cultural diversity of the Australian community. Such requirements are also reflected in the Corporation's Editorial Policies, which state that the ABC's broadcast and publication of comprehensive and innovative content requires a willingness to take risks, invent and experiment with new ideas while taking care not to gratuitously harm or offend.

Both the ABC and SBS use classification, consumer advice, time zones and access to a robust audience feedback framework to curate diverse content for their large and varied audiences across multiple platforms.

The national broadcasters, in carrying out their respective Charter activities with the support of public funding, are often able to take chances with programs that commercial and community broadcasters cannot or will not support. The national broadcasters provide a valuable service in nurturing new talent and supporting cutting-edge and challenging programming. The distinction between public broadcasters and other media sectors should remain clear. The national broadcasters should not be subject to the same regulatory scheme as that applying to other media providers – over and above the regulatory obligations already applying under public broadcasters adopting a risk-averse approach, impairing their ability to carry out their respective Charter activities – ultimately to the detriment of the communities which they serve.

Australia's National Broadcasting Framework

In the case of Australia's national broadcasters, editorial and operational independence is secured through legislation, in particular the ABC Act and the SBS Act, which constitute the two broadcasters as independent statutory corporations.

The national broadcasters are self-regulating entities that are primarily accountable to their respective Boards, each of which is required to "maintain the independence and integrity" of the Corporation that it oversees.³ The ABC and SBS are accountable to the Parliament as a whole through regular appearances at Senate Estimates hearings, questions on notice, detailed reporting on a range of specified matters in their annual reports⁴ and appearances before Parliamentary committees more generally. Their independent financial and governance arrangements are subject to audit by the Australian National Audit Office.

The powers of the Government to direct the actions of the national broadcasters are correspondingly limited. The ABC and SBS Acts empower the Minister to direct the ABC and SBS to broadcast matters deemed to be in the national interest, subject to the requirement that Parliament is informed of the particulars of and reasons for any such direction.⁵ Otherwise, the ABC is "not subject to direction by or on behalf of the Government of the Commonwealth"

³ ABC Act, s.8(1)(b); SBS Act, s.10(1)(a).

⁴ In addition to the matters that the ABC and SBS are required to report on under the *Commonwealth Authorities and Companies Act 1997* ("CAC Act") and the Finance Minister's Orders applying to CAC Act companies, the ABC is subject to the reporting requirements in s.80 of the ABC Act and SBS to the requirements in s.73 of the SBS Act.

⁵ ABC Act, s.78; SBS Act, s.12.

unless the power to give direction is "expressly provided by the provision of another Act".⁶ Likewise, SBS and its Board are not subject to direction by or on behalf of the Government, except as otherwise provided by or under the SBS Act or any other Act.⁷ The SBS Act provides that SBS and its Board are subject to General Policy Orders issued by the Government under sections 28 and 48A of the *Commonwealth Authorities and Companies Act 1997* only to the extent that any such Order "does not affect the content or scheduling of programs".⁸ In relation to Government policy, the ABC Board is obliged only to give consideration to statements furnished by the Minister that relate to matters of broadcasting and administration.⁹ In the case of SBS, the Minister may, after consultation, give direction to the Board, but is explicitly prohibited from doing so "in relation to the content or scheduling of programs to be broadcast".¹⁰

Subject to the provisions of their respective Acts, both the ABC and SBS are expressly free to "determine to what extent and in what manner political matter or controversial matter will be broadcast".¹¹

The ABC and SBS Boards are solely responsible for developing codes of practice in relation to programming matters on the national broadcasters' services.¹² These must be notified to the broadcasting industry regulator, the Australian Communications and Media Authority (ACMA), which is able to hear unresolved complaints from members of the public alleging breaches of the codes under the provisions of the *Broadcasting Services Act 1992* ("BSA").¹³ However, the ACMA has no role in the development of codes, including their approval. This helps preserve the national broadcasters' independence by effectively ensuring that there is no capacity for an external body that may be open to Government direction, as the ACMA potentially is, to influence the editorial principles that underlie the national broadcasters' programming activities.

The ABC's Charter requires it to take account of "the standards from time to time determined by the ACMA in respect of broadcasting services" in the provision of its broadcasting services within Australia.¹⁴ The SBS Board is required to be "aware of, and responsive to, community needs and opinions on matters relevant to the Charter".¹⁵

The relationship with the regulator in the ABC and SBS Acts is mirrored throughout the BSA, which essentially applies to the ABC and SBS only in relation to complaints escalation and spectrum and technical matters. The national broadcasters are not, for example, included among the industry groups required to develop and seek approval from the ACMA for codes of practice under section 123 of the BSA. Indeed, even where the ACMA has the power under Part 9B of the BSA to develop or impose mandatory industry codes and standards that might

⁶ ABC Act, s.78(6).

⁷ SBS Act, s.13(1).

⁸ SBS Act, s.13(2).

⁹ ABC Act, s.8(2).

¹⁰ SBS Act, s.11(3).

¹¹ ABC Act, s.79A, SBS Act, s.70A.

¹² ABC Act, s.8(1)(e); SBS Act, s.10(1)(j)

¹³ BSA, ss.150-153.

¹⁴ ABC Act, s.6(2)(A)(ii).

¹⁵ SBS Act, s.10(1)(g).

apply to the national broadcasters, any such code or standard will have no effect if it deals with matters already covered in the codes of practice notified to ACMA by the national broadcasters.¹⁶

In a similar fashion, the ABC and SBS are not subject to the requirement imposed on commercial and community television broadcasters under the BSA that their codes "apply the film classification system provided for by the *Classification (Publications, Films and Computer Games)* Act 1995".¹⁷ This again ensures that an aspect of their programming—the classification of content—is not subject to standards determined by an external entity, in this case the Classification Board.

Nonetheless, as the Discussion Paper acknowledges (pars. 11.28–29), the ABC and SBS both voluntarily classify their television programming in a fashion broadly consistent with the overall tone and object of the National Classification Scheme, including adopting categories from the National Classification Code. This reflects the national broadcasters' shared belief that considerable public benefits flow from providing audiences with access to consistent classification information and schedules segmented into predictable time zones. It is achieved through the codes of practice developed by the ABC and SBS Boards and notified to the ACMA, and through the two organisations' editorial policies, which contain specific and comprehensive provisions relating to issues such as managing harm and offence and are accompanied by a classification standard for television programming.

The exact approaches of the two national broadcasters currently differ. The ABC's television classification guidelines, the ABC Television Program Classification Associated Standard, adapt, but are distinct from, the Guidelines for the Classifications of Films and Computer Games ("Classification Board Guidelines"); they represent an approach tailored specifically to public television content, but which is applicable to and used for classification of content on some online platforms. The ABC has a more objective approach than the Board's current Guidelines. The SBS system of television program classification is currently based on the Classification Board Guidelines.

The ABC and SBS believe that the classification and complaint-handling systems they have developed are highly effective, audience-focused, responsible and responsive. They are already classifying content in a converged media environment, including, in the case of the ABC, a considerable volume of content specifically produced and published or broadcast for children. Both broadcasters have dedicated audience response teams that accept public feedback by mail, telephone, email and online. These responses are consolidated and delivered daily to all programming staff and are available to all ABC and SBS employees. The national broadcasters also monitor and engage with audiences on key social media platforms, including message boards, Twitter and Facebook. Overall, the national broadcasters receive immediate and comprehensive feedback on programming and classification issues. The significant investment of the national broadcasters in funding highly-responsive complaints mechanisms reflects the importance they each place in understanding community standards and concerns. As community response and engagement are key measures of how the national broadcasters are acquitting their Charter responsibilities, it is unrealistic to expect that

¹⁶ BSA, s.130L.

¹⁷ BSA, s.123(3A)(a).

external regulators will be able to adopt the same highly-responsive mechanisms or invest in them to the same level.

In the case of the formal complaints, both broadcasters have independent complaintshandling systems headed by the ABC Director of Editorial Policies and the SBS Ombudsman respectively. These independent positions report directly to their respective Managing Directors and Boards and to Parliament through the annual reporting process. The ABC and SBS believe their approach to classification, coupled with their extensive audience feedback measures and complaints-handling processes that are independent of their programming divisions, represents industry best practice.

It should be clear that making the national broadcasters subject to the ALRC's proposed new National Classification Scheme and its attendant regulatory arrangements would represent a fundamental change in the relationship between the national broadcasters and a Government-appointed regulator. Moreover, it would diminish the authority of the ABC and SBS Boards by requiring them to seek approval from an external entity in relation to matters that have the potential to affect the content and scheduling of programs. Given the established accountability arrangements that apply to the national broadcasters help to secure their editorial independence, including the existence of specific legislative exemptions from external interference with the content and scheduling of the national broadcasters' programs, such a change should be approached with great caution.

Current Classification and Complaint-Handling Systems

The national broadcasters note that their current classification and associated complainthandling systems not only perform well, but represent industry best practice. The ABC and SBS believe that, rather than being deficient in any way that would justify an attempt to "correct" them, key aspects of their systems need be replicated.

By way of illustration, since 2000, a total of 29 complaints about ABC classification matters were referred to the ACMA, of which only nine were upheld as breaches of the Corporation's Code of Practice. To put this in context, in the 2010–11 financial year alone, ABC1 and ABC2 broadcast a combined total of over 15,000 program hours. Similarly, for SBS, since 2000, a total of 25 complaints about classification have been appealed to the ACMA, of which only four were upheld, including one which SBS itself had previously upheld as a breach.

Indeed, the ABC's classification approach significantly reflects and acknowledges the converged media environment in which it operates. Content classified for broadcast on one channel, such as ABC1, carries that classification—including bespoke consumer advice—to other broadcast channels, such as ABC2 or ABCNews24. In addition, all broadcast PG, M and MA15+ content that is published on the ABC's online television service, iView, is presented as it would be if it were broadcast, while G content carries the corresponding classification symbol, which it would not do when broadcast, in recognition that the platform is not subject to time zones. Unique iView content is also classified.

In addition, content available for streaming or download from other ABC online sites is classified on a referral basis. Editorial managers will refer specific content to ABC classifiers that is likely to be at the M or MA15+ classification level. This includes non-broadcast material, such as behind-the-scenes documentaries or deleted scenes.

These practices acknowledge the value of such information to assist audiences with viewing decisions.

Separate to the classification process is the ABC moderation process. User-generated content (UGC) that is submitted to the ABC is subject to moderation guidelines that assesses likely content using a risk assessment process.¹⁸ Content that is likely to be higher-risk and all content targeted at children or young people is moderated—or reviewed—prior to posting. Video content is generally subject to pre-moderation.

This enables content to be considered against harm and offence standards, as well as for legal issues of contempt, defamation, racial vilification and dissemination of potentially prohibited content. Content that is considered lower-risk and targeted to adult audiences may be post-moderated, subject to established internal approval mechanisms. Content can also be still reviewed after is has been posted and other users are generally given the ability to flag problematic content. Content that is considered inappropriate is either not approved for publication, edited or removed from publication. Individual users can also be blocked from posting on sites if the content they have posted, or their behaviour, requires such treatment. The Corporation also applies this approach to moderating UGC on ABC-controlled third-party social media platforms, such as Facebook, to the extent permitted by the third-party site and in line with the expectations and conventions of existing users of the third-party site.

SBS has also adapted its classification practices to the converged media environment. The SBS On Demand service displays the classification rating of all of its television programs which are made available online, including G-rated programs. Online editorial managers also refer non-broadcast audio-visual content that is likely to contain strong material to SBS's classifiers for review. UGC on SBS's websites and on SBS-branded properties on third-party social media websites (to the extent that SBS has control over it) is subject to the SBS Website User-Generated Content Guidelines, which require UGC to be appropriately moderated.¹⁹ For example, UGC audio-visual content and sites dealing with sensitive areas such as health are more likely to require pre-moderation. Sites which are likely to involve challenging or distressing UGC must carry appropriate warnings, so that users are given the opportunity to make up their own minds as to whether the material is suitable for them.

The ABC and SBS are also unaware of any extant Government policy to change the accountability frameworks applying to the national broadcasters or to otherwise reduce their independence. Indeed, the most recent Government policy statement in relation to their independence, the policy response "Strengthening our National Broadcasters", states that the Government "is committed to maintaining the independence of the two broadcasters and ensuring strong governance, free from political interference."²⁰

In the absence of either a demonstrable failure in the system used by the national broadcasters to classify their content or a policy imperative to change their accountability arrangements, changes of the kind proposed in the Discussion Paper should not be pursued.

It should be clear that making the national broadcasters subject to a classification regulator would not simply place them on the same "level playing field" as other media organisations.

¹⁸ http://abc.net.au/corp/pubs/documents/GNModerationINS.pdf

¹⁹ http://www.sbs.com.au/aboutus/corporate/view/id/536/h/SBS-s-User-Generated-Content-Guidelines

²⁰ DBCDE. "Strengthening our National Broadcasters", p. 13.

As described above, the ABC and SBS are subject to a range of legislative and parliamentary oversight provisions that do not apply to other media providers. Precisely because these separate and parallel accountability processes will not be unwound if the national broadcasters are made subject to the new National Classification Scheme, the effect will instead be to increase the regulatory burden on the ABC and SBS over that applied to other organisations.

Recommended approach

The ABC and SBS believe that it is possible to achieve the ALRC's objectives for reforming Australia's classification regime without introducing changes that potentially compromise their independence.

The Boards of the national broadcasters have a duty under their respective Acts to develop codes of practice relating to programming matters and to notify them to the ACMA.²¹ These provisions could be amended so that the ABC and SBS Boards are explicitly required to develop codes in relation to classification of programs and, in doing so, have due regard to the classification obligations, categories and criteria set out in the proposed Classification of Media Content Act. Indeed, the current ABC Code of Practice notes that its classifications are adapted from the Guidelines issued by the Classification Board and the SBS Television Classification Code is "based on" the Guidelines.

If the Regulator responsible for overseeing the National Classification Scheme was to be other than the ACMA, the provisions could be further amended to require the classification codes so developed to be notified to that other body. The ABC and SBS would be subject to complaints escalation and resolution processes overseen by the Regulator, much as the ACMA is currently able to hear complaints from members of the public alleging breaches of the national broadcasters' codes of practice.

This approach would allow substantial harmonisation with the new National Classification Scheme, while preserving established accountability arrangements.

Content Produced on a Commercial Basis

In the Discussion Paper, the ALRC proposes that certain categories of media content must be classified under the proposed new National Classification Scheme prior to that content being sold, hired, screened or distributed in Australia (Proposals 6–1 and 6–2). One of these content categories is "television programs produced on a commercial basis". The meaning and intended scope of this expression are unclear.

Defining content "produced on a commercial basis"

Paragraphs 6.32–6.37 of the Discussion Paper suggest that the ALRC's intention in proposing that certain content only be required to be classified if it is produced "on a commercial basis" (par. 6.37) is to create classification rules that apply to content "distributed by companies and

²¹ ABC Act, s.8(1)(e); SBS Act, s.10(1)(j).

corporations", while exempting "content distributed by individuals, such as 'user-generated content'" (par. 6.32). The Paper notes that companies and corporations are likely to have the financial ability to meet the costs of classification, while individuals may not (pars. 6.32–6.33).

There is, however, a significant gap between content created "by companies and corporations" and content produced "on a commercial basis". The ABC and SBS, for example, are statutory corporations and would thus seem to fall within the ALRC's intended scope. However, as public broadcasters, neither produces or transmits its television content with the intention of making profits, suggesting that the requirement in Proposal 6–1 would not apply to them. A similar contradiction may also arise in relation to other not-for-profit media organisations, such as community broadcasters.

As indicated above, the ABC and SBS strongly believe that public broadcasters should not be subject to the new National Classification Scheme. Nonetheless, under the national broadcasters' proposed approach, the ABC and SBS Boards would be required to have regard to the Scheme and its associated classification guidelines when formulating their respective codes. It would thus seem desirable that the ALRC's proposal employ a form of words that is not inconsistent with their television program output.

One approach would be to amend Proposal 6–1 so that it reads:

"The Classification of Media Content Act should provide that feature length films and acquired or commissioned television programs must be classified before they are sold, hired, screened or distributed in Australia."

This recognises that the television content distributed by professional media organisations is usually the result of processes that entail either a payment for the right to broadcast content (acquisition) or the allocation of funds for its production (commissioning), but is silent on whether or not that content is produced on a commercial basis. It seems unlikely that individuals or non-professional groups would undertake the same processes.

Defining "television programs"

A potentially more difficult problem lies in defining "television programs", a term which, the Discussion Paper makes clear, has been used "in the absence of a popularly understood, media-neutral alternative phrase" (par. 6.60).

The national broadcasters note the European Union's Audiovisual Media Services Directive, which may be instructive in this regard. Central to the definition of "audiovisual media services" in that Directive is that they provide "programmes" to the general public.²² A "programme" is defined as:

a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content

²² European Parliament and Council of the European Union. "Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services" ("Audiovisual Media Services Directive"), 10 March 2010, Article 1, par. 1(a)(i).

of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;²³

It might be desirable to replace or supplement the expression "television programs" with a similarly-defined concept of "television-like programs".

The ALRC is urged to ensure that, if television programs are to be mandatorily classified under the new Scheme, the proposed legislative provisions be drafted in a manner consistent with the principles guiding the ALRC's review, notably that the regulation:

- "be kept to the minimum needed to achieve a clear public purpose, and [...] be clear in its scope and application" (Principle 7);
- "be focused upon content rather than platform or means of delivery" (Principle 9);
- "be responsive to technological change and adaptive to new technologies, platforms and services" (Principle 5), and
- "not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets" (Principle 6).

Flexibility, Responsiveness and Independence

The national broadcasters' principled position is that they should remain outside the proposed new National Classification Scheme, but that their Boards should have due regard to that Scheme in developing their respective codes of practice.

Regardless of the ABC and SBS relationship to the new classification framework, the national broadcasters would particularly emphasise the importance of industry codes as a way of maintaining independence, responsiveness and flexibility.

In the Discussion Paper, the ALRC proposes that "[t]he Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions must be made applying these criteria" (Proposal 9–4). This, it suggests, should be achieved by having the classification categories and matters set out in the Act, the National Classification Code and detailed classification guidelines "contained in a separate legislative instrument that consolidates all decision-making information" (par. 9.65).

The national broadcasters believe that whatever guidelines are included in this proposed legislative instrument should be at a sufficiently high level to provide guidance and consistency on issues such as classification categories and markings, while not dictating classification practice to a significant extent. The ALRC should consider the functionality of a system that places too much detail, control and influence in a high-level legislative instrument.

While the national broadcasters agree that "there should be a consistent process for making classification decisions" (par. 9.60), they are also concerned that setting detailed and comprehensive guidelines as part of the legislative instrument will significantly constrain

²³ Audiovisual Media Services Directive, Article 1, par. 1(b).

industry participants in their ability to respond to changes in audience consumption patterns and technology use.

As the Convergence Review demonstrates, there is widespread acceptance that technological change and the phenomenon of convergence are accelerating rapidly and are impacting media consumption and distribution. A classification system which is responsive and flexible should place the majority of the responsibility for meeting high-level classification objectives as outlined in legislation or an instrument with the creators, curators and providers of content. Industry participants are far better placed to understand, and be responsive to, the needs of their audiences, their businesses and to gauge and adapt to technological change than the Classification Board.

A system which provides for a high level of prescription in legislation by setting detailed and prescriptive measures in a legislative instrument narrows considerably the potential for industry participants to tailor individual codes of practice to meet technological and audience demands in a flexible way.

For the national broadcasters, the size of their audiences, the different audiences served, and the range of different formats and genres of content distributed requires that the ABC and SBS have the flexibility to develop and implement classification codes that are specifically designed to meet their requirements. Other providers of content will have similar concerns and requirements.

To enshrine in legislation or instrument the detailed concepts that govern classification decisions will restrict innovation and responsiveness to audience concerns and changing technologies.

The ABC and SBS would urge the ALRC to be clear in its final report on the level of prescription that will be included in the proposed legislative instrument and to ensure that the "detailed classification guidelines" do not prescribe practice and policy to the extent that codes of practice cannot respond rapidly to changing audience demands and technological change.

An example of the potential change wrought by too prescriptive an instrument is the question of the assessment of the impact of classifiable elements. If, for example, the existing Guidelines became part of the proposed instrument, it would seriously impact the independence of the ABC and SBS, as a government agency will, through guidelines it sets, effectively dictate to the ABC and SBS how their content should be produced, classified and scheduled, as well as who is allowed to engage with it.

A significant difference between the Guidelines and the ABC's Associated Standard for Television Program Classification is the primacy given in the Guidelines to a subjective "impact test". Such a test may be appropriate to computer game classification; however, it is not the best approach for television content.

The ABC assesses the impact of classifiable elements, but does not do so on the basis of a generic "template test" that is likely to result in a more subjective, less rigorous classification. Instead, the detailed provisions for each classifiable element (Themes, Violence, Sex, Language, Drug Use and Nudity) of the ABC Classification Standard provide a level of consistency that is not achieved through the broad impact test required in the Guidelines.

In addition, it is the ABC's view that the impact test will also reduce the consistency of classification decisions. A higher level of subjectivity will result in greater variations in

opinion on classification issues. Furthermore, an impact test in combination with a large number of accredited classifiers will broaden even further the potential for inconsistency.

SBS's experience of the impact test is that it can result in inconsistent classification decisions (see, for example, Case Studies A and B in the Appendix). SBS will be reviewing its Codes of Practice in 2012 and is likely to propose adopting the ABC's approach.

In-house, professional classifiers who are employed on a full-time basis over many years are far better placed to make classification decisions for specific audiences and platforms.

As stated above, the self regulatory system for classification used by the national broadcasters is successful and appropriate to their audiences and the diversity of their content offerings. The ABC and SBS seek to retain their ability to independently classify content through an appropriately comprehensive code.

Time Zones

In response to Question 8-1, whether broadcast television should continue to be subject to time-zone restrictions that prohibit certain media content at particular times of the day, the ABC and SBS acknowledge that, as time-zone restrictions are meaningless on platforms where access to content is time-shifted or on-demand, they cannot be a necessary requirement of any technologically-neutral classification model. At the same time, for scheduled media, time zones provide an effective additional mechanism by which audiences can be informed and provided with assurance about available content. A new National Classification Scheme should support the possibility of time zones being used in this way. The national broadcasters intend to continue using time zones for the time being for their television services in order to best respond to their audiences' needs.

The ABC and SBS, unlike the commercial broadcasters, are not subject to the time-zone restrictions that exist under the BSA. The national broadcasters set their own time zones through codes of practice, having due regard to the practices and approaches of the rest of industry and taking into account their audiences' needs. Time zones were developed as a way of giving parents confidence that they could limit the exposure of children to inappropriate material. There can be no doubt that the effectiveness of time zones in achieving this purpose is diminishing over time as audiences shift from viewing scheduled television to on-demand viewing through personal video recorders, catch-up television services and platforms where no times zones apply, such as pay television and mobile services.

This issue will most likely be addressed over time through technological solutions such as parental locks. However, policy makers and broadcasters will need to proceed carefully given that most audience members continue to view programs at their broadcast time, rather than time-shifted – at the end of 2011, only about 8% of all free-to-air prime-time viewing was time-shifted.²⁴

The ABC is working to ensure parental controls also apply to its content on new platforms. The ABC iView iPad application, the soon-to-be-launched iView iPhone application, and some of the iView connected-TV offerings have parental controls allowing a parent to restrict

²⁴ OzTAM, 5-city Metropolitan, "Percentage of Consolidated Average Audience which is Playback", Wks 45-48, 2011.

viewing to certain levels of program classification by using a security code to lock out content at or above a particular classification.

A parental lock is now mandatory for all televisions, set-top boxes and recorders which offer access to digital television channels. There remain some concerns, however, about the effectiveness of the technology on some products.²⁵

A phased transition away from time zones is desirable, but is likely to require a significant public education campaign and robust technological solutions which give parents confidence that they will be effective in protecting children from inappropriate content.

Time zones and classification categories are used in tandem to ensure that audiences can make informed decisions about the types of content they are watching. The objective that time zones help to achieve is that of consumer protection. It is consumer protection that should be the focus and the mechanisms that work to fulfil that objective should be assessed in terms of their effectiveness. A framework based on consumer protection and risk assessment could ensure that appropriate protections are put in place across platforms depending on the characteristics of the platform.

For example, while time zones serve as an appropriate way of managing risk, other methodologies that fulfil the same objectives could be adopted by individual media providers over time. The new Scheme might be drafted in such a way that providers could opt to remove time-zone restrictions if they could demonstrate they had an appropriate parental lock system in place. The Scheme should include the flexibility in code development to encompass a range of approaches and solutions.

For the ABC, with its national broadcast coverage, localised services and dedicated channels (e.g. ABC3) time zones continue to represent an effective and appropriate means of providing audiences with confidence about the types of content they are watching.

Classification Categories

The national broadcasters agree with the broad concept of consolidating and harmonising classification categories proposed in Chapter 9 of the Discussion Paper. However, they have reservations about some of the specific changes to the classification categories that are proposed.

The object of the exercise should be to make the system simpler and easier for audiences to understand, while taking into account the broad range of content developed for both niche and general audiences. The proposals in the Discussion Paper will increase the number of categories, as well as the names of the categories and the ways in which they will relate to current time-zone restrictions. This is likely to be confusing for audiences and disruptive to broadcasters. There will also be a significant cost to reclassify and relabel existing content.

In general, the national broadcasters believe their audiences largely understand and accept the existing classification categories that apply to ABC and SBS television programming.

²⁵ Adam Turner. "Bypassing TV's parental lock is child's play", *SMH.com.au*, 18 March 2011. http://www.smh.com.au/digital-life/computers/blogs/gadgets-on-the-go/bypassing-tvs-parental-lock-is-childs-play-20110317-1byq0.html.

They believe that, as a matter of principle, including specific ages within the names of classification categories can be misleading for parents and children.

C (Children)

The C category currently exists as a product of the Children's Television Standard (CTS) and the Australian Content Standard (ACS), which ensure that commercial broadcasters screen prescribed levels of children's content. The criteria for defining C and P programs contained in the CTS are not classification criteria, but rather the criteria that ACMA uses to determine if children's content qualifies under the CTS.

Applying a "C" classification to a program would not provide any more information about the classifiable elements of that program than if it was classified G. However, the G classification, while marking content as "safe" for all viewers, does not provide any advice or guidance about the suitability of that content to specific audiences.

There is a lot of G-rated content that is not intended for minors for reasons other than its classifiable elements. For example, a documentary about architecture will be of little interest to a pre-schooler. What would be of more benefit to parents—and what it would appear the ALRC is seeking to achieve through its proposed C classification—is to clearly signpost to parents that a program is intended for or is targeted toward children. This is not a matter of classification, but of viewer advice.

The ABC and SBS would propose that rather than creating a new classification category that attempts to define "children's" programs, there should instead exist a simple viewer advice symbol (or symbols) that content providers can use to inform audiences that children are the intended audience of the program. Thus, while all pre-school programming would, by default, be G-rated, it could be differentiated from adult-targeted G material by the addition of the advisory symbol. Similarly, all programming intended for older children will be G or, on occasion, PG, but could be accompanied by an advisory symbol.

The ABC screens significant amounts of children's content and is the primary broadcaster of children's content in the free-to-air television sector. ABC4Kids on ABC2 and ABC3 are services devoted to younger audiences.

The ABC has developed clear and simple branding for its children's output, as well as defined times and destinations for children's audiences and content. The Corporation has developed this approach and communicated to audiences the differentiation in the children's audience: ABC4Kids contains content for preschool-aged children which is classified G. ABC3 contains content for school-aged children which is classified PG. In addition, such platforms have the benefit of time zones and an understanding of when different niche audiences are likely to be watching. Such differentiation in audiences is a clear benefit of digital broadcasting that enables platforms to be directed to more niche audiences.

Introducing a C classification for such services will be potentially confusing. There can be significant differences between content aimed at four-year-olds and content aimed at eight- or 12-year-olds. Nonetheless, they are both types of content intended for children. The introduction of a "catch all" C classification will not better inform the viewing decisions of the parents of preschoolers than G-classified content that is hosted or broadcast in a specific children's "destination" such as ABC4Kids or otherwise adequately signposted. For example, there is a significant difference in the pre-school program *Giggle and Hoot* and the school-aged

My Place. While both are classified G, they are broadcast on different networks for different intended audiences. A C classification would likely apply to both and would not indicate that one was for pre-schoolers and the other for school-aged children. For this reason, the ABC recommends the use of new advisory symbols. These would be used to indicate that the content is G-classified, but is suitable for older school children in the case of *My Place, Prank Patrol* and *Good Game SP* and for pre-school children for content such as *Play School, Giggle and Hoot* and *Bananas in Pyjamas*.

What remains important is the advice that accompanies children's content. Adequate classification information and education about the types of content to be found in specific destinations will provide parents with more confidence than a broadly-based C classification.

Parents and children understand that certain destinations have been created by the ABC specifically for children. Generally speaking, the ABC sees more than four times the streaming of children's programming from specifically-created websites²⁶ than it does from the general children's programming available on iView.²⁷

Instead of searching for children's content on iView, parents and children tend to go straight to specifically-created children's online destinations to view the same content. For example, in July 2011, *Play School* was streamed 200,000 times from its dedicated site,²⁸ compared with fewer than 50,000 views from iView.

It is also possible that older children will deliberately avoid watching content designated as C. Young teens in particular may well be disinclined to watch valuable content designed specifically for them if it is placed in the same category as preschool content.

For clarity, if a C classification is introduced, it is vitally important that it not be confused or conflated with the CTS. The national broadcasters are not regulated by the CTS and the ACMA plays no part in determining whether ABC and SBS content qualifies as being "children's" content. By comparison, commercial broadcasters do not proceed beyond the script development stage to production until the ACMA has assessed the program as qualifying as C. It would be another impact on the independence of the national broadcasters if the ACMA or the Regulator began to play a role, even if by default through classification decisions, in determining what constitutes children's content and hence whether or not it should be on ABC4Kids or ABC3.

The ABC in particular has developed a strong and successful children's content offering without regulator intervention in the classification of its programs. It is vitally important that the ABC retains its independence to produce, commission and schedule children's programming without recourse to a statutory authority.

PG 8+

In the case of children's content, it is once again worth noting that there is a range of programming available. Programming specifically designed for older children, such as the ABC's *My Place* is classified as G. It should be available to children to watch at any time of the day. However it is not designed for, nor would it be of interest to, four-year-olds.

²⁶ E.g., www.abc.net.au/abc3/watchnow/.

²⁷ http://www.abc.net.au/iview/#/abc3

²⁸ http://www.abc.net.au/abcforkids/sites/playschool/videos/episodes/#

It would seem unnecessary and most likely a disincentive to watching such a program if it was classified as PG 8+ simply because it is for older children. Instead, it would be misleading, as a 12-year-old does not require parental guidance to watch a program like *My Place*, and it may instead have unintentional consequences and act as a disincentive to children older than eight to watch such programming.

PG and Documentary

Many documentary programs that are not relevant to children and which address themes not intended for children are currently accommodated in the PG classification. Under the proposed Scheme, these types of programs would necessarily need to be reclassified as T 13+, as they are not intended for eight-year-olds. However, if, as discussed below, T 13+ becomes an effective substitute for the existing M classification, then it would be misleading and potentially disadvantageous to audiences to apply what is in effect an M classification to educational and socially-relevant content that should be available to a broader audience as PG content. M-classified content must today be broadcast after 8.30pm. If the same time-zone restrictions apply to T 13+ programs, many documentaries will be not be able to be screened early in the evening or on weekends between 10am and 8.30pm.

It is a reflection of the different approaches to programming by public broadcasters that engaging, intelligent and challenging documentaries, such as the historical and arts documentaries *Leaky Boat* (ABC), *Kokoda* (ABC), *William S. Burroughs: A Man Within* (SBS) and *The Buchenwald Ball* (SBS), are screened earlier in the evening and on weekends.

It is a reflection of the different approaches to programming by public broadcasters that engaging, intelligent and challenging documentaries can, will and should be screened earlier in the evening and on weekends. Viewer feedback and audience ratings indicate that the national broadcasters' audiences expect and value such content at these viewing times. To eliminate such high-quality documentaries would produce an asymmetrical schedule and would restrict the national broadcasters' ability to provide programming for mature audiences when they wish to watch it.

Case Study: Saturday Arts Programming

The SBS programming schedule has traditionally supported arts-oriented content on Saturday afternoons, which is allocated to material not exceeding the PG classification. Such material may generally be accommodated by the PG classification with the support of the Guidelines and convention. Nevertheless, it is the nature of artistic content that it can at times be challenging and provocative. While classified PG, it is often neither intended nor expected that it be viewed by a child audience. The Guidelines currently note that "material classified PG may contain material which some children find confusing or upsetting".

SBS is of the view that renaming this classification category PG 8+ would, even if the Guidelines were to remain the same, effectively reduce the boundary of permissible content in response to the notion of age appropriateness.

For example, SBS has broadcast *David Bailey Four Beats To The Bar And No Cheating* under the PG classification in this time slot. This documentary contains an excerpt from an avantgarde film, wherein a man is shown to disappear under a sheet, which is then riddled with bullets. The sheet is simultaneously shown to be stained with blood. This sequence is overtly artistic in tone, its stylised and unrealistic nature being readily apparent. Nevertheless, it is a depiction of violence wherein bodily trauma is implied via blood-stains. It is not altogether clear that such material, which currently enjoys viewer support in the daytime PG time zone, would be deemed appropriate under a classification that reinforces an expectation that it is appropriate for children over eight years of age.

The current PG classification acknowledges that material bearing this classification is not recommended for viewing by persons under 15 without guidance from parents or guardians. This acknowledges the breadth of PG-level content, much of which is not directed at, or intended for, children. Indeed, many worthy documentaries of significance are classified PG and these often deal with matters clearly intended for a mature audience. While themes in these documentaries may be handled with such discretion that the PG classification is appropriate, this is applied with the expectation that no age-based appropriateness is implied.

SBS considers that a PG 8+ classification would misrepresent the nature of the category as it is currently understood and appreciated. This would ultimately make it difficult to broadcast traditionally accepted adult-oriented material in PG classification zones.

T 13+

The proposed T13+ (Teen) category would similarly create problems for audience expectations and scheduling decisions. The use of the word "teen" will lead audiences to believe that this content is designed for teens in much the same way as the proposed new C classification is intended to denote content designed for children.

In the Discussion Paper, the ALRC proposes that T 13+ take the place of the existing M classification category (par. 9.17). This change will have serious consequences for the scheduling decisions of networks, including the national broadcasters. If time-zone restrictions remain, it will mean that programs that would have been screened from 8.30pm will only be able to be screen after 9.00pm (on the SBS) and after 9.30pm (on the ABC).

The 8.30pm timeslot has, since the removal of the old AO (Adults Only) classification, been traditionally valued as a threshold at which material may be broadcast that is directed at mature viewers. Currently, M-classified material, which is not recommended for viewers under 15, may be broadcast from this time. The 8.30pm time slot has long been considered the appropriate time for the switch from material acceptable for children to that which is directed at mature viewers.

It is unlikely that M-classified programs such as *The Slap, Rake* and *Spooks* that were broadcast by ABC Television at 8.30pm would be classified T 13+. Instead, these programs would need to be classified in the higher category of MA 15+, which would indicate that they contain stronger material and would require that they be broadcast after 9.30pm. This would significantly restrict audiences' access to programs that are appropriate to them at the reasonable times when they have traditionally been screened.

Given that the current M classification is not recommended for viewers under 15, a shift to T 13+ represents an objective softening of the classification via the explicit age-based criterion. Furthermore, the move from the concept of "mature" to one of "teenage" represents an enormous evaluative shift. "Teenage" implies a multitude of values and expectations, most of

which are not relevant to matters of classification, and which certainly do not accord with the notion of "mature".

The capacity of the national broadcasters to broadcast both documentaries and dramas from 8.30pm (ABC) and 9.00pm (SBS) that are intended for a mature audience and deal with serious issues—including matters such as suicide, self-harm and drug, alcohol addiction and war—would be compromised by the introduction of a classification category that indicated suitability for a teenage audience, i.e. T 13+.

Recommended Classification Categories

The national broadcasters submit that maintaining the existing classification categories and adding explicit children's content advisory symbols would simplify the system and achieve the policy outcome of protecting children from harmful content while allowing adults to hear, see and read what they want. The proposed categories would thus be:

- G-general
- PG parental guidance recommended
- M mature; recommended for people aged 15 years and over
- MA mature adult programs, not suitable for people under 15 years of age.

These would be accompanied as appropriate by two advisory symbols:

- Pre-school advisory symbol
- School age advisory symbol.

Consumer advice

Proposal 9–3 states that there should be standardised consumer advice, including that there should be a list of familiar consumer advice. This could have the effect of limiting the flexibility of the national broadcasters. While the ABC and SBS have their own a large range of consumer advice options that are related to each classification category, they also have the ability to tailor advice specifically for content to meet the needs of their audiences. A standardised set of consumer advice would limit the national broadcasters' ability to tailor specific advice, provide clear advice and to interact with its audience. For example, the ABC has particular consideration of children and young people and SBS takes account of its diverse and multicultural audiences when formulating viewer advice. It would also limit the national broadcaster's independence in programming decision making.

Classification markings

The ABC currently classifies its content, whether for broadcast television or its iView service, and uses the classifications contained in the ABC Code of Practice. These markings replicate those currently found in the current National Guidelines for the Classification of Films and Computer Games. This has been a voluntary choice by the ABC Board in developing the ABC Code.

The difference, however, is that the ABC has its own consumer advice attached to each classification category that is specifically tailored for ABC audiences.

In response to Proposal 8–5, the ABC notes that it already has measures in place to comply with the requirement that classification markings be displayed.²⁹ As is the case with Proposal 8–6 (that promotions for upcoming programs are suitable for the audience likely to view the promotion), the ABC already has measures in place to achieve these outcomes and does not need to be further regulated.

SBS displays the classification symbols for PG, M, MA15+ and MAV15+ programs at the start of programs and after each advertising break. In respect of program promotions, in response to a complaint appealed to the ACMA, SBS has agreed to amend its Codes of Practice in line with the Commercial TV Industry Codes of Practice, which the ACMA considered set best practice in this area. This will ensure that SBS's program promotions are consistent with the surrounding material for the audience likely to view the promotions (e.g. PG promotions in PG programs).

Roles of the Classification Board and Regulator

As set out in Chapter 12 of the Discussion Paper, responsibility for regulating and administering most aspects of the proposed National Classification Scheme will lie with the new, unified Regulator. Its responsibilities will include, among other things, monitoring and enforcing compliance with classification laws, overseeing the development of industry codes of practice for classification, handling classification-related complaints, authorising industry classifiers, providing classification training and authorising appropriate third-party training courses. The Classification Board will be retained and will have responsibility for making classification decisions relating to the specific types of content (as set out in Proposal 7–1), reviewing classification decisions and conducting audits of decisions made by industry classifiers (par. 12.2).

The ABC and SBS broadly support this approach, although they have a few reservations, particularly in relation to the role of the Classification Board, which are set out below.

As outlined above, the national broadcasters believe strongly that they should remain outside the proposed new National Classification Scheme, but that their Boards should have due regard to that Scheme in developing their respective codes of practice. In practice, this would mean that they would not be subject to the majority of functions of the Regulator, although the Regulator would handle complaints about breaches of the ABC and SBS codes of practice that relate to classification.

The national broadcasters support the ALRC's suggestion (par. 12.3) that the Regulator form one part of the ACMA, as the ACMA already has responsibility for regulating the majority of media organisations and industries that are, or are likely to be, the producers and distributors of the content to which the National Classification Scheme applies.

²⁹ ABC Editorial Policies, Television Program Classification, 7.3.3.

The Classification Board as a "Benchmark Classifier"

The Discussion Paper argues that "even if it might be pragmatic for industry to classify all media content, it is clear that a board or equivalent body with statutory independence from government and financial independence from industry, remains highly valued" (par. 7.32). Accordingly, it proposes that the Classification Board provide an "expert benchmark for classification standards and classification decisions" (par. 7.34).

The difficulty with this proposal is that the expertise of the Board is not in classifying television, nor in television content.

Instead, the television industry has its own expert benchmarks for classification standards and decisions based on years of practical application. As described above, ABC and SBS classifiers classify thousands of hours of content per year, including thousands of hours of children's content. They receive daily feedback through a variety of channels and are required to take responsibility for their classification decisions by responding—via their complaints units—to audience complaints. The Classification Board, which has no day-to-day interaction with the media industry or its audiences, has none of this expertise.

Elevating the Board and its decisions is thus likely to create a level of uncertainty and undermine industry confidence in the Board's classification decisions in areas where it does not play a significant role in the classification of those types of content.

A consequence of this bench-marking role is that the decisions of the Classification Board have an elevated status in the proposed Scheme, such that, while media organisations are entitled to review and reclassify content if they wish, they are not entitled to do so if the content has already been classified by the Board (pars. 6.81–82). Given the Board's lack of expertise in television classification and its disconnection from the expectations of television audiences, this seems illogical. Accordingly, the ABC and SBS believe that broadcasters should be entitled to reclassify all content, including that previously classified by the Board.

Reviews of Classification Decisions

The ABC and SBS agree with the ALRC's proposition that all classification decisions relating to content that is required to be classified should be able to be appealed and reviewed (par. 7.85). However, they have reservations about the proposal that the body responsible for such reviews be the Classification Board (Proposal 7–6).

For the reasons stated above, the national broadcasters reject the notion that Classification Board has any particular or "benchmark" expertise beyond its limited sphere of responsibility or that it would be in any way qualified to effectively review classification decisions relating to television broadcasting. Accordingly, the Classification Board should have no authority over television industry classification decisions. Instead, the review mechanism for classification decisions would be better to be incorporated into the role of the Regulator.

The proposed Scheme makes Regulator solely responsible for handling complaints that cannot be resolved to the satisfaction of the complainant by the media organisation that made the original classification (7.100). The ABC and SBS believe that the Regulator should likewise be responsible for conducting any reviews of classification decisions that arise from those complaints processes, as well as any other reviews required under the new Classification of

Media Content Act. The decisions of the Regulator should be appealable by an internal, but independent review panel.

The Regulator should be appropriately resourced to provide this review function.

A particular advantage of this approach is that it more effectively resolves the problem of the Board reviewing its own decisions than the approach set out in the Discussion Paper (pars. 7.90–93). While it is doubtless possible to formulate rules that would adequately ensure no conflict exists between the original Board classification and a subsequent Board review, such rules cannot fully remove a perception of conflict of interests. Shifting the review function to the Regulator, by comparison, eliminates this perceptual problem.

Classification Audits

The concept of an audit is one which, for the national broadcasters' television services at least, is redundant. Hundreds of thousands of people watch, consume and interact with national broadcasters' television content on an hourly basis. Moreover, audiences complain if they are unhappy with the service or programming provided. It is unlikely that problems with classification decisions will go undetected.

The existing complaints mechanism provides a more-than-robust mechanism to gauge the appropriateness and effectiveness of the classification practices of industry participants. So long as a Regulator can investigate complaints fairly and objectively, audiences can have confidence that classification decisions can be independently scrutinised. As a result of having a comprehensive complaints management system, the value, accuracy and functionality of the classification system can be monitored and reviewed on an ongoing and dynamic basis.

Both the SBS and ABC provide regular reports on formal complaints to their respective Boards. This information is compiled and reported in their annual reports, which are submitted to Parliament, and elements are also included in the ACMA's comprehensive reporting to government. The ABC also publishes on its web site summary details of all complaints found to be upheld through its internal complaint-investigation process.

Against this background, audits are unnecessary, redundant, resource-intensive and potentially disruptive. If applied to the ABC and SBS, they would also represent yet another impact on the ability of the national broadcasters to fulfil their legislated responsibility to provide a truly independent service.

Enforcement

Enforcement provisions against the national broadcasters for code breaches are different to those applied to other media providers.

While the national broadcasters understand and accept that regulatory oversight by an independent umpire is both necessary and a part of the existing regulatory framework, they also believe that the different approach taken to the ABC and SBS with regard to enforcement recognises the different circumstances that apply to public broadcasters.

Specifically, with regard to classification a comprehensive complaint-handling framework already exists. Decisions on complaints are made at the broadcaster level, with consequent outcomes for the relevant staff, in a great many more cases than proceed to the ACMA. The nature of these responses is appropriate given the high level of responsibility taken by the public broadcasters and the high level of scrutiny applied to the ABC and SBS by the public, the Parliament and the media at large.

One aspect of the proposed enforcement regime is of serious concern to the ABC and SBS, namely the proposition that the Regulator should have responsibility to revoke authorisations of industry classifiers, the ability to issue barring notices to industry classifiers and to call-in unclassified media (Proposal 7–7). If, as argued above, the national broadcasters remain outside of the National Classification Scheme, such sanctions should not affect them. However, the proposal that the Regulator might revoke the authorisations of individual classifiers represents a sufficiently worrying proposal that the ABC and SBS believe comment is warranted.

There are few examples of regulatory sanctions directed toward individuals within the coregulatory code frameworks used for broadcasting, telecommunications and online industries today. Where an individual is employed to fulfil the role of classifier within an organisation, an appropriate and consistent approach would be to address issues of non-compliance at the level of the corporation, rather than the individual.

Further, there appear to be no specific provisions built into the proposed procedures to ensure a right to be heard, appeals against bias and that decisions are made only on proper evidence. If the Regulator is to have the power to deregister individuals and in effect render them unable to fulfil the responsibilities of their role, it is necessary that such legalistic protections are built in to ensure a fair, transparent and objective employment of those powers. The ability to take action against individuals would appear to be inappropriate and unnecessary in the context of employment with a corporation.

Sanctions against individual classifiers would also give the Regulator the ability to affect the employment decisions of media organisation. In the case of the ABC and SBS, such a power would interfere with their institutional autonomy, as both the ABC Act and the SBS Act specifically provide that the terms and conditions of employment are to be determined by the ABC and SBS respectively.³⁰ Moreover, any move to revoke the accreditation of an ABC or SBS classifier would have practical ramifications. The SBS employs one full-time classifier; the ABC employs three. Any such action would, in effect, restrict the ABC and SBS from classifying content and may result in significant disruption to audiences and the national broadcasters' ability to comply with classification responsibilities under their respective codes of practice.

Finally, placing such a significant power in the hands of the Regulator may also result in classifiers taking a more conservative approach to decision-making. The right classification decision may not be made in order to ensure individuals are not "deregistered" in the case of oversight or accident let alone the impact on the broadcasters' independence and their obligations to innovation and distinctiveness.

Training

While the national broadcasters believe that they should remain outside of the National Classification Scheme, this should not prevent ABC and SBS classifiers from taking part in the industry accreditation.

³⁰ ABC Act, s.32; SBS Act, s.54.

Over many years of broadcasting content, the ABC and SBS have developed an in-house capability for classification. Over 20,000 hours of television are broadcast by the ABC every year. In addition, the Corporation publishes an extensive range of audio-visual content online. SBS likewise broadcasts over 15,000 hours of television, as well as a significant amount of audio-visual content online. In essence, the ABC and SBS are already acting as converged suppliers of content. The classifiers at the SBS and ABC have, accordingly, developed a comprehensive and high-level understanding of classification issues, precedents and processes. This includes providing guidance and advice to content producers throughout the development and production process through to relationships with network controllers for content presentation and delivery. Case Study C in the Appendix illustrates this process.

The ABC and SBS agree that a consolidated approach to training and accreditation should be part of any classification scheme. While a focus on the standardisation of skills will assist in a more consistent approach to classification decision-making, as with any practically-based profession, trainees should be required to successfully undertake and complete a number of hours of supervised practice, such as an internship.

Developing an appropriate training framework and training content would, as a basic necessity, require the input of classifiers employed by television broadcasters. Accreditation of any such scheme should allow for the recognition of prior learning, including specifically the experience of network classifiers such as those at the ABC and SBS. The ABC and SBS propose that a minimum number of hours of classification experience (such as 100) should form part of the accreditation process.

As part of a commitment to best-practice classification, the ABC and SBS would explore the mentoring of trainee classifiers in-house.

The national broadcasters also note an apparent contradiction in the Discussion Paper in relation to the respective roles of the Regulator and the Board in regard to training. According to Proposal 12–1(c), the Regulator is responsible for "authorising industry classifiers, providing classification training or approving classification training courses provided by others". However, paragraph 7.76 states that "[t]o ensure that all industry classifiers are classifying content consistently and properly applying the statutory classification criteria, industry classifiers should only be authorised to classify content if they have completed training approved by the Director of the Board." The ABC and SBS assume that the latter reference is an error, but would welcome clarification from the ALRC.

Double-handling

The ABC and SBS would support the use of previous decisions in subsequent broadcasts while noting that responsibility for the classification decision will ultimately lie with the broadcaster of the content. It is likely that, even where content has not been modified, the national broadcasters will review each classification decision before broadcasting or publishing the content.

Similarly, where content has not been modified to a significant degree, classifications applying to television should be applied to DVD. The responsibility for the classification decision would ultimately lie with the final distributor of the content.

It is worth noting that there is a significant difference between classifying daily television

content and classifying television programs in DVD format (i.e. boxed sets). In the broadcaster context, for commissioned content, classifiers begin working with television producers and commissioning editors at the beginning of the creative process. As content is developed, it is evaluated for its potential classification, time slot and audience. Classifiers may be consulted to provide advice at script stage and during production and editing to ensure an efficient use of production resources and a creative treatment that fits the agreed classification and programming parameters. This discussion continues until the eventual broadcast date and incorporates input from the producers, classifiers, commissioning editors and network programmers. Depending on the needs of the platform, programs may be moved in the schedule and change time slots, necessitating changes in the program itself or a change in its classification.

For example, the ABC's *Rake* series was originally commissioned for an MA15+ time zone but was then moved to 8:30pm, requiring editing to meet the requirements of an M classification. In contrast, a television series DVD boxed set is classified without the informing factor of time zones, and without the specificity of broadcaster, time slot or intended audience.

For programming that is acquired, such as television series, the Classification Board's classification of the DVD boxed set will be whatever the highest classification level is across the series, even though within the series the classification rating may be different for each episode. When the ABC or SBS classifies a series for broadcast, each episode is classified separately and, where necessary, they will edit the program to meet the relevant classification requirements. These different approaches affect the applicability of the Board's decisions to content that is to be broadcast on television.

Conclusion

The issue of greatest importance for the ABC and SBS in this Review is the maintenance of their editorial independence and institutional autonomy. As public broadcasters, they operate within a legislative framework that differs from the ones applying to other media organisations in that it imposes specific public responsibilities, including obligations to deliver diverse and innovative content and exhibit high standards and levels of accountability, while consciously limiting the ability of the Government and other external bodies to influence their editorial processes. The national broadcasters' relationship with regulators is restricted, as responsibility for oversight of their activities instead primarily lies with their Boards and the Parliament.

The ABC and SBS are not a part of the existing National Classification Scheme and believe they should remain outside of any new Scheme that is introduced. Including the national broadcasters in the Scheme would represent a significant change in their accountability arrangements and a reduction of their independence. It is not justified by any failure in their current approach to classification, which includes effective processes for ensuring programs are properly classified before broadcast and responsive internal complaints-handling systems.

The ABC and SBS believe consistency in classification decision-making and information for audiences can be achieved without introducing changes that potentially compromise their independence simply by extending existing obligations on their Boards to develop codes of practice so that they include classification of programs and requiring that, in so doing, they have due regard to the unified classification guidelines developed under the proposed Classification of Media Content Act.

Regardless of the national broadcasters' relationship to the Scheme, it should provide for industry codes to be the primary vehicles for defining classification process. While unifying classification categories and concepts should be captured in a single legislative instrument, it should be of sufficiently high level to allow industry codes to usefully reflect the specificities of media and be flexible enough to allow their adaptation to industry-specific developments and audience demands in a timely and effective manner. It should allow industries to develop the best means of meeting high-level objectives for protecting audiences, particularly children, from inappropriate content and signposting content in the most appropriate way. Time zones and parental lock measures should both be available to service providers to meet audience expectations and requirements.

Classification Categories should be as simple and easy to use and understand as possible. The categories should not include age descriptors in their names in order to avoid confusion. The national broadcasters believe the current categories are broadly understood, but could be made clearer for audiences with minor changes, such as introducing separate nonclassification advisories for content that meets the needs of pre-school and school-age children. Importantly, changes to classification categories should not result in significant changes to the scheduling decisions of broadcasters or result in restrictions on audiences' ability to access appropriate content.

The use of consumer advice should be flexible and responsive to the needs of specific audiences.

The proposal to regard the Classification Board as a "benchmark classifier" across all media, including those with which it has no expertise, is distinctly worrying and may lead to uncertainty in industries. For the same reason, the national broadcasters believe that the proposed classification review function should reside not with the Board, but with a properly-resourced Regulator, an approach that would have the additional advantage of creating transparency in relation to the review of classifications by the Board.

The comprehensive and highly-effective internal complaints mechanisms of the national broadcasters should remain the first point of contact and investigation of complaints for audiences. An escalation pathway to the Regulator should remain available to complainants. Regulator decisions should be appealable by an internal, but independent review panel.

Classification audits of public broadcasters' content are unnecessary and redundant given the high level of scrutiny applied to ABC and SBS content, the expertise of in-house classification teams, the comprehensive complaints-handling frameworks that exist within the national broadcasters and the possibility of complaint escalation to ACMA or the proposed Regulator. The intended objectives of any audit process are already comprehensively served by the complaints-handling framework.

Sanctions against the ABC and SBS for breaches of classification regulation should remain unchanged and should not include the power to take action against individual classifiers employed by the national broadcasters.

A national classification training scheme should take into account the previous experience and expertise of in-house television classifiers.

The national broadcasters agree that classification decisions should be made with the primary purpose of protecting young viewers from inappropriate content and to inform all audiences in a consistent manner about the types of content they may view. The inherently responsible approach taken by the ABC and SBS is reflected in their programming and the small numbers of breaches of the codes that have occurred. In particular, the ABC has taken a rigorous and careful approach to its children's programming and has created child-friendly zones on ABC4Kids and ABC3 and online in its dedicated children's websites. It is fundamental to the children's programming offering that parents can trust that the content their children consume is appropriate, educational, and safe.

However, for documentary and arts programming, it is both necessary and expected that a wide audience will engage with challenging concepts from time to time. It would be concerning if such content could not be accommodated by the new National Classification Scheme except in time zones or with classifications that might make that content far less likely to be accessed or reduce its profile and place in the national conversation.

Appendix: Case Studies

Case Study A: Gourmet Farmer (SBS)

Background

Gourmet Farmer is a documentary program about Matthew Evans, a former chef and food critic who has swapped his city life for small farm living in Tasmania, eager to put to the test his primary belief that we should all be directly connected with our food.

The program was commissioned by SBS with an intended broadcast time of 7.30pm under the PG classification.

Series 1, episode 5 of *Gourmet Farmer* was classified PG (Adult Themes; Animal Slaughter) by SBS. This episode contained a depiction of a chicken being slaughtered, wherein its throat was shown to be cut and blood was shown to pour from its neck. The Classification Board's determination for the series' release on DVD was consistent with that made by SBS for broadcast. The DVD, comprising 10 episodes from Series 1, was classified PG (Mild Coarse Language; Animal Slaughter).

Series 2, episode 7 of *Gourmet Farmer* was classified PG (Animal Slaughter) by SBS. This episode contained vision of a mutton bird being captured and killed by an Aboriginal hunter. The bird was removed from its nest and the body was adroitly flicked around the neck, killing it instantly. The bird exhibited no signs of emotional distress, and signs of physical trauma were not evident. This depiction of animal slaughter was certainly less vivid than the example cited above from series 1.

The Classification Board's determination for the release of Series 2 on DVD was inconsistent with that of SBS and the standards which it applied to Series 1. The Classification Board determined that this depiction of animal slaughter warranted the M classification, even though conventions of classification would dictate that this presentation was less, not more, impactful. The series was classified M (Animal Slaughter; Infrequent Coarse Language) by the Classification Board.

Complaints

SBS received one formal complaint regarding the depiction of animal slaughter in Series 1. This was handled by SBS's internal complaints handling system; the complainant did not escalate the grievance to ACMA, this being a prima facie indication that the complainant was satisfied with SBS's response.

SBS received no formal complaints regarding the depiction of animal slaughter in Series 2 under the PG classification.

Analysis

In order for commissioned content to be created that satisfies broadcaster scheduling, productions must be subject to an open, transparent and dependable process of classification.

This case study demonstrates the ABC and SBS's concerns that broadcast television cannot apply the Classification Board's determinations to its operations due to the absence of reliable, consistent classification decisions that reflect the Classification Guidelines, convention and precedent (including the findings of ACMA investigations). In-house classifiers have both the experience and knowledge to make decisions that are in accordance with the Guidelines, and understand previous decisions and audience expectations. It is unreasonable to expect that the ABC and SBS (or any broadcast television service) should have to adapt its scheduling or content to reflect classification decisions that are inconsistent and against which there may be no right of appeal.

Case Study B: The Biggest Chinese Restaurant in the World (SBS)

Background

The Biggest Chinese Restaurant in the World is a four-part documentary series examining the inner workings of the West Lake Restaurant in Changsha, which reflects the competing interests of contemporary Chinese culture, the traditional and modern, the communist and capitalist. The documentary is a worthy series commissioned by the BBC.

The series contained a number of depictions of Chinese culinary practices, including the removal of a still-beating duck's heart with chopsticks, the cooking of the body of a fish while the head remained animate (the fish is plated and sauced while the gills are moving), and the preparation of a living snake for cooking.

SBS classified this series PG, with consumer advice for "Adult Themes and Animal Slaughter" applied to three of the four episodes.

The Classification Board determination for the release of this series on DVD was G; no consumer advice was applied.

Analysis

SBS is of the firm belief that the nature of this content, considering the dictates of the Guidelines, convention and its intimate knowledge of its audience's expectations, was best reflected by the application of the PG classification with consumer advice indicating that it contained "Adult Themes and Animal Slaughter".

SBS received three complaints regarding this series, none of which was escalated to the ACMA. This indicates that the material, while not being uncontroversial, was managed by SBS in a manner that was ultimately consistent with community standards. SBS holds the view that this would not have been the case had the material been classified G, pursuant to the Classification Board's decision.

The ABC and SBS believe their internal classifiers are best placed to make consistent classification decisions that demonstrate due regard for previous determinations of a like nature. This technical and historical understanding is further supported by a connection to their audiences that is less likely to be appreciated by a detached regulatory body.

Case Study C: Classification of The Slap (ABC)

The ABC seeks to meet its Charter obligations to provide in Australia innovative programs that contribute to a sense of national identity and reflect the cultural diversity of the Australian community while encouraging and promoting the arts. In accordance with these aims, the ABC entered into a co-production Australian independent production company Matchbox Pictures in order to create a dramatised version of the popular and acclaimed novel *The Slap* by Christos Tsiolkas.

Careful consideration was given to the intended audience and the scheduling of this dramatic series. Some of Australia's best and most lauded producers, writers, and actors signed up to participate in the creation of this landmark series and the ABC undertook to commit considerable resources to the production, presentation and marketing of this series. Given its anticipated quality, it was decided that the audience be the widest possible of those aged over fifteen years. That is, that the series be accommodated appropriately at the M level of classification and be scheduled for 8.30pm on ABC1.

The first step in the classification of this series was that a Network TV Program Classifier ("the Classifier") was assigned to the production and consulted with the ABC Fiction department; she then designed and delivered a classification presentation to the relevant Fiction development and production executives as part of the early development process of the series.

As initial drafts of scripts were created, each was assessed with considerable care and the Classifier produced comprehensive notes regarding classification issues arising from these drafts. The Classifier also highlighted the relevant sections of the ABC's Associated Standard of Television Classification regarding each classifiable element given treatment in the scripts.

Throughout the lengthy production process, the Classifier provided advice to the producers as required, and were viewed and assessed rough cut edits of each episode.

As the fine-cut edits of each episode were created, these were classified and bespoke consumer advice created. This final classification information was attached to each episode and notified to the producers and all relevant ABC Fiction, scheduling, presentation and marketing departments.

The eight-part series was then broadcast on ABC1 at 8.30pm episode by episode at weekly intervals. On iView, the series carried the same classification information as the television broadcasts. The Classifier also assessed content and provided classification information to be published online for web-only content for the ABC website,³¹ and advised regarding the appropriate placement of television promotions of *The Slap* in relation to classification time zones.

An audience of approximately 950,000 watched each episode in the series on ABC1, with over 650,000 plays across iView and 240,000 views via *The Slap* program website.

During and after the broadcast of each episode, audience members communicated with each other and the ABC regarding their viewing experiences. Many audience members did so by calling ABC switchboards, sending emails, writing comments on ABC online message boards or on the series' Facebook page.

The Classifier read these messages and other media references to gauge the community

³¹ www.abc.net.au/tv/theslap

response to the classification of this series, as is customary with the broadcasting of such content.

Formal complaints relating to ABC television classification are investigated by an internal complaints' handling body that is separate from the content-making divisions of the ABC: the Audience and Consumer Affairs' (ACA) unit. This unit requested advice from the Classifier in relation to complaints received regarding the classification of *The Slap*. After investigating the complaints, the ACA upheld the ABC's original television classification of *The Slap*.