Australian Government
Australian Law Reform Commission

National Classification Scheme Review

DISCUSSION PAPER

You are invited to provide a submission or comment on this Discussion Paper.

Discussion Paper 77

September 2011

This Discussion Paper reflects the law as at 30 September 2011.

© Commonwealth of Australia 2011

This work is copyright. You may download, display, print and reproduce this material in whole or part, subject to acknowledgement of the source, for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the *Copyright Act 1968* (Cth), all other rights are reserved. Requests for further authorisation should be directed to the Australia Law Reform Commission.

Commission Reference: DP 77

ISBN: 978-0-9871777-0-4

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 40 MLC, 19 Martin Place, Sydney, NSW, 2000, Australia.

ALRC publications are available to download free of charge or to purchase in hard copy from the ALRC website. If you require assistance, please contact the ALRC.

Telephone: within Australia (02) 8238 6333
International +61 2 8238 6333
Facsimile: within Australia (02) 8238 6363
International +61 2 8238 6363

E-mail: classification@alrc.gov.au
Homepage: www.alrc.gov.au

Making a submission

Making a Submission to the Inquiry

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is 18 November 2011.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Discussion Paper.

Online submission tool

The ALRC strongly encourages online submissions directly through the ALRC website http://www.alrc.gov.au/inquiries/classification/respond-discussion-paper, where an online submission form will allow you to respond to individual questions. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions and proposals as you wish.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6333.

Alternatively, written submissions may be mailed, faxed or emailed to:

The Executive Director

Australian Law Reform Commission

GPO Box 3708

SYDNEY NSW 2001

Email: classification@alrc.gov.au

Facsimile: +61 2 8238 6363

Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are made available on the ALRC website.

The ALRC also accepts submissions made in confidence. Confidential submissions will not be made public. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Contents

Terms of Reference 5
Participants 7
Proposals and Questions 9

Part 1 Introduction 17

1. Introduction to the Inquiry 19
Introduction 19
Related inquiries 20
The approach to reform 22
The Inquiry process 23
Scope of the Inquiry 24
Discussion Paper outline 25
How to make a submission 30

2. The Current Classification Scheme 31
Summary 31
History of censorship and classification 31
Classification cooperative scheme 32
Broadcasting Services Act 33
Assessing the current scheme 36
The need for fundamental reform 42
ALRC's views 43

3. Media Convergence and the Transformed Media Environment 45
Summary 45
Media convergence and the transformed media environment 45
Media convergence and 'broken concepts' in legislation 54

4. Guiding Principles for Reform 57
Summary 57
Guiding Principles 59

5. The Proposed Classification Scheme 73
Summary 73
The case for reform 73
Benefits of the proposed new National Classification Scheme 74
A new National Classification Scheme 77
The new Classification of Media Content Act 78

Part 2 A New Classification System **83**

6. What Content Should be Classified? **85**
Summary 85
How to determine what should be classified 86
Feature-length films, television programs and computer games 95
All content likely to be X 18+ 99
All content likely to be RC 100
Modifications—when content should be reclassified 101
Voluntary classification 103

7. Who Should Classify Content? **105**
Summary 105
Who currently classifies content? 106
How to determine who should classify content 108
Content that must be classified by the Classification Board 111
Content that may be classified by authorised industry classifiers 114
Classification checks and safeguards 119
Industry bodies and their relationship with the Regulator 125

8. Markings, Advertising, Display and Restricting Access **127**
Summary 127
Restricting access to content likely to be classified R 18+ 128
Restricting access to content classified R 18+ and X 18+ 130
Removing mandatory access restrictions on MA 15+ content 130
Methods of restricting access 131
Markings for content that must be classified 139
Advertising for content that must be classified 141
Public display of media content 143

9. Classification Categories and Criteria **147**
Summary 147
The existing classification categories 148
Classification categories under the proposed classification system 149
Common classification categories for all media content 153
Existing classification criteria 157
Common classification criteria for all media content 158
Legislation or industry codes 160
Researching community standards 161

10. Refused Classification Category **163**
Summary 163
RC—Relevance to this review and overview of the concept 164
The legislative framework 165
The current scope of RC content 169
Criticisms of the current scope of RC 175
ALRC's views 183

Part 3 Administering and Enforcing the New Scheme 187

11. Codes and Co-regulation 189
Summary 189
Regulatory forms 189
Factors in determining regulatory form 191
Industry codes 192
ALRC's proposals 196

12. The New Regulator 201
Summary 201
Existing agencies 202
Functions of the new Regulator 204

13. Enacting the New National Classification Scheme 211
Summary 211
The new Classification of Media Content Act 211
The classification cooperative scheme 212
Commonwealth legislative powers 214
ALRC's views 216

14. Enforcing Classification Laws 219
Summary 219
Enforcement of classification offline and online 220
Enforcement under the classification cooperative scheme 220
Enforcement of online content regulation 223
Enforcement problems 225
ALRC's proposals 226

Appendix 1. Agencies, Organisations and Individuals Consulted 233
Appendix 2. Platform Neutrality and the Question of Media Effects 237
Appendix 3. Proposed Classification Markings 241
Appendix 4. What Must be Classified and by Whom and What Must be Restricted? 243

Terms of Reference

Review of Censorship and Classification

Having regard to:

- it being twenty years since the Australian Law Reform Commission (ALRC) was last given a reference relating to Censorship and Classification
- the rapid pace of technological change in media available to, and consumed by, the Australian community
- the needs of the community in this evolving technological environment
- the need to improve classification information available to the community and enhance public understanding of the content that is regulated
- the desirability of a strong content and distribution industry in Australia, and minimising the regulatory burden
- the impact of media on children and the increased exposure of children to a wider variety of media including television, music and advertising as well as films and computer games
- the size of the industries that generate potentially classifiable content and potential for growth
- a communications convergence review, and
- a statutory review of Schedule 7 of the *Broadcasting Services Act 1992* and other sections relevant to the classification of content

I refer to the ALRC for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, matters relating to the extent to which the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act), State and Territory Enforcement legislation, Schedules 5 and 7 of the Broadcasting Services Act 1992, and the Intergovernmental Agreement on Censorship and related laws continue to provide an effective framework for the classification of media content in Australia.

Given the likelihood of concurrent Commonwealth reviews covering related matters as outlined above, the Commission will refer relevant issues to those reviews where it would be appropriate to do so. It will likewise accept referral from other reviews that fall within these terms of reference. Such referrals will be agreed between the relevant reviewers.

1. In performing its functions in relation to this reference, the Commission will consider:

    1. relevant existing Commonwealth, State and Territory laws and practices
    2. classification schemes in other jurisdictions
    3. the classification categories contained in the Classification Act, National Classification Code and Classification Guidelines
    4. any relevant constitutional issues, and
    5. any other related matter.

2. The Commission will identify and consult with relevant stakeholders, including the community and industry, through widespread public consultation. Other stakeholders include the Commonwealth Attorney-General's Department, the Department of Broadband, Communications and the Digital Economy, the Australian Communications and Media Authority, the Classification Board and Classification Review Board as well as the States and Territories.

3. The Commission is to report by 30 January 2012.

Robert McClelland.

Participants

Australian Law Reform Commission

President

Professor Rosalind Croucher

Commissioner in Charge

Professor Terry Flew

Commissioners

The Hon Justice Berna Collier, Part-time Commissioner

The Hon Justice Susan Kenny, Part-time Commissioner

Executive Director

Sabina Wynn

Legal Team

Bruce Alston, Principal Legal Officer

Jared Boorer, Senior Legal Officer

Justine Clarke, Senior Legal Officer

Kathryn Nielson, Legal Officer

Michele Reddy, Senior Policy Officer

Interns

Nina Abbey

Adam Arnold

Katie Batty

Robert Chiarella

Catherine Farrell

Sean Lau

Lauren Loz

Lucinda O'Dwyer

David Rowe

Jennifer Ruiz, University of Maryland

Jacqueline Serkowski

Andrew Trotter

Advisory Committee Members

Dr Jeffrey Brand, Associate Dean and Head of School of Communication and Media, Faculty of Humanities and Social Sciences, Bond University.

Associate Professor Jane Burns, Chief Executive Officer, Co-operative Research Centre for Young People, Technology and Well-being.

Simon Bush, CEO, Australian Home Entertainment Distributors Association.

Simon Cordina, Assistant Secretary, Cyber-Safety and Trade, Department of Broadband Communications and the Digital Economy.

David Court, Head of the Centre for Screen Business, Australian Film, Television and Radio School.

Ron Curry, CEO, Interactive Games & Entertainment Association.

Jane Fitzgerald, Assistant Secretary, Classification Branch, Attorney-General's Department.

Iarla Flynn, Head of Public Policy and Government Affairs, Google Australia and New Zealand.

Fiona Jolly, CEO, Advertising Standards Bureau.

Tom Kennedy, Executive Director, Group Digital Services, Omnilab Media.

Bryce Menzies, Marshall + Dent Lawyers.

Donald McDonald AC, Director, Classification Board.

Louise McElvogue, Convergence Review Committee.

Jonquil Ritter, Executive Director, Citizen & Community Branch, Australian Communications and Media Authority.

Tim Watts, Regulatory Manager, Regulatory Affairs, Strategy & Corporate Services, Telstra.

Proposals and Questions

5. The Proposed Classification Scheme

Proposal 5–1 A new National Classification Scheme should be enacted regulating the classification of media content.

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

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

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

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

(d) access restrictions on adult content;

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

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

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

Proposal 5–4 The Classification of Media Content Act should contain a definition of 'media content' and 'media content provider'. The definitions should be platform-neutral and apply to online and offline content and to television content.

6. What Content Should be Classified?

Proposal 6–1 The Classification of Media Content Act should provide that feature-length films and television programs produced on a commercial basis must be classified before they are sold, hired, screened or distributed in Australia. The Act should provide examples of this content. Some content will be exempt: see Proposal 6–3.

Proposal 6–2 The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA 15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6–3.

Proposal 6–3 The Classification of Media Content Act should provide a definition of 'exempt content' that captures all media content that is exempt from the laws relating to what must be classified (Proposals 6–1 and 6–2). The definition of

exempt content should capture the traditional exemptions, such as for news and current affairs programs. The definition should also provide that films and computer games shown at film festivals, art galleries and other cultural institutions are exempt. This content should not be exempt from the proposed law that provides that all content likely to be R 18+ must be restricted to adults: see Proposal 8–1.

Proposal 6–4 If the Australian Government determines that X 18+ content should be legal in all states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.

Proposal 6–5 The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.

Proposal 6–6 The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:

(a) charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;

(b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or

(c) adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).

Proposal 6–7 The Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. The Act should define ‘modify’ to mean ‘modifying content such that the modified content is likely to have a different classification from the original content’.

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

7. Who Should Classify Content?

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

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

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

(c) content that may be RC;

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

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

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

Question 7–1 Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier? In Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.

Proposal 7–3 The Classification of Media Content Act should provide that content providers may use an authorised classification instrument to classify media content, other than media content that must be classified.

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

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

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

Proposal 7–6 The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:

(a) reviewing industry and Board classification decisions; and

(b) auditing industry classification decisions.

This means the Classification Review Board would cease to operate.

Proposal 7–7 The Classification of Media Content Act should provide that the Regulator has power to:

(a) revoke authorisations of industry classifiers;

(b) issue barring notices to industry classifiers; and

(c) call-in unclassified media content for classification or classified media content for review.

8. Markings, Advertising, Display and Restricting Access

Proposal 8–1 The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.

Proposal 8–2 The Classification of Media Content Act should provide that access to all media content that has been classified R 18+ or X 18+ must be restricted to adults.

Proposal 8–3 The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA 15+ or likely to be classified MA 15+.

Proposal 8–4 The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. These codes might be developed for different types of content and industries, but might usefully cover:

(a) how to restrict online content to adults, for example by using restricted access technologies;

(b) the promotion and distribution of parental locks and user-based computer filters; and

(c) how and where to advertise, package and display hardcopy adult content.

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

Proposal 8–5 The Classification of Media Content Act should provide that, for media content that must be classified and has been classified, content providers must display a suitable classification marking. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be streamed or downloaded, and on advertising for the content.

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

(a) the likely audience of the advertisement;

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

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

9. Classification Categories and Criteria

Proposal 9–1 The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ and RC. Each item of media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.

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

Proposal 9–3 The Classification of Media Content Act should provide that all content that must be classified, other than content classified C, G or RC, must also be accompanied by consumer advice.

Proposal 9–4 The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions must be made applying these criteria.

Proposal 9–5 A comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, with a broad reach across the Australian community. This review should be undertaken at least every five years.

10. Refused Classification Category

Proposal 10–1 The Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content could be added to any blacklist of content that must be filtered at the internet service provider level.

11. Codes and Co-regulation

Proposal 11–1 The new Classification of Media Content Act should provide for the development of industry classification codes of practice by sections of industry involved in the production and distribution of media content.

Proposal 11–2 Industry classification codes of practice may include provisions relating to:

(a) guidance on the application of statutory classification obligations and criteria to media content covered by the code;

(b) methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;

(c) duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;

(d) the use of classification markings;

(e) methods of restricting access to certain content;

(f) protecting children from material likely to harm or disturb them;

(g) providing consumer information in a timely and clear manner;

(h) providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and

(i) reporting to the Regulator, including on the handling of complaints.

Proposal 11–3 The Regulator should be empowered to approve an industry classification code of practice if satisfied that:

(a) the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code;

(b) the body or association developing the code represents a particular section of the relevant media content industry; and

(c) there has been adequate public and industry consultation on the code.

Proposal 11–4 Where an industry classification code of practice relates to media content that must be classified or to which access must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.

12. The New Regulator

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

Proposal 12–1 A single agency ('the Regulator') should be responsible for the regulation of media content under the new National Classification Scheme. The Regulator's functions should include:

(a) encouraging, monitoring and enforcing compliance with classification laws;

(b) handling complaints about the classification of media content;

(c) authorising industry classifiers, providing classification training or approving classification training courses provided by others;

(d) promoting the development of industry classification codes of practice and approving and maintaining a register of such codes; and

(e) liaising with relevant Australian and overseas media content regulators and law enforcement agencies.

In addition, the Regulator's functions may include:

(f) providing administrative support to the Classification Board;

(g) assisting with the development of classification policy and legislation;

(h) conducting or commissioning research relevant to classification; and

(i) educating the public about the new National Classification Scheme and promoting media literacy.

13. Enacting the New National Classification Scheme

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

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

14. Enforcing Classification Laws

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

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

Proposal 14–3 The new Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with:

(a) restrictions on the sale, screening, distribution and advertising of classified material;

(b) statutory obligations to classify media content;

(c) statutory obligations to restrict access to media content;

(d) an industry-based classification code; and

(e) directions of the Regulator.

Proposal 14–4 Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the *Broadcasting Services Act 1992* (Cth).

Proposal 14–5 The Australian Government should consider whether the Classification of Media Content Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.

Part 1
Introduction

1. Introduction to the Inquiry

Contents

Introduction 19
Related inquiries 20
The approach to reform 22
The Inquiry process 23
Scope of the Inquiry 24
Discussion Paper outline 25
How to make a submission 30

Introduction

1.1 On 24 March 2011, the Attorney-General for Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire into and report on the framework for the classification of media content in Australia. This framework is referred to in this Discussion Paper as the National Classification Scheme.

1.2 In considering the effectiveness of the National Classification Scheme, and options for reform, the ALRC is required to consider the extent to which the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), state and territory enforcement legislation, schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth), and the Intergovernmental Agreement on Censorship and related laws continue to provide an effective framework for the classification of media content in Australia.

1.3 In performing its functions in relation to this reference, the ALRC has also been asked to consider:

1. relevant existing Commonwealth, State and Territory laws and practices
2. classification schemes in other jurisdictions
3. the classification categories contained in the Classification Act, National Classification Code and Classification Guidelines
4. any relevant constitutional issues, and
5. any other related matter.

1.4 In referring the review to the ALRC, the Attorney-General had regard to:

- the rapid pace of technological change in media available to, and consumed by, the Australian community
- the needs of the community in this evolving technological environment

- the need to improve classification information available to the community and enhance public understanding of the content that is regulated
- the desirability of a strong content and distribution industry in Australia, and minimising the regulatory burden
- the impact of media on children and the increased exposure of children to a wider variety of media including television, music and advertising as well as films and computer games
- the size of the industries that generate potentially classifiable content and potential for growth …

1.5 The Terms of Reference also noted that this is the first comprehensive review of censorship and classification in Australia since 1991. The *Classification Act* and complementary state and territory enforcement legislation (referred to in this Discussion Paper as the 'classification cooperative scheme') were enacted following recommendations made by the ALRC in its 1991 report, *Censorship Procedure* (ALRC Report 55). That report recommended establishing a legislative framework that would enable the Commonwealth, states and territories to take a national approach to classification.

Related inquiries

1.6 Since 2008, there have been a significant number of inquiries and reviews covering matters related to the Inquiry. These are briefly described below.

1.7 In 2008, the report of the Senate Standing Committee on Environment, Communications and the Arts, *Sexualisation of Children in the Contemporary Media*, was released.[1] The Committee, chaired by Senator Anne McEwen, observed increasing community concern over the inappropriate sexualisation of children. The report advised that 'preventing the premature sexualisation of children is a significant cultural challenge',[2] and made recommendations to broadcasters, publishers, the advertising industry, and state and territory governments about these concerns.

1.8 In 2010, the Australian Government Attorney-General's Department conducted a public consultation on an R 18+ classification for computer games.[3] Subsequent to the completion of this consultation, the Minister for Home Affairs, the Hon Brendan O'Connor MP, released draft guidelines for the introduction of an R 18+ classification for computer games. State and territory classification ministers reached in-principle agreement on the introduction of an R 18+ classification for computer games at the

---

1 Senate Standing Committee on Environment, Communications and the Arts, *Sexualisation of Children in the Contemporary Media* (2008).

2 Ibid, 2, rec 1.

3 See Australian Government Attorney-General's Department, *Final Report on the Public Consultation on the Possible Introduction of an R18+ Classification for Computer Games* (2010). This review received over 58,000 submissions, of which 98% favoured the introduction of an R 18+ classification for computer games.

July 2011 meeting of the Standing Committee of Attorneys-General (SCAG)[4] (now the Standing Council on Law and Justice).

1.9 In 2010, the Department of Broadband, Communications and the Digital Economy (DBCDE) reported on a review of measures to increase accountability and transparency for Refused Classification (RC) material.[5] Arising out of this review, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, committed to undertake a review of the RC category to accompany the proposed introduction of internet service provider (ISP) filtering of RC content, alongside more transparent mechanisms for independent review of lists of blocked URLs, clear avenues for review of classification decisions, and greater involvement of the Classification Board and the Classification Review Board in the process of classifying online content that has been subject to public complaint.

1.10 In June 2011, the Senate Legal and Constitutional Affairs References Committee released its report *Review of the National Classification Scheme: Achieving the Right Balance*.[6] The Committee, chaired by Senator Guy Barnett, made a total of 30 recommendations, relating to the National Classification Code and Classification guidelines, the classification of art works and removal of the 'artistic merit' defence, the transfer of classification powers to the Commonwealth, classification enforcement, training and accreditation for industry classifiers, terms of appointment for members of the Classification Board and the Classification Review Board, and the handling of complaints related to classification.

1.11 Also in June 2011, the Joint Select Committee on Cyber-Safety, chaired by Senator Dana Wortley, released its Interim Report, *High-Wire Act: Cyber-Safety and the Young*.[7] The Joint Select Committee investigated young people's use of the internet and possible cyber-safety threats, including cyber-bullying, exposure to illegal and inappropriate content, inappropriate social and health behaviours in an online environment (technology addiction, online promotion of anorexia, drug usage, underage drinking and smoking), identity theft, and breaches of privacy.

1.12 In July 2011, the House of Representatives Standing Committee on Social Policy and Legal Affairs tabled its report, *Reclaiming Public Space: Inquiry into the Regulation of Billboard and Outdoor Advertising*.[8] The Committee, chaired by Graham Perrett MP, made 19 recommendations relating to the effectiveness of industry self-

---

4 B O'Connor (Minister for Home Affairs and Minister for Justice), 'Draft R 18+ Computer Game Guidelines Released' (Press Release, 25 May 2011); B O'Connor (Minister for Home Affairs and Minister for Justice), 'Agreement on R 18+ Classification for Computer Games' (Press Release, 22 July 2011).

5 Department of Broadband, Communications and the Digital Economy, *Mandatory Internet Service Provider (ISP) Filtering: Measures to Increase Accountability and Transparency for Refused Classification Material–Consultation Paper* (2009).

6 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011).

7 Joint Select Committee on Cyber-Safety—Parliament of Australia, *High-Wire Act: Cyber-Safety and the Young: Report* (2011).

8 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Reclaiming Public Space: Inquiry into the Regulation of Billboards and Outdoor Advertising: Final Report* (2011).

regulation by the Advertising Standards Board, codes of practice for outdoor advertising, complaints procedures, and research into prevailing community standards. This report raised issues about the effectiveness of advertising industry self-regulation, but 'rejected the classification system as an inappropriate system for regulating outdoor advertising'.[9]

1.13 Importantly, and in parallel with the ALRC's Inquiry, the DBCDE is undertaking a Convergence Review. The Convergence Review Committee is an independent committee chaired by Glen Boreham, whose task is 'to review the operation of media and communications legislation in Australia and to assess its effectiveness in achieving appropriate policy objectives for the convergent era'.[10]

1.14 The Convergence Review is due to report to the Government in the first quarter of 2012, and released a series of five discussion papers for public comment, including a paper dealing with community standards, in September 2011.[11] The Convergence Review incorporates a statutory review of the operation of sch 7 of the *Broadcasting Services Act*.[12]

1.15 Finally, in August 2011, the Office for the Arts in the Department of Prime Minister and Cabinet released its *National Cultural Policy Discussion Paper*.[13] While a National Classification Scheme does not directly promote cultural creativity and innovation, it can be a factor in recognition of cultural diversity, adoption of new technologies and the development of creative industries, so recommendations need to be developed with an awareness of possible cultural policy implications.

The approach to reform

1.16 Section 24(1) of the *Australian Law Reform Commission Act 1996* (Cth) specifies that, in performing its functions, the ALRC must aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes:

> (a) do not trespass unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions; and
>
> (b) are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.

1.17 Under s 24(2) of its Act, when formulating recommendations, the ALRC must have regard to the effect that the recommendations may have on:

> (a) the costs of getting access to, and dispensing, justice; and

---

9 Ibid, 36.

10 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Terms of Reference* (2010).

11 See Department of Broadband, Communications and the Digital Economy, *Convergence Review: Framing Paper* (2011); Convergence Review (2011) *Discussion Paper: Community Standards*.

12 As required by *Broadcasting Services Act 1992* (Cth) sch 7 cl 118.

13 Department of the Prime Minister and Cabinet Office for the Arts, *National Cultural Policy Discussion Paper* (2011).

(b) persons and businesses who would be affected by the recommendations (including the economic effect, for example).

1.18 Under its Act, the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[14]

1.19 Three principles that generally inform ALRC inquiries are: the need to ground recommendations in an evidence base; extensive community consultation; and the ability to draw upon the ALRC's status as an independent statutory agency to bring together expert opinion on the subject matter of the review.

1.20 Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base. A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[15]

1.21 Laura Barnett has observed that law reform commissions 'should make efforts to ensure that the consultation process remains an open process'.[16] The ALRC is well placed to make use of informal information-gathering sessions, as well as the use of technology to better facilitate public input, due to its trusted reputation, based on a history of rigorous inquiry and statutory independence from government.

The Inquiry process

1.22 The timetable for the ALRC National Classification Scheme Review is shown below.

24 March 2011	Release of formal Terms of Reference
21 April 2011	Appointment of Lead Commissioner
20 May 2011	Release of Issues Paper and call for submisisons
September 2011	Release of Discussion Paper and call for submissions
November 2011	Deadline for submissions
To January 2012	Consultations
30 January 2012	Final report and recommendations due to be delivered to the Attorney-General. The report will not be publicly available until it is tabled in Parliament.

14 *Australian Law Reform Commission Act 1996* (Cth) s 38.

15 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 202.

16 L Barnett, 'The Process of Law Reform: Conditions for Success' 39 *Federal Law Review* 161, 175.

1.23 Since the commencement of the Inquiry, the ALRC has developed four strategies for building an evidence base for reform.

1.24 First, an Issues Paper was released in May 2011. In order to better facilitate public submissions, there was an online submission form on the ALRC website, where people could respond directly to questions arising from the Issues Paper by the 15 July 2011 deadline.

1.25 The ALRC received 2,452 submissions, the vast majority of which were not confidential, and are available for viewing from the ALRC website. The ALRC will release additional analysis of the public submissions responding to the Issues Paper questions, making use of qualitative analysis software, during October 2011.

1.26 Secondly, a round of consultations was held with relevant industry, government and community stakeholders in the period May–July 2011 in Sydney, Canberra, Melbourne, Brisbane and Adelaide. In addition, Professor Flew, as Commissioner, participated in a range of forums as an invited speaker. The agencies, organisations and individuals consulted by the ALRC are listed in Appendix 1.

1.27 Thirdly, internet communication tools, such as an e-newsletter and blog, were used to provide information and obtain comment. Draft Principles for a new National Classification Scheme were posted on an ALRC blog for public comment on 12 August 2011, and had attracted 98 comments by the September 2 closure date. The ALRC has also made use of a Facebook page and Twitter feed to provide information on media reports related to classification issues.

1.28 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of its Advisory Committees. While the ultimate responsibility for the final Report and recommendations remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, as appropriate to the Terms of Reference, is an invaluable aspect of ALRC inquiries. Advisory Committees assist in the identification of key issues, provide quality assurance in the research and consultation effort, and assist with the development of reform proposals. A full list of the Advisory Committee members and Commissioners is set out at the front of this Discussion Paper.

Scope of the Inquiry

1.29 The nature and extent of these forms of evidence gathering and engagement are framed by both the subject matter and scope of the Inquiry, and the timeframe in which the Inquiry must be completed under its Terms of Reference. This Inquiry has a potentially very broad scope, as it necessarily refers not only to a diverse and growing array of forms of media content, but also to the complex question of community standards. At the same time, the ALRC has been required to complete its deliberations within a nine-month time frame. The scope of the inquiry must, therefore, be clearly defined.

1.30 The Terms of Reference require the ALRC to review the classification cooperative scheme for publications, films and computer games, based on the

Classification Act and complementary state and territory enforcement legislation. This regime applies not only to films exhibited in cinemas, but also filmed entertainment made available through DVD and similar technologies.

1.31 The other category of media content clearly covered by the Terms of Reference is online and mobile content. Since the passage of the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), online content accessed through the internet has been subject to the *Broadcasting Services Act*. Schedule 5 of the *Broadcasting Services Act* sets out provisions in relation to internet content hosted outside Australia, and sch 7 does so in relation to online and mobile content hosted in or provided from Australia. Under the *Broadcasting Services Act*, the Australian Communications and Media Authority (the ACMA) investigates complaints about online and mobile content that the complainant believes to be 'prohibited content' or 'potential prohibited content', with reference to the classification categories in the *Classification Act*.

1.32 In this Inquiry, the ALRC is also considering the place of broadcast media—radio and television—in a new National Classification Scheme. Broadcast media content is classified by relevant industry bodies, subject to co-regulatory arrangements and codes of practice approved by, or notified to, the ACMA.[17] Designing an effective framework for the classification of media content, as required by the Terms of Reference, necessitates considering television content, especially in light of the significance of television content in the lives of Australians, the important role played by television networks in providing community information about classification, and the sometimes contentious nature of this content—especially in terms of its suitability for children.

1.33 Where relevant in consideration of a new National Classification Scheme, the ALRC also discusses the possible place of other media content in relation to classification obligations. This includes areas where there are industry self-regulatory models currently in place, such as music and advertising, as well as areas where the principle of classification has been more contested, such as artworks and user-created content.

Discussion Paper outline

1.34 This chapter provides an outline of the background to the Inquiry and an analysis of the scope of the Inquiry as defined by the Terms of Reference. It also describes the development of the evidence base to support the law reform response as reflected in the proposals and questions included throughout the Discussion Paper.

1.35 Chapter 2 begins by briefly describing the historical background to classification laws. The chapter then describes the framework of the current National Classification Scheme, comprised of the classification cooperative scheme for publications, films and computer games, and classification-related law as it applies to online and mobile

17 *Broadcasting Services Act 1992* (Cth); *Australian Broadcasting Corporation Act 1983* (Cth); *Special Broadcasting Service Act 1991* (Cth).

content under the *Broadcasting Services Act*. The roles of the Classification Board, the Classification Review Board and the ACMA are outlined, along with that of industry under co-regulatory codes of practice for online and broadcast content. The chapter assesses the current scheme, looking at aspects that work reasonably well and those that are in need of reform. The chapter concludes by noting the strong arguments made to the ALRC about the need for fundamental reform, and for a new National Classification Scheme.

1.36 Chapter 3 outlines factors in the media environment that necessitate reform of classification law and the development of a new National Classification Scheme. It identifies the range of trends which have been associated with media convergence, including increased access to high-speed broadband internet, digitisation, globalisation, accelerated innovation, the rise of user-created content and the changing nature of the media consumer, and the blurring of distinctions between public and private media consumption. It also draws attention to findings arising from the Convergence Review, and recent work undertaken by the ACMA on ‘broken concepts’ in existing broadcasting and telecommunications legislation and their relevance to media classification.

1.37 Chapter 4 identifies eight guiding principles for reform directed to providing an effective framework for the classification of media content in Australia. These principles should inform the development of a new National Classification Scheme that meets community needs and expectations, while being more effective in its application and responsive to the challenges of technological change and media convergence. The eight guiding principles are that:

(1) Australians should be able to read, hear, see and participate in media of their choice;

(2) communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;

(3) children should be protected from material likely to harm or disturb them;

(4) consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;

(5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;

(6) the classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;

(7) classification regulation should be kept to the minimum needed to achieve a clear public purpose, and should be clear in its scope and application; and

(8) classification regulation should be focused upon content rather than platform or means of delivery.

1.38 Chapter 5 introduces the ALRC's proposed new National Classification Scheme. The chapter briefly summarises the overall rationale for the establishment of the scheme, highlighting its key benefits and how the scheme responds to the guiding principles of reform identified in Chapter 4. The chapter presents centrepiece proposals establishing the proposed new scheme, through the enactment of a new Classification of Media Content Act. Under the Act, a single agency (the Regulator) would be responsible for regulating the classification of media content.

1.39 Chapter 6 considers what content should be classified under the proposed National Classification Scheme. It starts by considering distinguishing features of content that might be used to determine whether something must be classified. The ALRC then proposes that the following content (subject to some exemptions) must be classified before it is sold, hired, screened or distributed in Australia:

- feature-length films produced on a commercial basis;
- television programs produced on a commercial basis;
- computer games produced on a commercial basis and likely to be MA 15+ or higher;
- all media content likely to be X 18+ (that is, sexually explicit adult content); and
- all media content that may be RC.[18]

1.40 The classification of most other media content—for example, books, magazines, websites, music, and computer games now likely to be G, PG and M—should become or remain voluntary. However, the ALRC proposes that industry bodies should develop codes of practice that encourage the voluntary classification of some of this other content—such as lower-level computer games—using the categories, criteria, and markings of the National Classification Scheme. The ALRC also proposes that media content should be classified before: enforcement agencies require someone to stop distributing content (whether on the internet or otherwise); enforcement agencies prosecute someone for distributing content; and before the content is added to any proposed list of content that must be filtered by internet service providers.

1.41 Chapter 7 considers who should be responsible for classifying content that must be classified. It proposes that some classification decisions now made by the Classification Board may instead be made by authorised industry classifiers, subject to review by the Classification Board and regulatory oversight. The ALRC proposes that the Board should continue to classify:

- feature-length films produced on a commercial basis for cinema release;
- computer games produced on a commercial basis and likely to be MA 15+ or higher;
- content that may be RC;

---

18 A table summarising what content must be classified and by whom, and what must be restricted, is in Appendix 4.

- content submitted by the Minister, the Regulator or another government agency; and
- content that needs to be classified for the purpose of enforcing classification laws.

1.42 The ALRC also proposes that, apart from this media content that must be classified by the Board, all other media content may be classified by authorised industry classifiers, including:

- feature-length films not for cinema release and television programmes (for example, films and television programs on DVD, the internet, and television); and
- computer games likely to be classified G, PG and M.

1.43 Chapter 8 proposes that access to all media content—online and offline—that is likely to be R 18+ must be restricted to adults. Content providers should restrict access so that minors are protected from high-level content, even if it is not possible to have all of the content formally classified. The ALRC also proposes that access to content classified R 18+, or X 18+ where it is legal to distribute, must also be restricted to adults. The ALRC proposes that methods of restricting access to online and offline content should be set out in industry codes, approved and enforced by the Regulator. The new scheme should also provide for a principled rule that ensures advertisements for classified content—such as advertisements for films, television programs and computer games—are suitable for their audience. The chapter concludes by considering whether the public display of some media content should be prohibited.

1.44 Chapter 9 considers the classification categories and criteria used to classify content across different media, formats and platforms in Australia. The ALRC proposes that these be consolidated and harmonised, and that the Classification of Media Content Act should provide for the following set of classification categories:

- C (Children);
- G (General);
- PG 8+ (Parental Guidance);
- T 13+ (Teen);
- MA 15+ (Mature Audience);
- R 18+ (Restricted);
- X 18+ (Restricted); and
- RC (Refused Classification).[19]

1.45 The ALRC also proposes that classifiers must assign consumer advice (such as 'Strong violence' or 'Moderate coarse language') to all content they classify, except content classified C or G. Classifiers operating under the proposed National Classification Scheme should also use the one set of 'statutory classification criteria' to

---

19 Proposed classification markings appear in Appendix 3.

make classification decisions, although industry codes of practice may describe the criteria in more detail and explain their application to specific media. The statutory criteria and their elaboration in industry codes should be reviewed every five years in consultation with stakeholders and the community and in light of relevant research.

1.46 Chapter 10 outlines the relevance of the RC category to this Inquiry and describes the legislative framework for RC content. The current scope of the category is discussed and criticisms are noted. The ALRC proposes that the Classification of Media Content Act should provide that, if content is classified RC, the classification decision should clearly state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. Identified in this way, such content may be added to any blacklist of content for the purpose of filtering at the ISP level. The chapter also discusses a pilot study being conducted by the ALRC to research community standards with regard to the current higher level classification categories—MA 15+ up to and including RC.

1.47 Chapter 11 focuses on industry classification codes of practice and proposes that the Classification of Media Content Act enable the development and operation of such codes, consistent with the statutory classification categories and criteria contained in the Act. The intention is that these codes would assist in the interpretation and application of the statutory classification categories and criteria and introduce some additional flexibility to the regulatory scheme. The chapter examines the possible processes for the development of industry classification codes, and proposes mechanisms for the approval and enforcement of codes by the new Regulator. The ALRC also proposes that where an industry classification code of practice relates to media content that must be classified or access to which must be restricted, the Regulator should have power to enforce compliance.

1.48 Chapter 12 discusses the ALRC's proposal for a new Regulator with primary responsibility for regulating the new National Classification Scheme. The Regulator would be responsible for a range of functions that are currently performed by the Classification Branch of the Attorney-General's Department, the Director of the Classification Board, and the ACMA. The Regulator would also have a range of new functions necessary for the operation of the scheme. The Regulator would be responsible for most regulatory activities related to the classification of media content—both offline and online. The Classification Board would be retained as an independent statutory body responsible for making some classification decisions and auditing decisions made by industry classifiers.

1.49 Chapter 13 discusses the legislative and constitutional basis for the existing Commonwealth-state cooperative scheme for the classification of publications, films and computer games and the *Broadcasting Services Act*. The chapter proposes that the new Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia, supplemented by state referrals of power, if necessary.

1.50 Chapter 14 discusses enforcement of classification laws. An important part of the rationale for having a new National Classification Scheme is to avoid inconsistency in enforcement of classification laws and associated penalties. The ALRC concludes

that the Australian Government should, therefore, be responsible for the enforcement of classification laws and makes proposals for a regime of offences and penalties. If the Australian Government determines that the states and territories should retain enforcement powers, the ALRC proposes a new intergovernmental agreement be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification decisions made under the new Classification of Media Content Act, but only with respect to publications, films and computer games.

How to make a submission

1.51 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.52 There is no specified format for submissions and they may be marked 'confidential' if preferred. The ALRC prefers electronic communications and submissions, and strongly encourages stakeholders to make use of the online submission form available on the ALRC website. However, the ALRC will gratefully accept anything from handwritten notes to detailed commentary and scholarly analyses on relevant laws and practices. Even simple dot-points are welcome. Submissions will be published on the ALRC website, unless they are marked confidential.[20]

1.53 The ALRC appreciates that tight deadlines for making submissions place considerable pressure upon those who wish to participate in ALRC inquiries. Given the deadline for delivering the final report to the Attorney-General at the end of January 2012, and the need to consider fully the submissions received in response to this Discussion Paper, all submissions must be submitted on time—by Friday 18 November 2011.

1.54 It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries. The quality of the outcomes is assisted greatly by the understanding of contributors in needing to meet the deadline imposed by the reporting process itself. This Inquiry is no exception.

> In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in this Discussion Paper must reach the ALRC by **Friday 18 November 2011.**
>
> The ALRC encourages stakeholders to use the online submission form available at http://www.alrc.gov.au/content/online-submission-national-classification-review-discussion-paper.
>
> Submissions not marked confidential will be published on the ALRC website.

20 Submissions provided only in hard copy may not be published on the website.

2. The Current Classification Scheme

Contents

Summary 31
History of censorship and classification 31
Classification cooperative scheme 32
The Classification Board and the Classification Review Board 33
Broadcasting Services Act 33
Broadcasting industry codes and standards 34
Schedules 5 and 7 of the *Broadcasting Services Act* 34
Internet industry codes 35
Assessing the current scheme 36
Positive aspects of the current scheme 37
Negative aspects of the current scheme 39
The need for fundamental reform 42
ALRC's views 43

Summary

2.1 This chapter begins by briefly describing the historical background to current classification laws. The chapter then describes the framework of the current National Classification Scheme, comprised of the classification cooperative scheme for publications, films and computer games; and classification-related law as it applies to online and mobile content under the *Broadcasting Services Act*. The roles of the Classification Board, the Classification Review Board and the Australian Communications and Media Authority (the ACMA) are outlined, along with that of industry under co-regulatory codes of practice for online and broadcast content. The chapter assesses the current scheme, looking at aspects that work reasonably well and those that are not working well and are in need of reform. The chapter concludes by noting the strong arguments made to the ALRC about the need for fundamental reform and for a new National Classification Scheme.

History of censorship and classification

2.2 The history of censorship and classification in Australia is set out elsewhere and will not be recounted in detail in this Discussion Paper.[1] A précis of this history might

---

1 A useful brief history is provided in Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), ch 2. Other historical accounts include I Bertrand, *Film Censorship in Australia* (1978); B Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945* (1997).

start with important reforms that took place after the landmark 1968 case *Crowe v Graham*, which involved the interpretation of 'obscene' and 'indecent' under NSW indecent publications legislation. The High Court of Australia upheld the use of a 'community standards' test—referring to offence to the 'modesty of the average man'—rather than adopting the common law test of obscenity, based on the 'tendency to deprave and corrupt' and precedents dating back to 1868.[2]

2.3 Subsequent to *Crowe v Graham*, reforms first announced by the Minister for Customs and Excise, the Hon. Don Chipp MP in 1970, and enacted by the Whitlam Government in 1972, saw the Australian approach shift from a closed and highly interventionist model of censorship into a more open, liberal and accountable regime, based around classification as the norm and direct banning of material as the exception.

2.4 The National Classification Scheme has, since the early 1970s, primarily revolved around the principle of classification rather than censorship, although any classification scheme is also likely to involve some censorship, based upon what has come to be known as the 'community standards' test. Gareth Griffith has described the distinction in these terms:

> Prima facie classification implies that nothing is banned [but] only restricted if necessary. Classification has certainly a more neutral flavour than the more pejorative term censorship ... Whereas censorship is suggestive of public order and idea of the public good, classification is associated with the facilitation of informed choice in a community of diverse standards.[3]

2.5 The ALRC, in the 1991 report *Censorship Procedure* (ALRC Report 55), made the observation that much of what had occurred since the 1970s has involved classification rather than censorship, and on that basis, recommended renaming the Film Censorship Board as the Classification Board, and the Censorship Review Board as the Classification Review Board:

> Rather than focusing on preventing material from being disseminated, policy now concentrates more on classifying films and publications into defined categories, with restrictions on dissemination only being imposed at the upper limits of what is considered acceptable by the general community.[4]

Classification cooperative scheme

2.6 The classification cooperative scheme for films, publications and computer games was implemented through the *Classification (Publications, Films and Computer Games) Act 199*5 (Cth) (*Classification Act*) and complementary state and territory enforcement legislation. The *Classification Act* is supplemented by a number of regulations, determinations and other legislative instruments, including the:

- National Classification Code (May 2005);

---

2 *Crowe v Graham* (1968) 121 CLR 375, 379.
3 G Griffith, *Censorship in Australia: Regulating the Internet and Other Recent Developments* (2002), 3.
4 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [2.6].

- Guidelines for the Classification of Publications 2005 (Cth); and
- Guidelines for the Classification of Films and Computer Games (Cth).

2.7 The cooperative classification scheme is underpinned by an Intergovernmental Agreement on Censorship, agreed to by the Commonwealth and all states and territories (the Intergovernmental Agreement). The Intergovernmental Agreement provides that each state and territory may choose how and whether to implement any particular classification decision, and requires that all ministers consider and approve any amendments to the National Classification Code or Guidelines.[5]

The Classification Board and the Classification Review Board

2.8 The Classification Board is the primary body classifying films, publications and computer games in Australia. The Board may comprise up to 30 members, and currently has 12 members, including a Director and Deputy Director. The Governor-General appoints all members for either full or part-time appointments, having regard to ensuring the Board 'is broadly representative of the Australian community'.[6] Currently, members are appointed for three-year terms, and may be reappointed, but they can serve no longer than seven years. The Board charges fees for classifying material prescribed by regulation.

2.9 The Classification Review Board is an independent body comprised of part-time members which reviews Classification Board decisions on application. Like the Classification Board, its members are intended to be broadly representative of the Australian community. The Classification Review Board considers a much smaller volume of material than the Board: in 2009–10, the Classification Review Board classified four films for public exhibition, one film not for public exhibition, two computer games and one publication.[7]

Broadcasting Services Act

2.10 The *Broadcasting Services Act 1992* (Cth) came into force in 1993, replacing the *Broadcasting Act 1942* (Cth). The Act contains an objects section that aims to state the goals and principles of broadcasting policy, and a statement of regulatory policy expressing a commitment to 'light touch' regulation intended to promote greater competition, new technologies and the development of new services.[8]

2.11 The *Broadcasting Services Act* also devolved responsibility for the development of program classification, and the handling of complaints, to industry bodies in a co-regulatory framework, through the development of industry codes of practice approved and registered with the ACMA.

---

5 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995) pt III.
6 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 48.
7 Classification Review Board, *Annual Report 2009–10*, 62.
8 *Broadcasting Services Act 1992* (Cth) ss 3, 4.

Broadcasting industry codes and standards

2.12 In developing classification standards for television programs, broadcasters are required to take account of:

- the objects of the *Broadcasting Services Act* (s 3);
- code of practice requirements stated in the *Broadcasting Services Act* (s 123);
- classification standards for other media, as administered by the Classification Board; and
- outcomes of consultation with the community and the ACMA about these standards.

2.13 The commercial television code of practice is developed and administered by Free TV Australia as the relevant industry body for free-to-air commercial networks. The subscription television codes of practice, the subscription narrowcasting codes of practice, and the open narrowcasting codes of practice are developed and administered by the Australian Subscription Television and Radio Association (ASTRA). The Australia Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) codes of practice are developed and approved within those organisations. These codes are discussed in more detail in Chapter 11.

Schedules 5 and 7 of the *Broadcasting Services Act*

2.14 The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) established the legislative framework for online content regulation in Australia. It extended the co-regulatory system for broadcasting to online content, combining this with a complaints-based mechanism for content assessment.[9]

2.15 Schedule 5 of the *Broadcasting Services Act* sets out provisions in relation to internet content hosted outside Australia, and sch 7 does so in relation to content services, including some content available on the internet and mobile services hosted in or provided from Australia. Broadly, the scheme places constraints on the types of online content that can be hosted or provided by internet service providers (ISPs) and content service providers.

2.16 Schedule 7 defines ‘prohibited’ or ‘potentially prohibited’ content.[10] Generally, ‘prohibited content’ is content that has been classified by the Classification Board as X 18+ or RC and, in some cases, content classified R 18+ or MA 15+ where the content is not subject to a ‘restricted access system’. Content is ‘potential prohibited content’ if the content has not been classified by the Classification Board and, if it were to be classified, there is a substantial likelihood that it would be prohibited content.

---

9 Overviews of online content regulation in Australia can be found in Coroneos (2008) ‘Internet Content Policy and Regulation in Australia’ *op. cit.*, and K Crawford and C Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011), 53–57.

10 *Broadcasting Services Act 1992* (Cth) sch 7 cls 20, 21.

2.17 Under the *Broadcasting Services Act*, the ACMA investigates complaints about online content that the complainant believes to be 'prohibited content' or 'potential prohibited content' with reference to the National Classification Code. The Classification Board will classify online content on receipt of an application for classification.

2.18 The ACMA may choose to investigate on its own initiative, and must investigate all complaints that are not frivolous, vexatious, made in bad faith, or made to undermine the effective administration of the schedules.[11]

2.19 The action that the ACMA must take depends, among other things, on where the content is located. Where prohibited content is hosted in Australia, the ACMA must issue a final notice to the content service provider seeking removal of the content, the link or service, or requiring the use of a restricted access system, depending on the nature and classification category of the content.[12] The ACMA must issue an interim notice for Australian-hosted potential prohibited content and apply to the Classification Board for classification of the content.[13] Content hosts must undertake the action required by the notice by 6pm the next business day, and financial penalties apply for failing to comply with a notice.[14] Where Australian-hosted prohibited or potential prohibited content is also considered to be sufficiently serious, the ACMA must notify law enforcement agencies.

2.20 Where prohibited or potential prohibited content is hosted outside Australia, the ACMA notifies filter software makers accredited by the internet industry in accordance with the code of practice in place under sch 5.[15] The filters are made available by internet service providers to their customers for free or on a cost recovery basis. Where prohibited or potential prohibited content hosted overseas is also considered to be sufficiently serious, the ACMA notifies the member hotline in the country where the content appears to be hosted. Where no member hotline exists, the ACMA notifies the Australian Federal Police for action through Interpol.

Internet industry codes

2.21 Schedules 5 and 7 of the *Broadcasting Services Act* are intended to establish a co-regulatory framework based on industry codes developed by sections of the internet industry.

2.22 Under sch 5, the matters that must be dealt with by industry codes for internet service providers include enabling parents to better monitor the online activities of their children, provision of filtering technologies, content labelling, legal assessments of content, and complaints handling procedures.[16]

---

11 Ibid sch 7 cl 43.
12 Ibid sch 7 cls 47, 56, 62.
13 Ibid sch 7 cl 47(2)–(5).
14 Ibid sch 7 cl 53.
15 Ibid sch 5 cl 40.
16 Ibid sch 5 cl 60.

2.23 Under sch 7, the matters that must be dealt with by industry codes for commercial content service providers include the engagement of trained content assessors; and ensuring that content is assessed by these content assessors. Matters that may be dealt with include complaint-handling procedures, promoting awareness of safety issues, and assisting parents to supervise and control children's access to online content.[17]

2.24 In accordance with schs 5 and 7, the Internet Industry Association (IIA) has developed two industry codes—the Internet and Mobile Content Code[18] and the Content Services Code.[19] The codes impose various obligations on content hosts, ISPs, mobile carriers, and content service providers. Subjects addressed include:

- obligations in responding to notices;
- requirements about what information must be provided to users;
- requirements about making filters available;
- requirements about establishing complaints procedures; and
- the appropriate use of restricted access systems.

2.25 Peter Coroneos, former chief executive of the IIA, has described the IIA codes as 'promoting industry facilitated user empowerment' and 'designed to achieve the broad objectives of the legislation without significant burden on or damage to the industry'.[20]

Assessing the current scheme

2.26 In any set of recommendations for a new National Classification Scheme, there needs to be not only a consideration of the changing external environment and the underlying principles that inform proposed recommendations, but also a rigorous evaluation of both the nature of the problems that policy makers are seeking to address, and the ways in which existing policy instruments are working – or failing to work – in approaching those problems.

2.27 In the Australian Public Service Commission's paper, *Smarter Policy*, these questions are addressed in the following way:

(1) A rigorous analysis requires an assessment that the policy intervention will achieve net benefits for the community after taking account of its impacts. The identification of a social, economic or environmental problem does not justify government intervention in itself. Policy makers need to demonstrate that the benefits of intervening outweigh the costs.

---

17 Ibid sch 7 cls 81–82.

18 Internet Industry Association, *Internet Industry Codes of Practice: Codes for Industry Co-regulation in the Areas of Internet and Mobile Content* 2005.

19 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008).

20 P Coroneos, 'Internet Content Policy and Regulation in Australia' in B Fitzgerald and others (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008), 58.

(2) Policy makers do not start with a clean slate. The choice of policy instruments is invariably constrained, to some extent, by the existing array of government interventions. Thus an audit of current policy instruments already operating in the policy space is a prerequisite for a good policy design process. This audit would ideally include interventions by all levels of government and the full range of policy instruments—both regulatory and non-regulatory.[21]

2.28 The Terms of Reference require the ALRC to inquire into whether the existing National Classification Scheme continues to provide an effective framework for the classification of media content in Australia. Some of the perceived positive and negative aspects of the current scheme are discussed below.

Positive aspects of the current scheme

2.29 The classification cooperative scheme that came into place in 1995 was a significant improvement. Before then, there existed a complex network of Commonwealth, state and territory laws that bore only a limited relationship to one another and which meant, in practice, that the classification of a single film could involve 13 pieces of legislation across various jurisdictions.

2.30 There was also a lack of commonality between the classification guidelines and markings that applied for films and those for television.[22] John Dickie, the last Chief Censor and the first Director of the Office of Film and Literature Classification, observed that the 1995 reforms had considerable merit, and that because of 'the investment by Government and industry over many years to inform media consumers', the ALRC Inquiry

> should try to improve the system rather than start all over again. It took many years for the viewing public to synthesise the classification categories for film and DVDs with those for television when they were altered in the early 90's.[23]

2.31 Under the current system, the Classification Board makes over 7,000 decisions within prescribed time limits every year, and few of these decisions attract controversy.[24] Commentators have noted that distributors generally have realistic expectations about eventual classifications, particularly for films and DVDs.[25]

2.32 The public generally knows and understands the current classification system. In a 2005 survey undertaken by the Office of Film and Literature Classification, virtually

---

21 Australian Public Service Commission, *Smarter Policy: Choosing Policy Instruments and Working with Others to Influence Behaviour* (2009).

22 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), 55 (1991), [1.11].

23 J Dickie, *Submission CI 582*, 11 July 2011.

24 From 1 July 2009 to 30 June 2010, the Classification Board received 7,302 applications, including applications to classify 4,820 films, 1,101 computer games, 291 publications (228 single issue and 63 serial publications), 258 online content referrals from the ACMA, and 88 referrals from enforcement agencies. These figures are generally consistent with the number of applications the Classification Board has received over the previous two years: D McDonald, *Correspondence*, 6 May 2011.

25 See, eg, J McGowan, 'Classified Material' (2007) *Law Society Journal* 22, 22.

all who responded were familiar with the classification system for film and DVDs, and the vast majority believed that classification symbols were useful.[26]

2.33 The Classification Board and the Classification Review Board are independent statutory bodies, operating apart from government, industry, and each other. This formal independence has been viewed as one of the Australian classification system's very important and highly valued features.

2.34 A co-regulatory framework has now operated in broadcast and subscription television for 18 years, and it has strong support from the industries involved. In its submission in response to the Issues Paper, Free TV Australia observed that:

> This system of regulation, which is underpinned by a robust complaints handling process which applies across the Code, the [Children's Television Standard] and the [Australian Association of National Advertisers] Codes, is working well. This is evidenced by the fact that there is a very low level of complaint about programming content (including advertisements), even though commercial free-to-air broadcasters are transmitting content twenty-four hours a day, three hundred and sixty five days a year across nine channels—an annual total of 78,840 broadcast hours. In 2010 Free TV's average daily reach was 13.8 million people. Yet only 834 classification complaints were received for the whole year, with only six upheld by broadcasters. In 2009–2010, the ACMA conducted 85 investigations into commercial television broadcasters, of which only 30 related to classification matters, with only 11 of those resulting in a breach finding.[27]

2.35 The Australian Subscription Television and Radio Association (ASTRA) was also highly supportive of co-regulatory arrangements for subscription television:

> ASTRA supports an approach where general principles and a national framework for content classification are determined by the Government through Parliament, but where content providers are primarily responsible for ensuring compliance with classification and content regulations that may apply. Working within a framework that reflects prevailing community attitudes and standards, content providers are best placed to respond appropriately and in a timely manner to consumer concerns relating to content classification. The current co-regulatory model for subscription television is an example of industry-based content classification regulation that works well both for consumers and broadcasters.[28]

2.36 The ACMA has noted that co-regulatory mechanisms as applied through industry codes can be an important part of any future regulatory framework, as they can, subject to a number of conditions, provide the basis for more efficient and effective ways of achieving policy goals by influencing the behaviour of relevant industry stakeholders.

> Under communications and media legislation, self- and co-regulatory arrangements require industry participants to assume responsibility for regulatory detail within their own sectors, and this is underpinned by clear legislative obligations, with the regulator retaining reserve powers. These arrangements provide flexibility for the ACMA, as the regulator, to exercise a variety of roles dependent on the nature of the

---

26 Office of Film and Literature Classification, *Classification Study* (2005), 6, 17, 32.
27 Free TV Australia, *Submission CI 1214*, 15 July 2011.
28 ASTRA Subscription Television Australia, *Submission CI 1223*, 15 July 2011.

> concern, such as whether the issue is a policy matter or market issue. This includes the flexibility to not intervene to allow market-based solutions to develop, provide advice to government on policy issues, or encourage industry-based solutions. [29]

Negative aspects of the current scheme

2.37 Respondents to the Issues Paper drew attention to specific aspects of the current classification framework that have become dysfunctional, are failing to meet intended goals, and create confusion for the industries involved and the wider community. As these are discussed in more detail in later chapters, they are noted in this chapter as issues requiring attention in a revised National Classification Scheme.

2.38 Major inconsistencies exist in the application of classification guidelines across media platforms. The major anomaly has been in the treatment of computer games as compared to films and publications, with the absence of an R 18+ classification for computer games. This arose out of concerns that existed in 1994 about the possible effects of greater interactivity. This decision, which has only recently been reversed, can be seen as overly restricting the rights of adults to access content on a particular media platform, and as marking a reversion to earlier censorship-based understandings of the role of government.[30]

2.39 Another problem of the current scheme is the pervasive 'double handling' of media content for purposes of classification. Feature films that were classified for cinematic release need to be reclassified when subsequently released as DVDs or in an equivalent home entertainment format, because the content has been 'modified' by virtue of the inclusion of additional features—even if the final classification is in almost all cases the same. For example, television programs that were classified when initially broadcast have to be reclassified by the Classification Board if re-released as a DVD 'box set'. Such activity is costly to the media industries, time consuming for the Classification Board, and diverts resources from other areas of potentially greater public concern.

2.40 The *Classification Act* provides that Commonwealth, state and territory ministers must agree to any amendment to the National Classification Code and on classification guidelines or amendments to those guidelines,[31] and the Intergovernmental Agreement under which the scheme is established and maintained may be amended only by unanimous agreement.[32] This process is time consuming and poorly designed to deal with significant changes in either community expectations or technological advances. Agreement among the Commonwealth, states and territories to the introduction of an R 18+ classification for computer games took over a decade to achieve through the framework of the Standing Committee of Attorneys-General meetings.

---

29 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010), 1.

30 G Griffith, *Censorship in Australia: Regulating the Internet and Other Recent Developments* (2002), 12.

31 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 6, 12.

32 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), cl 3(2).

2.41 While the classification cooperative scheme overcame some of the anomalies in the treatment of media content in different states and territories in Australia, significant differences remain. The sale and distribution of X 18+ material is permitted in the ACT and the Northern Territory, but not in the states, while states have different regulations relating to restricted publications and the sale and display of R 18+ films and computer games. There are also significant differences in enforcement and penalties provisions between states and territories. Some states and territories approach enforcement of classification laws as a criminal matter dealt with by the police, while others, such as the ACT and Queensland, deal with it through trade and commerce related agencies.

2.42 There is evidence of considerable, and growing, non-compliance with Classification Board decisions, and a refusal on the part of distributors to submit submittable publications to the Board. The Issues Paper drew attention to ongoing difficulties in controlling access to, and enforcing penalties for, online material, the distribution of unclassified or incorrectly marked material, distributors not complying with call in notices, the resources that would be required to more effectively investigate and prosecute breaches, and inconsistent enforcement provisions between states and territories.[33]

2.43 The absence of an X 18+ classification for sexually explicit material across Australia means that there is what one submitter described as a significant 'grey line between R 18+ and RC' in the classification scheme.[34] The exhibition and distribution of X 18+ material is permitted in the ACT and the Northern Territory but not in the states, where the possession of such material is permitted, but sale or distribution is prohibited. This has led to the existence of a 'grey market' in publications and DVDs distributed nationally—estimated to be worth about $20–30 million a year.[35] The significance of this 'grey market' becomes even greater as adult content is now largely migrating to the internet, and is distributed on an international basis.

2.44 The breadth of the current Refused Classification (RC) category has been identified as a problem with the current scheme, particularly as it may be applied to online content through a proposed mandatory internet filter or through voluntary filtering activities undertaken by ISPs themselves. The RC category is discussed in detail in Chapter 10. As it currently stands, RC covers material that is illegal under criminal law to produce, distribute or possess—for example, child abuse material—and material that is illegal to distribute but is not illegal to possess—for example, material depicting various sexual fetishes.

2.45 The RC category also covers material that 'promotes, incites or instructs in matters of crime or violence'. This means that material relating to drug use, shoplifting, graffiti or euthanasia can be refused classification on grounds similar to that which

33 See also Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011; Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Estimates: Transcript of Public Hearing* 18 October 2010, 11, 14 (D McDonald).

34 I Graham, *Submission CI 1244*, 17 July 2011.

35 Eros Association, *Submission CI 1856*, 20 July 2011.

would be applied to material advocating murder, rape or terrorist acts. While almost all stakeholders accepted the need for an RC category, many considered the current RC category to be overly broad, too ambiguous in its application, and highly problematic in the context of any proposed mandatory internet filtering.

2.46 The current classification framework potentially applies greater restrictions to online content as compared to similar, or even the same, content in other media formats. Dr Gregor Urbas and Tristan Kelly observed that, under the current *Broadcasting Services Act*

> more content is prohibited online than offline ... With the introduction of iPads and the rise in popularity of digital books, more existing publications are likely to become available over the Internet, and this inconsistent standard will become more problematic.[36]

2.47 At the same time, a complaints-based approach to the classification of online media content, as compared to a statutory requirement to submit content for classification in other media, generates inconsistencies of treatment across media platforms. Lack of clarity in the relationship between online and 'offline' media classification manifests itself in an uncertain relationship between the ACMA and the Classification Board as regulators of media content.

2.48 The ACMA has been responding to an increasing number of complaints about online content. In May 2011 alone, it received 754 complaints, more than the total number of complaints for the entire year of 2006–07. Between 1 July 2010 and 31 May 2011, the ACMA received 4,155 complaints, investigated 3,565 of them, and actioned 1,768 items deemed prohibited or potentially prohibited content.[37] Given the exponential growth in the number of complaints about online content, and the slower growth of the number of films, publications and computer games requiring classification, online investigations will soon exceed the activities of the Classification Board. This raises the issue of whether there should be a single point for all classifications and investigations that operates across all platforms, rather than the current platform-based division of responsibilities.

2.49 Finally, schs 5 and 7 of the *Broadcasting Services Act* have been described as 'highly complex and confusing legislation that is almost incomprehensible'[38] and legally uncertain. Telstra pointed out that, where content is assessed under sch 7, the legislation as currently drafted may involve a costly 'double classification' obligation, which disadvantages Australian online content providers.

> This superfluous 'double classification' obligation for online content creates unnecessary uncertainty for industry participants implementing these arrangements and raises the spectre of prohibitive compliance costs should online content provided by Australian content providers need to be formally classified by the Classification Board ... Australian online content providers subject to this requirement would be put

---

36 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

37 Australian Communications and Media Authority, *Monthly Summary: Online Content Complaints*, May 2011.

38 I Graham, *Submission CI 1244*, 17 July 2011.

> at a major competitive disadvantage to overseas based content providers who would not be subject to these obligations.[39]

The need for fundamental reform

2.50 In the Issues Paper, the ALRC asked whether, in this Inquiry, the focus should be on developing a new framework for classification, or on improving key elements of the existing framework.[40]

2.51 The ALRC's purpose in asking this question was to seek community input on the question of whether incremental 'fine tuning' of the National Classification Scheme was appropriate, or whether more root-and-branch reform of the framework was required.

2.52 The Senate Legal and Constitutional Affairs References Committee, in its report *Review of the National Classification Scheme: Achieving the Right Balance,* argued that fundamental reform of the national classification scheme was required:

> The National Classification Scheme is flawed, and cannot be sustained in its current form. This is primarily because the scheme has not been successful in achieving a uniform and consistent approach to classification in Australia. Further, the current situation where the National Classification Scheme is loosely paralleled by co-regulatory and self-regulatory systems is far from adequate, particularly given the increasing convergence of media.[41]

2.53 Many stakeholders identified the National Classification Scheme as requiring fundamental reform to address the challenges of a convergent media environment. Industry submissions in particular were almost universal in condemning the National Classification Scheme as 'an analogue piece of legislation in a digital world',[42] that has failed to respond to the challenges of media convergence.

2.54 Telstra argued that there was a need for the ALRC to undertake a holistic examination of the National Classification Scheme with the objective of developing a new classification framework for the new media environment:

> Despite its worthy underlying intent, successive Governments have responded to challenges to the system posed by rapid technological change with a series of issue specific regulatory responses. After more than a decade of incremental changes, the National Classification Scheme as it stands today is a complex arrangement of parallel and sometimes overlapping systems of classification ... In this context, rather than seeking to address the issues with the classification scheme that have emerged as a result of rapid technological change with further ad hoc reforms ... the ALRC should undertake a holistic examination of the National Classification Scheme with the

---

39 Telstra, *Submission CI 1184*, 15 July 2011.

40 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 1.

41 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 23.

42 Australian Publishers Association, *Submission CI 1226*, 16 July 2011.

> objective of developing a new classification framework for the modern media environment.[43]

2.55 The Australian Home Entertainment Distributors Association argued that it:

> supports the intent of the Scheme as it currently stands but also strongly supports reform to recognise the realities of digital distribution, simultaneous release of content across platforms, the explosion in volume of content (including user generated) and the current fractured jurisdictional nature of the Scheme. [44]

2.56 The Special Broadcasting Service questioned the continued relevance of an National Classification Scheme that applies different rules for different media platforms:

> The current classification scheme adopts an 'old media' view that applies stricter controls to delivery platforms that previously had greater influence than others and that assumes that consumers have limited control over what they, or their children, watch. These underlying assumptions are, increasingly, less valid and distinctions between distribution platforms will ultimately become meaningless ... There is a need for a framework that applies across platforms in a consistent and equitable manner, and which takes into account the growing availability of tools which enable consumers to control access to content.[45]

2.57 Google observed that there has been a shift from 'vertical media silos' and stand-alone media platforms, to what they termed a 'horizontal model of networks, platforms and content':

> The media environment has changed dramatically in the twenty years since the ALRC last considered censorship and classification. The existing classification regime was developed in an age where the media landscape was characterised by technologically distinct vertical media silos: radio, television, Internet etc. These media publishers created the content to be consumed by a passive audience.
>
> Today's media landscape is very different. The 'audience' of passive recipients of content has been replaced by citizen creators and citizen journalists engaging interactively with media platforms/services such as YouTube, Facebook, Yahoo!7 and ninemsn, to create and distribute content. Vertical media silos have been replaced by a horizontal, converged landscape of platforms, content providers and users, facilitated by communications networks ... In this changed environment, how we determine the appropriate policy approach to regulation of content needs to be fundamentally reconsidered.[46]

ALRC's views

2.58 The ALRC believes that the major principles that have informed media classification in Australia, such as balancing the rights of adults to make informed media choices with the protection of children and restriction of access to some media content on the basis of community standards, continue to be relevant. While a convergent media environment presents major new challenges for the National

---

43 Telstra, *Submission CI 1184*, 15 July 2011.
44 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.
45 SBS, *Submission CI 1833*, 22 July 2011.
46 Google, *Submission CI 2336*, 22 July 2011.

Classification Scheme, there is still an important role for the classification of media content, and a community expectation that media content will continue to have classification markings based on well understood guidelines.

2.59 In the context of media convergence, there is a need to develop a framework that focuses upon media content rather than delivery platforms, and can be adaptive to innovations in media platforms, services and content. Failure to do so is likely to disadvantage Australian digital content industries in a highly competitive global media environment.

2.60 The current classification framework is highly fragmented, with different guidelines and regulatory arrangements for different media platforms, and unclear lines of administrative responsibility. The relationship between the Commonwealth, states and territories in particular requires significant reorganisation, and there is a case for a new Act governing classification, as well as revised regulatory arrangements.

2.61 The costs and regulatory burden of the current classification framework align poorly to community standards and expectations. There is too much top-down regulation of some media content and platforms, including double handling of the same content, while regulatory responsibilities are unclear in relation to other media.

2.62 The ALRC is of the view that a more co-regulatory approach would better align the activities of government agencies to community expectations, by enabling a greater role for industry in classifying content, and allowing government regulators to focus on the content that generates the most concern in light of community standards and the protection of children.

3. Media Convergence and the Transformed Media Environment

Contents

Summary 45
Media convergence and the transformed media environment 45
Increased access to high-speed broadband internet 47
Digitisation of media products and services 47
Convergence of media platforms and services 48
Globalisation of media platforms, content and services 49
Acceleration of innovation 50
Rise of user-created content 51
Greater media user empowerment 52
Blurring of public/private and age-based distinctions 53
Media convergence and 'broken concepts' in legislation 54

Summary

3.1 This chapter outlines factors in the media environment that necessitate reform of media classification and the development of a new National Classification Scheme. It identifies the range of trends which have been associated with media convergence, including increased access to high-speed broadband internet, digitisation, globalisation, accelerated innovation, the rise of user-created content and the changing nature of the media consumer, and the blurring of distinctions between public and private media consumption. It also draws attention to findings arising from the Convergence Review, and recent work undertaken by the Australian Communications and Media Authority (the ACMA) on 'broken concepts' in existing broadcasting and telecommunications legislation and their relevance to media classification.

Media convergence and the transformed media environment

3.2 Convergence has been defined as

> the interlinking of computing and ICTs, communication networks, and media content that has occurred with the development and popularisation of the Internet, and the convergent products, services and activities that have emerged in the digital media space. Many see this as simply the tip of the iceberg, since all aspects of institutional activity and social life—from art to business, government to journalism, health and

> education, and beyond—are increasingly conducted in this interactive digital media environment, across a plethora of networked ICT devices.[1]

3.3 In their book *Media Convergence: Networked Digital Media in Everyday Life*, Graham Meikle and Sherman Young observe that convergence can be understood in four dimensions:

- technological—the combination of computing, communications and content around networked digital media platforms;
- industrial—the engagement of established media institutions in the digital media space, and the rise of digitally-based companies such as Google, Apple, Microsoft and others as significant media content providers;
- social—the rise of social network media such as Facebook, Twitter and YouTube, and the growth of user-created content; and
- textual—the re-use and remixing of media into what has been termed a 'transmedia' model, where stories and media content (for example, sounds, images, written text) are dispersed across multiple media platforms.[2]

3.4 While technological change is a constant feature of modern economies, the changes associated with convergence, digitalisation and networking have been seen as providing the basis for a new 'techno-economic paradigm'. This is a term developed by innovation economists to refer to 50-year cycles of changes to the technological and knowledge base of societies. A techno-economic paradigm is defined as:

> A cluster of inter-related technical, organisational, and managerial innovations whose advantages are to be found not only in a new range of products and systems, but most of all in the dynamics of the relative cost structure of all possible inputs to production.[3]

3.5 Historically, the major techno-economic paradigms have been: the Industrial Revolution (1780s–1830s); the Age of Steam and Railways (1840s–1870s); the Age of Steel, Electricity and Heavy Engineering (1880s–1920s); the Age of Oil, the Automobile and Mass Production (1930s–1980s); and the Age of Information and Telecommunications (1990s–present).[4]

3.6 The rise of a new techno-economic paradigm is invariably disruptive, as it challenges established business models, industry structures, organisational frameworks and public policy settings. As it generates losers as well as winners, and disrupts the institutional status quo associated with established institutional and social arrangements, there is invariably conflict and disagreement in the process of social adaptation to technological and economic change.

---

1 T Flew, *New Media: An Introduction* (3rd ed, 2008), 22.

2 G Meikle and S Young, *Media Convergence: Networked Digital Media in Everyday Life* (2011).

3 M Castells, *The Rise of the Network Society: The Information Age—Economy, Society and Culture Volume 1* (1996), 60–61.

4 C Perez, 'Technological Revolutions and Techno-Economic Paradigms' (2010) 34 *Cambridge Journal of Economics*, 185–202.

> Each great surge of development involves a turbulent process of diffusion and assimilation. The major incumbent industries are replaced as engines of growth by new emerging ones; the established technologies and the prevailing paradigm are made obsolete and transformed by the new ones; many of the working and management skills that had been successful in the past become outdated and inefficient ... Such changes in the economy are very disturbing of the social status-quo ... Imbalances and tensions resulting from the technological upheaval ... end up creating conditions that require an equally deep transformation of the whole institutional framework.[5]

3.7 The *Convergence Review: Emerging Issues Paper* drew attention to the extent to which key stakeholders in Australia's media and communication industries had identified convergence as having a transformational impact on their sectors, and the need for radical changes to the policy framework in response to such transformations:

> Australia's communications sectors are undergoing profound change as a result of convergence. Existing regulatory arrangements built around industry 'silos' are challenged by new technologies, market structures and business models. In this committee's view it is likely that *revolutionary* change to the existing policy framework will be needed to respond to convergence.[6]

Increased access to high-speed broadband internet

3.8 As of December 2010, there were 10.45 million active internet subscribers in Australia, of which 8.15 million were household subscribers and 2.3 million were business and government subscribers. This figure had grown by 17% from 8.95 million in December 2009. Nearly 15.1 million Australians aged 14 or over (83% of the population) went online during the December quarter of 2010, and 71% of internet users went online at least once a day. Approximately 3.1 million Australians aged 14 or over accessed the internet via a mobile phone handset during December 2010, as compared to 1.9 million during December 2009.

3.9 Australians are also accessing the internet through higher-speed connections: 46% of household subscribers are accessing services with a maximum download speed of 8Mbps or higher, while the number of dial-up subscribers declined by 21% over 2009–2010, with about 18.8 gigabytes of data being downloaded per internet subscriber in December 2010, up by 28.8% on the previous year, and with major growth in the downloading of video content.[7]

Digitisation of media products and services

3.10 Associated with rapidly increasing internet usage by consumers and business is the digitisation of all media products and services. It is estimated that 48 hours of video are uploaded every minute onto YouTube, and three billion videos are viewed every day worldwide from that site alone. In Australia, there are an estimated six million

---

5 Ibid, 199.

6 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Emerging Issues Paper* (2011), 11.

7 All figures are taken from Australian Communications and Media Authority, *The Internet Service Market and Australians in the Online Environment* (2011).

YouTube users, watching over 200 million videos a month. The Apple iTunes store now sells almost 10 million songs a day, making it by far the major music retailer worldwide.

3.11 At a more general level, Deloitte Access Economics estimated that in 2010, the direct contribution of the internet to the Australian economy was approximately $50 billion, or 3.6% of Australia's Gross Domestic Product. It found that 190,000 people were directly employed in occupations related to the internet, ranging from internet hardware and software industries to online information services, IT software and consulting, online advertising, government and e-commerce activities. This report also indicated that benefits to households, business and government arising from the use of the internet to access, operate, purchase and deliver goods, services and information were about $80 billion in 2010.[8]

Convergence of media platforms and services

3.12 Convergence of media platforms and services is now a feature of all established media, as well as being a core feature of new media. In the case of news media, for example, the top five Australian online news sites—news.com.au, ninemsn.com.au, smh.com.au, abc.net.au and theage.com.au—all rank among the top 25 Australian websites in terms of traffic, and an estimated 4.35 million users per month visit at least one of these sites.[9] For all of these media organisations, their digital content services are now very much at the heart of their news operations, and these patterns are intensifying.

3.13 At the same time, media convergence has increased the tendency towards media globalisation. In its submission, Telstra observed that, over the period from October 2009 to October 2010, the iTunes site attracted four times the number of video downloads of the largest Australian providers (ABC iView, Yahoo!7 and NineMSN), and that its viewers spent over 10 times longer on iTunes than on the equivalent Australian sites.[10]

3.14 Media convergence has major policy consequences. In its review of policies for audio-visual media, the Organisation for Economic Co-operation and Development (OECD) identified four fundamental changes in the media policy environment in the context of convergence:

- media policy needs to be premised upon content abundance and increased media competition, rather than upon distribution scarcity and monopolistic or oligopolistic media markets;
- technological changes generate new challenges for maintaining technology-neutral or network-neutral media regulations;

8 Deloitte Access Economics, *The Connected Continent: How the Internet Is Transforming the Australian Economy* (2011).
9 Data taken from Alexa website <http://www.alexa.com/topsites/countries/AU> at 19 July 2011.
10 Telstra, *Submission CI 1184*, 15 July 2011.

- media regulations can have unintended consequences in advantaging or disadvantaging some platforms, services and providers as compared to others engaged in comparable activities; and
- media markets have become more international, and national regulations may not be compatible with these international media and communications markets.[11]

3.15 The OECD therefore proposes as a guide to developing policy and regulatory instruments in a convergent media environment that:

> New developments do not imply that existing regulations need to extend their coverage over other platforms and services ... [I]t is important that instruments used do not hinder the positive developments and aspects of convergence while also being effective, robust and flexible.[12]

Globalisation of media platforms, content and services

3.16 The globalisation of media platforms, content and services is also a critical feature of the convergent media environment. At one level, it can be argued that media globalisation is not a new phenomenon. Hollywood movies and American television programs were a feature of the global media landscape for most of the 20th century, and this led to extended discussions worldwide about the risks of cultural domination and 'cultural imperialism'.

3.17 At the same time, local audiences have frequently displayed a preference for culturally relevant local media content where it is available.[13] In the Australian context, television ratings data consistently shows that locally-produced programs dominate the list of the top 20 watched shows, with sporting events, news and current affairs programs, drama programs such as *Winners and Losers*, and competition reality programs such as *Masterchef* and *Australia's Got Talent*, dominating the ratings lists. In the week of 3–9 July, 2011, for example, there was only one imported television program in the top 20 list—the British drama series *Downton Abbey*.[14]

3.18 What has changed has been the extent to which digital media content can be sourced, distributed and accessed from any point in the world to any other point in the world. This has led to the rise of media platforms and content distributors such as YouTube, Facebook, Twitter and Apple iTunes that sit across national jurisdictions.

3.19 For much of the 20th century, media regulations could be nationally based, as media services largely operated within existing territorial jurisdictions, and were therefore clearly subject to the laws and regulations of a single nation-state, even when

---

11 Organisation for Economic Co-operation and Development, *Policy Considerations for Audio-Visual Content Distribution in a Multiplatform Environment* (2007), 17–18.

12 Ibid, 18.

13 For an argument of this nature, see J Tunstall, *The Media Were American: U.S. Mass Media in Decline* (2008).

14 See OzTAM, *Consolidated Metropolitan Top 20 Programs: 5 City Ranking Report—Free To Air Only, Week 28, 2011* <http://www.oztam.com.au/documents/2011/OzTAM-20110703-EMetFTARankSumCons.pdf> at 20 July 2011.

they operated as multinational corporations. The ACMA has described the resulting internationalisation of content distribution in relation to the mobile applications ('apps') market in these terms:

> The mobile applications market functions on both a national and global scale, and this has implications for regulation in Australia. The app stores analysed for this paper are all based overseas, which is representative of the market as a whole at this time. App developers are also based in multiple international jurisdictions.[15]

3.20 In the 21st century, a range of network-based media platforms and services operate on a global scale in real time since, as the OECD has observed, 'the Internet has achieved global interconnection without the development of any international regulatory regime'.[16]

3.21 The challenges that this uncoupling of global internet-based media and national legal and regulatory systems present have important implications for all forms of media content regulation in Australia, including the National Classification Scheme. This point has been noted by Associate Professor Kate Crawford and Professor Catharine Lumby in their paper, *The Adaptive Moment*:

> Nation state governments clearly have a remit to enforce the laws of their country and to protect public policy priorities when it comes to cultural and social parameters. Their ability to enforce this remit is restricted due to the sheer volume of media content as well as the decentralisation and vast number of media producers.[17]

Acceleration of innovation

3.22 There is an accelerated rate of innovation in the context of a knowledge-based economy, in which ideas and innovation are increasingly the drivers of economic growth. The World Intellectual Property Office has observed, for example, that the number of patent applications worldwide has grown from about 1 million in 1995 to 1.9 million in 2008, and the number of patents granted has grown from 450,000 in 1995 to 750,000 in 2008.[18]

3.23 In discussing the economics of the knowledge society, Paul David and Dominique Foray relate the acceleration of knowledge production to the interrelationship between four developments:

- The growing share of intangible capital—including investment in education and training, research and development, and information and coordination as well as health expenditures—as compared to tangible capital in total capital formation. They estimate that the stock of intangible capital first exceeded that of tangible capital in the United States in 1973, and has continued to grow since then.

---

15 Australian Communications and Media Authority, *Emerging Business Models in the Digital Economy: The Mobile Applications Market* (2011), 15.

16 Organisation for Economic Co-operation and Development, *Communiqué on Principles for Internet Policy-making*, OECD High Level Meeting on The Internet Economy: Generating Innovation and Growth, Paris, 29–30 June 2011, 3.

17 K Crawford and C Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011), 40.

18 World Intellectual Property Organization, *World Intellectual Property Indicators* (2010), 33.

- The growing speed and intensity of innovation, and the increasing diversity of sources of innovation, including users themselves as co-creators of new or improved products and services.
- The ICT revolution, which has fundamentally transformed the conditions for creating, storing, accessing, distributing and reusing information and data.
- The rise of knowledge-based communities and global knowledge networks, where information can be easily shared and re-used, and where collaboration can occur that is not reliant upon physical co-presence in particular geographical locations.[19]

3.24 The media industries, broadly defined, have been at the centre of these developments. In its survey of corporate executives' responses to the global digital economy, Oxford Economics found that the three business sectors that anticipated the most dramatic transformations over a five-year timeframe were: IT and technology; telecommunications; and entertainment, media and publishing.[20]

Rise of user-created content

3.25 An important shift in the media ecology associated with convergence is the rise of user-created content, and a shift in the nature of media users from audiences to participants.

3.26 In its 2007 report, *Participative Web: User-Created Content*, the OECD observed that,

> User-created content is already an important economic phenomenon despite it originally being largely non-commercial. The spread of [user-created content] and the amount of attention devoted to it by users appears to be a significant disruptive force for how content is created and consumed and for traditional content suppliers. This disruption creates both opportunities and challenges for established market participants and their strategies.
>
> The more immediate economic impacts in terms of growth, entry of new firms and employment are currently with ICT goods and services providers and newly forming [user-created content] platforms. New digital content innovations seem to be more based on decentralised creativity, organisational innovation and new value-added models, which favour new entrants, and less on traditional scale advantages and large start-up investments.[21]

3.27 The OECD refers to the wider social implications of the rise of user-created content in these terms:

> The Internet as a new creative outlet has altered the economics of information production, increased the democratisation of media production and led to changes in the nature of communication and social relationships (sometimes referred to as the

---

19 P David and D Foray, 'An Introduction to the Economics of the Knowledge Society' (2002) 54(171) *International Social Science Journal* 9, 9–23.

20 Oxford Economics, *The New Digital Economy: How It Will Transform Business* (2011), 10.

21 Organisation for Economic Co-operation and Development, *Participative We and User-Created Content: Web 2.0, Wikis and Social Networking* (2007), 11.

> 'rise—or return—of the amateurs'). Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially give rise to increased user autonomy, increased participation and increased diversity.[22]

3.28 Associate Professor Axel Bruns has referred to the rise of the 'produser', or the internet user who is both a user and a creator of online content.[23] Charles Leadbeater and Paul Miller have referred to such trends as the 'pro-am revolution' where the tools of content creation become cheaper and simpler to use, thereby blurring distinctions between 'amateurs' and 'experts'.[24]

Greater media user empowerment

3.29 The rise of user-created content, and the shift in the nature of audiences towards a more participatory media culture, is associated with greater user control over their individual media environment. This is partly related to a greater diversity of choices of media content and platforms, but also in the ability to achieve greater personalisation of the media content that one chooses to access.

3.30 Henry Jenkins of the University of Southern California has described the relationship between media convergence and user empowerment, and its implications for traditional media companies, as follows:

> Convergence requires media companies to rethink old assumptions about what it means to consume media, assumptions that shape both programming and marketing decisions. If old consumers were assumed to be passive, the new consumers are active. If old consumers were predictable and stayed where you told them to stay, then new consumers are migratory, showing a declining loyalty to networks or media. If old consumers were isolated individuals, the new consumers are more socially connected. If the work of media consumers was once silent and invisible, the new consumers are now noisy and public.[25]

3.31 The capacity for more personalised media is strongly related to the internet, but it is also increasingly characteristic of more traditional media platforms, such as the increasing number of Australian households with some form of personal video recorder (PVR). OzTAM observes that the percentage of Australian households with a PVR increased from 31% of metropolitan households in July 2010 to 43% in July 2011.[26] PVRs include FOXTEL IQ2, Austar MyStar and TiVo, and as an increasing number of new digital television purchases take the form of 'smart TVs', this share is expected to increase significantly.

3.32 The significance of PVRs is that they enable household access to programs of choice to be less dependent upon the scheduling decisions of the television networks. They change the television viewing experience from one where the viewer faces a wide range of programs available at a given time, to an arrangement of greater consumer

---

22 Ibid, 12.

23 A Bruns, *Blogs, Wikipedia, Second Life, and Beyond: From Production to Produsage* (2008).

24 C Leadbeater and P Miller, *The Pro-Am Revolution: How Enthusiasts Are Changing Our Economy and Society* (2004). See also C Leadbeater, *We-Think: Mass Innovation, Not Mass Production* (2008).

25 H Jenkins, *Convergence Culture: Where Old and New Media Collide* (2006), 18–19.

26 OzTAM, *Digital Terrestrial Television and PVR Penetration* <http://oztam.com.au/Documents/2011/PercentageOfHouseholdsEstimates2011p7.pdf> at 26 July 2011.

choice about what to view and when. Importantly, such devices also include parental locks, giving parents greater potential to control the access that their children have to material accessed from such platforms.

Blurring of public/private and age-based distinctions

3.33 The eighth and final driver of change associated with media convergence is the blurring of distinctions between public and private, and of age-based restrictions to media access. Historically, there has been more extensive regulation applied to those media which have been felt to be either publicly available or distributed, as with cinema, radio and television, than towards print media (books, newspapers, magazines) whose distribution and consumption were considered to be more private and personal in nature. In 1976, the Green Report into Australian broadcasting observed that:

> The public own the airwaves ... [and] since frequencies are scarce, and the broadcast media are influential, to grant a broadcast licence is to bestow a privilege. This privilege carries with it an obligation to provide the public with programs which meet the standards it expects.[27]

3.34 While expectations that the media continue to meet community standards remains important, the distinctive features of different media platforms are now less clear-cut. Newspapers, magazines, audiovisual media content, music and film are increasingly distributed and consumed online, in environments that are both public in terms of the networked platforms from which they are accessed, and private in terms of their consumption in the home rather than in public places. The ALRC expects that such trends will intensify, as more and more Australians acquire access to high-speed broadband services.

3.35 It is estimated that, in the 12 months prior to April 2009, 2.2 million children (79%) aged 5–14 years reported accessing the internet, which was an increase from 65% in 2006. This included 60% of those aged 5–8, and 96% of 12–14 year olds. In 2009, 92% of child internet users accessed the internet from home, 86% accessed it from schools, and 45% from public libraries and internet cafes.[28]

3.36 It is considerably more difficult to restrict access to online content on an age basis than is possible in other media platforms. While television has operated on a time-based classification framework for many years (as programs with certain types of content—violence, nudity, sexual references—cannot be shown before particular times), and cinemas and video stores have applied a rough and ready assessment of the ages of those purchasing tickets or hiring DVDs, age verification is far more ad hoc on the internet.

---

27 Inquiry into the Australian Broadcasting System, *Australian Broadcasting: A Report on the Structure of the Australian Broadcasting System and Associated Matters* (1976).

28 Australian Bureau of Statistics, *Australian Social Trends: Children of the Digital Revolution* < www.abs.gov.au/socialtrends> at 18 July 2011, ABS Catalogue No. 4102.0.

Media convergence and ‘broken concepts’ in legislation

3.37 In its paper *Broken Concepts: The Australian Communications Legislative* Landscape, the ACMA identified seven broad regulatory consequences of convergence for the media domains for which it has regulatory responsibility.[29] Insofar as these concern the *Broadcasting Services Act* and its provisions as they relate to media classification, they are also relevant to the ALRC’s inquiry.

3.38 The seven ‘broken concepts’ which the ACMA identified in its study were:

(1) misalignment of policy and legislative constructs with market changes, technological changes and consumer behaviour;

(2) inconsistencies in the treatment of devices and content, and gaps in the existing framework’s coverage of new forms of content and applications—for example, the very different treatment of broadcasting services as defined under the *Broadcasting Services Act* and programs delivered over the Internet;

(3) misplaced emphasis on the legislative framework that skews regulatory activity towards traditional media and communications activity;

(4) blurring of boundaries between historically distinct devices, services and industry sectors, leading to inconsistent treatment of like content, devices or services;

(5) piecemeal responses to new issues, which has added unnecessary layers of complexity to legislation;

(6) questions regarding the applicability of mechanisms for enforcing existing community standards over new forms of content delivery; and

(7) institutional ambiguity regarding which government entity has responsibility for particular industries or activities, meaning that either several regulators or no regulators have a clear mandate to address market or consumer concerns. [30]

3.39 All of these problems can be identified in the current media classification scheme. It over-classifies some media, such as DVDs and computer games, while failing to classify other media, such as mobile apps, at all. It applies platform-based classification guidelines that map inconsistently onto new forms of devices and content, and applies cost and regulatory burdens unevenly across media industries in ways that are poorly related to community standards and potential public interest concerns.

---

29 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011).

30 Ibid, 7.

3.40 The current classification scheme is inherently difficult to adapt to convergent media, due to the fragmentation of regulatory agencies and administrative oversight, as well as the division of authority between the Commonwealth, the states and territories. Piecemeal responses to changes in technologies, markets and consumer behaviour have served to accentuate this institutional ambiguity, creating uncertainty for both consumers and industry, and blurring questions of responsibility for driving change.

4. Guiding Principles for Reform

Contents

Summary 57

Guiding Principles 59

Principle 1: Individual rights 59

Principle 2: Community standards 61

Principle 3: Protection of children 63

Principle 4: Consumer information 64

Principle 5: An adaptive regulatory framework 66

Principle 6: Competition and innovation 67

Principle 7: Clear regulatory purpose 68

Principle 8: Focus on content 69

Summary

4.1 This chapter identifies eight guiding principles for reform directed to providing an effective framework for the classification of media content in Australia. These principles should inform the development of a new National Classification Scheme that meets community needs and expectations, while being more effective in its application and responsive to the challenges of technological change and media convergence.

4.2 The eight guiding principles are that:

(1) Australians should be able to read, hear, see and participate in media of their choice;

(2) communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;

(3) children should be protected from material likely to harm or disturb them;

(4) consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;

(5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;

(6) the classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;

(7) classification regulation should be kept to the minimum needed to achieve a clear public purpose, and should be clear in its scope and application; and

(8) classification regulation should be focused upon content rather than platform or means of delivery.

4.3 These eight guiding principles provide the framework for the proposals for reform in this Discussion Paper. The principles are derived from existing laws, codes and regulations, as well as principles that have been identified in other relevant reviews and government reports. This chapter outlines the basis of each of these principles in legislation and other policy documents, and highlights relevant comments from stakeholders in this Inquiry.

4.4 A statement of guiding principles is considered important for three reasons. First, it acknowledges that, while classification is an inherently contested space, characterised by strong views on the relative importance attached to particular principles—for example, individual rights and freedoms as compared to the protection of children from potentially harmful media content—it is possible for policy makers and regulators to proceed on the basis of a common community understanding of underlying interests and principles. The National Classification Code has played an important role in this regard.

4.5 Secondly, it allows discussion of policy goals and policy instruments to be uncoupled. The ALRC proposes the application of a diverse range of policy instruments be applied to a new National Classification Scheme, involving a mix of direct government regulation, co-regulation, and industry self-regulation. As the Australian Public Service Commission has observed:

> Each main category of policy instrument has something valuable to offer but they generally have substantial limitations as a stand-alone strategy for government intervention. Further, each category of policy instrument works well in only a restricted range of circumstances—no single instrument type works across-the-board.[1]

4.6 Thirdly, as changes in the context of media convergence will be difficult to anticipate, there is a need for regulation that can be adaptive to changes in the media environment. A statement of guiding principles allows for flexibility in the application of policy instruments, while being anchored in an understanding of policy goals that can remain more constant over time.

---

1 Australian Public Service Commission, *Smarter Policy: Choosing Policy Instruments and Working with Others to Influence Behaviour* (2009), 12.

Guiding Principles

Principle 1: Individual rights

Australians should be able to read, hear, see and participate in media of their choice.

4.7 The National Classification Code as it currently exists contains the unambiguous statement that 'adults should be able to read, hear and see what they want'.[2] Similarly, the *Broadcasting Services Act 1992* (Cth) contains a statutory objective 'to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information'.[3]

4.8 While the National Classification Code requires that this principle be understood alongside other principles in the making of classification decisions, the right of adults to have access to the media of their choice has informed media policy in general, and classification policy in particular, and received wide support in submissions to this Inquiry.[4]

4.9 Such a principle is consistent with art 19 of the United Nations Universal Declaration of Human Rights and art 19 of the International Covenant on Civil and Political Rights (ICCPR).[5] The former states that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[6]

4.10 The ICCPR provides that this right includes the 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice', but may be subject to restrictions necessary for 'respect of the rights or reputations of others' or 'the protection of national security or of public order … or of public health or morals'.[7]

4.11 The rise of the internet has arguably further strengthened individual free speech, which lies at the heart of the contemporary global media and communications landscape. The internet enables not only access to a much wider range of media content

---

2 *National Classification Code 2005* (Cth) cl 1(a).

3 *Broadcasting Services Act 1992* (Cth) s 3(1)(a).

4 For example, SBS, *Submission CI 1833*, 22 July 2011; The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; The Australian Recording Industry Association Ltd and Australian Music Retailers' Association, *Submission CI 1237*, 15 July 2011; Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011; J Dickie, *Submission CI 582*, 11 July 2011.

5 United Nations, *The Universal Declaration of Human Rights*, 10 December 1948, 217A (III); *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976). See The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; Melbourne Fringe, *Submission CI 1199*, 15 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

6 United Nations, *The Universal Declaration of Human Rights*, 10 December 1948, 217A (III).

7 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), art 19.

than traditional mass communications media, but empowers its users to more readily become participants in the creation and distribution of media content. In light of this, the Convergence Review has identified as one of its guiding principles that:

> Australians should have access to and opportunities for participation in a diverse mix of services, voices, views and information.[8]

4.12 In proposing this principle, the Convergence Review noted 'the importance for Australians not only to have access to content but also to have the ability to take part in the two-way interaction that new technology allows'.[9]

4.13 The United Nations Special Rapporteur on Freedom of Opinion and Expression has stated that:

> Approaches to regulation developed for other means of communication—such as telephony and broadcasting—cannot simply be transferred to the Internet, but, rather, need to be specifically designed for it.[10]

4.14 Dr Gregor Urbas and Tristan Kelly suggested that the internet has been strongly associated with the right to freedom of expression in democratic societies:

> The Internet provides a unique medium for free expression. In the US case *ACLU v Reno*, Dalzell J stated: 'The Internet is a far more speech-enhancing medium than print, the village green, or the mails'.[11]

4.15 Several stakeholders in this Inquiry also observed that media users are increasingly the creators as well as the recipients of media content, and there is an associated need to extend the right to communicate to the right to participate in the media. Google argued that:

> At a time when technology has delivered the *potential* for users to access, create and distribute content anywhere and at any time, and when innovation is resulting in ever new ways for that engagement to occur, it is imperative that Australian content regulations not operate as a roadblock to innovation, nor a fetter on the free flow of legal content.[12]

4.16 The ALRC proposes that adults should not only be able to read, see and hear what they want—within the parameters of the law—but that this principle should extend to a more general right to communicate, which includes the right to participate in the media of their choice, and to be the producers and senders as well as the receivers of information and media content.

---

8 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Emerging Issues Paper* (2011), Principle 2, 8.

9 Ibid, 8.

10 The United Nations Special Rapporteur on Freedom of Opinion and Expression and others, *Joint Declaration on Freedom of Expression and the Internet*, 1 June 2011, referred to by Electronic Frontier Foundation, *Submission CI 1174*, 15 July 2011; Access Now, *Submission CI 1172*, 16 July 2011. See also Electronic Frontiers Australia, *Submission CI 2194*, 15 July 2011.

11 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

12 Google, *Submission CI 2336*, 22 July 2011.

Principle 2: Community standards

Communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community.

4.17 In the Australian classification system as it has evolved from the 1970s to the present, the right of adults to freely access information, communication and entertainment media of their choice has been tempered by other social and cultural factors. The National Classification Code makes explicit reference to the idea that members of the community should not be inadvertently exposed to material that they may find offensive, by referring to the principle that 'everyone should be protected from exposure to unsolicited material that they find offensive'.[13]

4.18 The general matters that the Classification Board is to have regard to are outlined in s 11 of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth):

> The matters to be taken into account in making a decision on the classification of a publication, a film or a computer game include:
>
> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
>
> (b) the literary, artistic or educational merit (if any) of the publication; and
>
> (c) the general character of the publication, including whether it is of a medical, legal or scientific character; and
>
> (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

4.19 The National Classification Code also refers to the need to take account of community concerns about 'depictions that condone or incite violence, particularly sexual violence' and 'the portrayal of persons in a demeaning manner'.[14]

4.20 The 'community standards' and 'reasonable adult' principles are applied in other relevant media legislation. The *Broadcasting Services Act* makes reference to such principles in s 3, which states that the objects of the Act include to: 'encourage providers of broadcasting services to respect community standards in the provision of program material'; 'ensure designated content/hosting service providers respect community standards in relation to content'; and 'restrict access to certain internet content that is likely to cause offence to a reasonable adult'.[15]

4.21 In its submission to the ALRC, the Communications Law Centre observed:

> It is one of the primary, fundamental responsibilities of government to maintain a community standard of public decency. This responsibility applies to every aspect of society. For example, members of the community are not permitted by law to behave in public in any manner that they can. A system of classification and censorship of

---

13 *National Classification Code 2005* (Cth) cl 1(c).

14 Ibid cl 1(d).

15 *Broadcasting Services Act 1992* (Cth) s 3(1)(h), (ha), (l).

> content should maintain a community standard of public decency in content and communications in Australia … [As] a community we have a right to assert that there are some materials which are so far contrary to fundamental human rights, or which are such an attack on basic human dignity, or which are so depraved, obscene, destructive or criminal that we do not admit them into our community even for adults.[16]

4.22 A similar point was made by the Australian Council on Children and the Media, which identified among its core principles for a National Classification Scheme:

> To give voice to the community's recognition of the powerful contribution media experiences make to the shaping of individuals and society;
>
> To prevent the dissemination of content that is injurious to the public good.[17]

4.23 What constitutes offensiveness is not necessarily fixed or certain, and what is offensive to one person may be entertaining, humorous or informative to another. In 1997, the then Attorney-General for Australia, the Hon Daryl Williams MP, noted that:

> The 'reasonable adult' test is used in two different senses—as a measure of community standards and also as an acknowledgment that adults have different personal tastes … In other words, although some reasonable adults may find the material offensive, and thus justify a restricted classification for it, others may not.[18]

4.24 Any community standards test presents the challenge of recognising the diversity of views and ideas in the community, and the cultural diversity of contemporary Australian society.

4.25 However, the challenges of diversity to any form of classification system are accentuated by media convergence, the proliferation of media content and globalisation.

4.26 Among the factors that Chris Berg and Tim Wilson from the Institute of Public Affairs identified as pointing towards a 'radical rethink of the principles and justification for classification' included: the shift of media onto the internet and internet-enabled home entertainment systems; the expansion of 'niche' media targeting smaller audiences and narrower interests; and an 'increasingly multicultural society seeking media produced for ethnic diasporas'.[19]

4.27 The relevance of more media content being accessed from the home was also raised in submissions. Civil Liberties Australia argued that 'most new technological platforms are accessed only in the context of private use', and that 'internet access, regardless of the platform, is clearly a private use context, in contradistinction to the cinema context'.[20] Dr Nicolas Suzor of the Faculty of Law, Queensland University of Technology proposed that 'in the online environment ... it is much less important to

---

16 Communications Law Centre, *Submission CI 1230*, 15 July 2011.

17 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

18 The Hon Daryl Williams MP, 'From Censorship to Classification', Address, Murdoch University, 31 October 1997, quoted in G Griffith, *Censorship in Australia: Regulating the Internet and Other Recent Developments* (2002), 5.

19 Institute of Public Affairs, *Submission CI 1737*, 20 July 2011.

20 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

take into account community concerns about content, since content accessed online is generally searched for, not inadvertently accessed'.[21]

4.28 At the same time, the ALRC is of the view that the development of the internet does not in itself provide a rationale for abandoning restrictions on content or regulations based on community standards. The requirement that all such access remains within the bounds of the law continues to be important. The child protection association, Bravehearts, noted that the principle that 'adults should be able to read, hear and see what they want' must include the caveat 'within the bounds of the law'.[22]

Principle 3: Protection of children

Children should be protected from material likely to harm or disturb them.

4.29 In referring the National Classification Scheme Review to the ALRC, the Attorney-General had regard to

> the impact of media on children and the increased exposure of children to a wider variety of media including television, music and advertising as well as films and computer games.[23]

4.30 The National Classification Scheme makes a distinction between the 'responsible adult' on the one hand, and children on the other. This is expressed in the National Classification Code as the principle that 'minors should be protected from material likely to harm or disturb them'.[24]

4.31 In relation to broadcasting and online content, the *Broadcasting Services Act* has statutory objectives to 'ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them', and to 'protect children from exposure to internet content that is unsuitable for children'.[25]

4.32 The protection of children was also identified as a primary objective of the National Classification Scheme in submissions.[26] The Queensland Commission for Children and Young People and Child Guardian considered that:

> the primary objectives of a national classification scheme should incorporate protections for children, clear advice to parents and caregivers and considerations of how to promote their wellbeing, positive development and best interests when classifying material.[27]

---

21 N Suzor, *Submission CI 1233*, 15 July 2011.

22 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

23 Terms of Reference.

24 *National Classification Code 2005* (Cth) cl 1(b).

25 *Broadcasting Services Act 1992* (Cth) s 3(1)(j), (m).

26 National Civic Council, *Submission CI 2226*, 15 July 2011; Queensland Commission for Children and Young People and Child Guardian, *Submission CI 1246*, 18 July 2011; Uniting Church in Australia, *Submission CI 1245*, 18 July 2011; Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; Bravehearts Inc, *Submission CI 1175*, 15 July 2011; Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011; Hon Nick Goiran MLC, *Submission CI 1004*, 14 July 2011.

27 Queensland Commission for Children and Young People and Child Guardian, *Submission CI 1246*, 18 July 2011.

4.33 Others made reference to the United Nations Convention on the Rights of the Child (CROC), to which Australia is a signatory. Among the relevant clauses of CROC are provisions that States Parties shall '[e]ncourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being' and prevent the 'exploitative use of children in pornographic performances and materials'.[28]

4.34 Some submissions pointed out that the distribution of child pornography has increased considerably through the internet, and that there is a need to address issues relating to the circulation of such material differently to questions concerning access of adults to pornography more generally. Urbas and Kelly, for example, noted that:

> According to the US Government, circulation of child pornography had been almost completely eradicated by the mid-1980s. However, the Internet has provided a new means of distribution, and this is now considered a multi-billion dollar industry. The apparent anonymity of the Internet allows paedophiles to share material easily, while the Internet's international reach allows access to material produced in any country to be accessed globally.[29]

4.35 The 'right' of adults to be able to access material freely and the need to protect children need not be conflicting principles. Telstra argued, for example, that the classification system should have two 'end-user focused' objectives of protecting children from material that may be harmful and empowering adults, within reason, to decide for themselves the media content that they wish to consume.[30]

Principle 4: Consumer information

Consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints.

4.36 In referring the review to the ALRC, the Attorney-General had regard to the 'need to improve classification information available to the community and enhance public understanding of the content that is regulated'.[31]

4.37 The National Classification Code provides that all members of the Australian community have the right not to be exposed to unsolicited material that they find offensive. The *Broadcasting Services Act* requires that broadcasters and providers of online content not only respect community standards, but also ensure means for addressing complaints about broadcasting services and certain internet content.[32]

4.38 Classification principles require the provision of information to the public about the material that has been classified. Members of the public should also be able to have their concerns addressed when they believe that a classification may be in error, or that content has been made available that is in breach of classification rules.

---

28 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), arts 17(e), 34(c).

29 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

30 Telstra, *Submission CI 1184*, 15 July 2011.

31 Terms of Reference.

32 *Broadcasting Services Act 1992* (Cth) s 3(1)(i), (k).

4.39 Several submissions stated that the provision of appropriate information to enable consumers to make informed decisions about media content should be a primary principle of the National Classification Scheme.[33] The Australian Subscription Television and Radio Association observed that 'content classification should empower parents to be confident when making decisions on the content they allow their children to see'.[34]

4.40 Civil Liberties Australia emphasised the consumer information dimension of classification, stating that the 'primary objective must be to equip people with the information they need to decide whether they want to purchase or experience particular content beforehand'.[35]

4.41 The current National Classification Scheme framework has been criticised as being confusing to the public.[36] The Senate Legal and Constitutional Affairs References Committee observed that the current framework for complaints handling is confusing to the public, and recommended the establishment of a classification complaints 'clearinghouse' as a one-stop shop for administering complaints:

> Consumers need to be provided with clear information about how to make complaints in relation to classification matters. In order to make a complaint, a consumer should not be required to have a detailed knowledge of the classification system, along with the role of the various bodies involved in classification and their associated responsibilities.[37]

4.42 MLCS Management observed, for example, that it is unclear to both industry and government how the National Classification Scheme should be applied to certain products, given that

> different content regulation schemes apply to different delivery channels ... consumers don't generally give a damn how they got their product—they just get it in the manner that best suits their needs. What they do want is some consistency about the application of classification information.[38]

4.43 In responding to the circulation of these guiding principles on the ALRC's Public Consultation blog, Free TV Australia raised the issue of whether the consumer information and complaints handling principles needed to be considered separately, and proposed that this principle be divided into two elements:

- The National Classification Scheme needs to provide consumer information in a timely, clear and consistent manner.

---

33 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; ASTRA Subscription Television Australia, *Submission CI 1223*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011; Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

34 ASTRA Subscription Television Australia, *Submission CI 1223*, 15 July 2011.

35 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

36 For example, A Hightower and Others, *Submission CI 2159*, 15 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011.

37 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 181.

38 MLCS Management, *Submission CI 1241*, 16 July 2011.

- The National Classification Scheme needs to encompass a responsive, effective and consistent means of addressing community concerns, including complaints.[39]

Principle 5: An adaptive regulatory framework

The classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services.

4.44 In referring this review to the ALRC, the Attorney-General had regard to the need for a framework which can adapt to 'the rapid pace of technological change in media available to, and consumed by, the Australian community'.[40] The Convergence Review has also recommended that 'Australians should have access to the broadest possible range of content across platforms, services and devices'.[41]

4.45 Industry stakeholders strongly argued for the need to move from piecemeal responses that apply the existing classification framework to each new technological development, towards one that is framed in such a way as to be adaptive to broader convergent media trends. This is consistent with the concern expressed by the Australian Communications and Media Authority (the ACMA) about 'piecemeal responses' to new issues, where

> legislation is incrementally amended and supplemented to address the rapid change occurring in the communications sector over the past two decades ... the present communications legislative landscape is fragmented [and this] has reduced the overall coherence of the regulatory scheme.[42]

4.46 Telstra observed that, in light of the fragmentation of international media markets, 'the focus of classification policy intervention needs to be shifted to domestically based users rather than the now multitudinous and internationally dispersed content creators and distributors'.[43]

4.47 The Australian Home Entertainment Distributors Association recommended that the Inquiry address the ambiguities in the current framework, particularly between content accessed in physical and digital forms:

> The ALRC should guide the government on *what* content should be administered by a reformed Scheme, and as part of this what *can* be administered in a digital distribution environment which is: instant, international, vast and often user generated.
>
> In other words, the Scheme should focus on the content that 'matters' and be implemented so that it can apply to as much content as possible directly by the content distributor.[44]

---

39 Free TV Australia, *Submission CI 2452*, 5 September 2011.

40 Terms of Reference.

41 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Emerging Issues Paper* (2011), Principle 8, 9.

42 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 7.

43 Telstra, *Submission CI 1184*, 15 July 2011.

44 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011. (Emphasis in original.)

4.48 Google argued the need to rethink media classification around the different layers of the converged media environment, rather than in terms of analogies between one media form and another:

> The existing classification regime is unworkable in a converged environment. A new regulatory framework must take into account the particular features of each layer of the converged media landscape—the network, the platforms, and the content layers—and apply the appropriate policy instrument.[45]

4.49 The ALRC supports the development of a policy and regulatory framework for media classification that can be adaptive and flexible, and can respond to changes in technology, consumer demand and markets. To this end, the ALRC suggests that platform neutrality should be a guiding principle of any new regulations (see Principle 8), that co-regulatory approaches should be developed to a greater degree than is currently the case, and that agencies such as the ACMA and the Classification Board should be better able to focus on content where there are the greatest concerns in relation to community standards and the protection of children.

Principle 6: Competition and innovation

The classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets.

4.50 The Terms of Reference for this Inquiry point to the need for the ALRC to give consideration to the ‘desirability of a strong content and distribution industry, and minimising the regulatory burden’.

4.51 Such a principle is consistent with the objective of the *Broadcasting Services Act* to provide ‘a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs’[46] and the principle of the Convergence Review that the ‘communications and media market should be innovative and competitive, while balancing outcomes in the interest of the Australian public’.[47]

4.52 The ALRC is of the view that the National Classification Scheme needs to ensure that there is parity of treatment between domestic and international media content providers. The problem with existing regulations is that they can be disproportionately applied to domestic providers, while the regulatory complexities arising from media globalisation and convergence are simply ignored.

---

45 Google, *Submission CI 2336*, 22 July 2011.

46 *Broadcasting Services Act 1992* (Cth) s 3(1)(b).

47 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Emerging Issues Paper* (2011), Principle 3, 8. The *National Digital Economy Strategy* has stated the Australian Government’s aim that, by 2020, ‘Australia will be among the world’s leading digital economies’: See Department of Broadband, Communications and the Digital Economy 2011, *#au20 National Digital Economy Strategy: Leveraging the National Broadband Network to Drive Australia’s Digital Productivity*, Executive Summary, 2.

4.53 Telstra, for example, noted that:

> The reduced capacity of Nation States to enforce regulation against international actors (even where the black letter law is consistent in its application) creates a serious risk that local providers, who are more easily caught by the regulatory reach of Government, could be indirectly competitively disadvantaged by regulatory intervention.[48]

4.54 The Interactive Games and Entertainment Alliance (the iGEA) drew attention to the need for a classification framework that does not 'impede innovation nor the exploration of the provision of entertainment and other services over new technologies'.[49]

4.55 The Internet Industry Association recommended the development of a framework that is harmonised, where possible, with other international classification standards, so that a revised National Classification Scheme would

> enable development of an international system whereby information about content could be provided once by the originator and vendors/distributors in different countries/cultures could use that information to apply 'age appropriate' recommendations appropriate to their culture.[50]

Principle 7: Clear regulatory purpose

Classification regulation should be kept to the minimum needed to achieve a clear public purpose, and should be clear in its scope and application.

4.56 The ALRC has been asked to propose a regulatory framework for the National Classification Scheme that can 'minimise the regulatory burden' while meeting community expectations. Similarly, the Convergence Review has proposed that 'where regulation is required, it should be to the minimum needed to achieve a clear public purpose'.[51]

4.57 The *Australian Government Best Practice Regulatory Handbook* frames a guiding principle for government regulation as follows:

> The challenge for government is to deliver effective and efficient regulation—regulation that is *effective* in addressing an identified problem and *efficient* in terms of maximising the benefits to the community, taking account of the costs.[52]

4.58 Concerns about the costs of compliance and the need for clarity were expressed by stakeholders.[53] The iGEA, for example, drew attention to the need for a classification framework 'designed to ensure that it is easy for the local and global industry to comply with' and which 'operates in a certain and low friction manner',

---

48 Telstra, *Submission CI 1184*, 15 July 2011.
49 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.
50 Internet Industry Association, *Submission CI 2445*, 28 July 2011.
51 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Emerging Issues Paper* (2011), 8.
52 Australian Government, *Best Practice Regulation Handbook* (2010), 1.
53 Telstra, *Submission CI 1184*, 15 July 2011; Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

with low costs of compliance.[54] Further, the classification framework 'should clearly indicate the extent of its application, including whether it applies to computer games played or delivered over the Internet from inside or outside of Australia'.[55]

4.59 In the ALRC's view, the critical variables in determining the appropriate regulatory form for classification of media content should include:

- the potential for risk, harm or impact associated with the content in question;
- the degree of community concern about the effective application of classification to the content in question;
- the likelihood of the industry or media content provider in question effectively self-managing its own relationship to its consumers and to the wider community; and
- the extent to which non-compliance with regulations generates reputational risk or diminished market standing for the industry or media content provider in question.

4.60 As discussed in later chapters of this Discussion Paper, the ALRC is of the view that there is considerable scope to extend co-regulatory arrangements in those areas where there is not major community contention about classification decisions, allowing government agencies to more effectively focus time and resources on the most contentious media content.

Principle 8: Focus on content

Classification should be focused upon content rather than platform or means of delivery.

4.61 The Senate Legal and Constitutional Affairs References Committee expressed the view that 'a uniform approach to the same or similar content is required, regardless of the medium of delivery', and that 'the equal treatment of content, regardless of the platform used to access that content, should be a guiding principle of a reformed National Classification Scheme'.[56]

4.62 Many stakeholders emphasised the value in principle of platform neutrality, and the extent to which the National Classification Scheme as it is currently operating is not based upon such a principle, and the problems that result.

4.63 Telstra, for example, drew attention to current inconsistencies in the treatment of similar content across different platforms, and the extent to which this becomes problematic in the context of devices such as the Telstra T-Box, which are explicitly designed to deliver content from multiple platforms through a single device:

---

54 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

55 Internet Industry Association, *Submission CI 2445*, 28 July 2011.

56 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 177–178.

> As technological innovation continues, and the diversity of content producers and distribution platforms continues to grow, distinguishing classification treatment on the basis of distribution platform is likely to become increasingly difficult, resulting in further inconsistencies of this kind.[57]

4.64 Assistant Professor Sarah Ailwood and Bruce Arnold, of the Faculty of Law, University of Canberra, observed that the current National Classification Scheme predates media convergence and, accordingly, 'treats content in terms of form rather than mode of delivery'. They advocated the development of a new classification model that is 'consistent across platforms'.[58]

4.65 MLCS Management observed that:

> The idea of different channels making a difference to users does not make sense. From a classification perspective, consumers simply do not care where they get content from ... We need to get over who is responsible for what channel, develop a framework for all content, and *then* sort out who manages it at a government level.[59]

4.66 The ALRC is of the view that, with the growing popularity of 'smart televisions' and other devices that enable seamless access to converged media content from a single platform, there is a need to focus classification on the content that is to be classified, rather than the platform from which it is being delivered.

4.67 At the same time, the ALRC recognises that the principle of 'platform neutrality' may present significant challenges in practice. Dr Lyria Bennett Moses of the Faculty of Law, University of New South Wales, observed that:

> if one strives to achieve parity of outcome (so that [it is] as hard to access material on-line as in a local bookstore or library or movie theatre), then one would need to impose very restrictive laws on on-line content ... Similarly, if one strives to draft laws in a technology neutral way (thus not differentiating between different technologies in the wording of the legislation), then the laws may not be equally effective or cost-effective in all contexts.[60]

4.68 The most conspicuous case of a lack of platform neutrality in the current scheme is between the treatment of computer games and other media, such as films and DVDs. A separate classification scheme was introduced in 1994 for computer games, based on concerns that games, because of their 'interactive' nature, 'may have greater impact, and therefore greater potential for harm or detriment, on young minds than film or videotape'.[61]

4.69 Gareth Griffith observed that this decision, which led to the highest available classification for computer games being MA 15+, marked a significant departure from the 'contemporary "classification" perspective' and 'suggestive of the "censorship"

---

57 Telstra, *Submission CI 1184*, 15 July 2011.

58 S Ailwood and B Arnold, *Submission CI 2156*, 15 July 2011.

59 MLCS Management, *Submission CI 1241*, 16 July 2011.

60 L Bennett Moses, *Submission CI 2126*, 15 July 2011. See also L Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33 *University of New South Wales Law Journal* 581, 581–604.

61 Office Of Film and Literature Classification, *Annual Report 1993–94*, quoted in G Griffith, Censorship in Australia: Regulating the Internet and Other Recent Developments (2002), 12.

perspective, emphasising ideas associated with "protection from harm" and the public good'.[62]

4.70 Many of the public submissions received in response to the Issues Paper were concerned to see this anomaly corrected. In this regard, the ALRC notes the agreement reached at the Standing Committee of Attorneys-General meeting in Adelaide in July 2011, that endorsed the development of an agreed national R18+ classification for computer games.

4.71 One issue that arises with any proposal to develop a more platform-neutral regulatory framework is whether different forms of media have different effects on individuals. There is an extensive literature on the question of media effects, which is summarised in Appendix 2 of this Discussion Paper. The ALRC is of the view that the evidence available is sufficiently ambiguous on the question of media effects that it would advise against applying different classification criteria to media platforms on the basis of whether that media form may have more impact on individual behaviour. A content-based approach to media classification, combined with more clearly age-based classification categories, is the preferred approach.

---

62 Ibid, 12.

5. The Proposed Classification Scheme

Contents

Summary 73
The case for reform 73
Benefits of the proposed new National Classification Scheme 74
Promoting platform neutrality 74
Consistent, age-based classifications 75
Co-regulatory approaches 75
More effective use of public resources 76
Formal training and accreditation framework for media classifiers 76
Aligning classification with cyber-safety and media education 77
A new National Classification Scheme 77
The new Classification of Media Content Act 78
Media content 80
Alternative approaches to implementation 80

Summary

5.1 This chapter introduces the ALRC's proposed new National Classification Scheme. The chapter briefly summarises the overall rationale for the establishment of the proposed new scheme, highlighting its key benefits and how the scheme responds to the guiding principles of reform identified in Chapter 4, as well as the current problems and future challenges discussed in Chapters 2 and 3. The chapter presents centrepiece proposals establishing the new scheme, through the enactment of a new Classification of Media Content Act. Under the Act, a single agency (the Regulator) would be responsible for regulating the classification of media content. The proposed content of the new Act, and the functions and responsibilities of the Regulator, are discussed in more detail throughout this Discussion Paper.

The case for reform

5.2 Responses received to the Issues Paper and consultations with industry, government and community stakeholders have affirmed the view that the existing National Classification Scheme is in need of fundamental reform. Stakeholders identified key flaws with the current classification system. As discussed in Chapter 2, the current classification framework is widely seen as resulting from its development in an *ad hoc* and reactive manner, and as poorly equipped to respond to a rapidly changing media environment and the challenges of media convergence.

5.3 In concluding that fundamental reform of the National Classification Scheme is required, the ALRC proposes an approach to reform that recognises the transformative nature of the convergent media environment (as discussed in Chapter 3), and grounded in a set of guiding principles that provide a foundation for the future development of the National Classification Scheme (as discussed in Chapter 4).

Benefits of the proposed new National Classification Scheme

Promoting platform neutrality

5.4 The proposed new National Classification Scheme would promote platform neutrality in classification law, as discussed in Chapter 4. Platform neutrality means that, as outlined in Principle 8, there should be a uniform approach to the same or similar content, regardless of the medium of delivery.

5.5 This helps avoid inconsistencies that are manifest under the current scheme, and makes the framework more adaptive to unanticipated changes in media technologies, products and services. This is in contrast to the existing framework, which has been described as 'like a bowl of spaghetti ... complex, tangled and, from a media user point of view, impossible to tell which bit of media content connects to which regulatory framework'.[1]

5.6 The ALRC proposes a broad definition of media content that covers not only publications, films and computer games, television and online and mobile content, but also other content, such as music, podcasts and user-generated content. However, as discussed in Chapter 6, this broader complement of content will not generally be subject to any obligation to classify.

5.7 Under the proposed Classification of Media Content Act, classification obligations would apply to media content that includes:

- publications, films and computer games currently subject to the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*);
- online and mobile content currently subject to the regulatory regime under schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth); and
- broadcast and subscription television content currently regulated under the *Broadcasting Services Act*, the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth).

5.8 Under the proposed new National Classification Scheme, the same content, for example a 'film', would be subject to the same basic classification obligation regardless of whether it was originally shown in a cinema, broadcast on television, purchased or hired as a DVD or equivalent format, or streamed from the internet. This would eliminate the current costly 'double handling' of the same media content for

1 Professor Catharine Lumby, Director, Journalism and Media Research Centre, University of New South Wales, statement at launch of K Crawford and C Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011), Sydney, 5 May 2011.

different media platforms. Further, all media content that is required to be classified will be classified according to a single set of classification categories and criteria.

5.9 The ALRC considers that ensuring that classification decisions align with community expectations requires some form of benchmarking. In that light, the ALRC proposes that films for cinema release and some computer games continue to be classified by the Classification Board.

5.10 The ALRC envisages that a comprehensive review of prevailing community standards towards media content in Australia would also be undertaken, that would draw upon quantitative and qualitative social research methodologies and undertaken by independent experts, on a five-yearly basis. Over time, the development of such longitudinal research findings may reduce the need for such benchmarking.

Consistent, age-based classifications

5.11 The ALRC proposes replacing the current classification categories and criteria with categories and criteria that recognise more explicitly the relationship between age-appropriate media content and stages of child development.

5.12 The ALRC proposes amending the categories for media content so that they include: C (content specifically for children); PG 8+ (content appropriate for children aged 8 or over, with parental guidance); T 13+ (content appropriate for teenagers, similar to the United States PG 13+ category); and MA 15+ (mature audience), in addition to the current G and R18+ categories. The current M (Mature) category would disappear, and PG would be a more age-specific category.

5.13 As discussed in Chapter 9, there is generally a high level of community awareness of the classification categories. However, the ALRC found considerable confusion about the relationship between the PG, M and MA 15+ categories particularly among parents and care givers. In order to provide better consumer information about the suitability of media content for children, the ALRC is proposing new and more informative age-based categories be applied.

Co-regulatory approaches

5.14 The new scheme proposed by the ALRC would introduce additional elements of co-regulation into the classification system in two ways.

5.15 First, most content that is subject to a classification obligation may be classified by accredited industry classifiers, though subject to regulatory oversight and audit. Under the scheme, industry groups would have an opportunity to develop their own industry-based classification processes and procedures. This allows government agencies to be more focused on the content that generates the most concern in terms of community standards and the protection of children.

5.16 Secondly, the scheme will provide for the development and operation of industry classification codes, consistent with the statutory classification categories and criteria. As discussed in Chapter 11, the intention is that these codes would assist in the interpretation and application of the statutory classification categories and criteria and introduce some additional flexibility to the regulatory scheme. The government

regulator provides a critical ‘back stop’ to the scheme in order to prevent abuse of the co-regulatory scheme by industry participants not concerned with the public interest.

5.17 Industry classification and the extended use of codes will assist classification regulation to be more responsive to technological change and adaptive to new technologies, platforms and services. It also provides the basis for greater ‘buy-in’ by industry players to the classification scheme, thereby allowing industry knowledge and expertise to be directly applied to addressing consumer issues, and building greater trust and knowledge sharing among content providers, distributors and users.[2]

More effective use of public resources

5.18 At present, some media content is over-classified by the Classification Board — for example, the reclassification of feature films and television programs for DVD release, and the classification of all computer games. At the same time, some content is exclusively classified by industry—for example, television programs—while other content is either not classified at all or is classified only following a complaint or investigation.

5.19 These distinctions are platform-based and historic, and bear little relationship to questions of risk or community concern. There has been little consideration of the costs and benefits arising from questions of who classifies what. The costs include not only the commitment of financial and human resources to current classification decisions, but also opportunity costs—the activities foregone in order to meet classification obligations.

5.20 By enabling industry to take greater direct responsibility for classification decision-making, the ALRC envisages more concentration of public resources on ensuring higher-level media content is properly classified and restricted. Industry classification will also free up resources currently deployed in the classification of publications, DVDs and computer games, which can be redeployed in the fast-growing area of online content.

Formal training and accreditation framework for media classifiers

5.21 A corollary of greater direct engagement of industry and content providers in classification decisions, overseen by a government regulator, is the need for a more formalised and consistent training and accreditation framework for media classifiers, in order to ensure consistent decisions that safeguard the effectiveness and integrity of the National Classification Scheme.

5.22 At present, approved classification training is provided by the Classification Branch of the Australian Government Attorney-General’s Department, allowing individuals to become authorised assessors. This training is not, however, formally accredited, and there is no award attached to such training. The ALRC will work with the Australian Qualifications Council and relevant government agencies to establish a

---

2 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010), 5.

framework for the accreditation of media classification training that is consistent with the Australian Qualifications Framework, as part of the Classification of Media Content Act.

5.23 The development of consistent and rigorous training and accreditation standards for media classifiers, that acknowledge the industry-based classification experience, will help more adaptive and flexible co-regulatory approaches be combined with a high level of public trust in the quality and consistency of classification decisions across different media platforms.

Aligning classification with cyber-safety and media education

5.24 In developing the new scheme, the ALRC recognises that classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them; and ensuring that consumer information about content is provided in a timely and clear manner.

5.25 The new scheme would provide that much content may not need to be classified, as long as access to the content is restricted. What steps are reasonable to take to restrict access will depend on the delivery platform and may be a matter dealt with in industry codes. This approach responds to the reform principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose, and be clear in its scope and application.[3]

5.26 In addition, the ALRC expects that a range of self-regulatory and other initiatives will continue to be developed to assist consumers to manage their own access to media content, and be able to protect children and others in their care. These measures could include:

- parental locks and other technical means to protect children from exposure to inappropriate media content;
- user reporting (or ‘flagging’) of inappropriate content;
- digital literacy and education programs;[4] and
- voluntary filtering of online content and the use of internet ‘walled gardens’.

A new National Classification Scheme

5.27 The ALRC proposes that a new National Classification Scheme should be enacted regulating the classification of media content. Essentially, the new scheme would replace the existing classification cooperative scheme for the classification of publications, films and computer games—based on the *Classification Act* and complementary state and territory classification enforcement legislation—and online content regulation under schs 5 and 7 of the *Broadcasting Services Act*.

---

3 See Ch 4, Principle 7.
4 Such as the Cybersmart program, a national cybersafety education program managed by the ACMA.

5.28 In addition, bringing television content within the scheme would require the new scheme to encompass some matters currently dealt with by other parts of the *Broadcasting Services Act*, the *Australian Broadcasting Corporation Act* and the *Special Broadcasting Service Act*.

5.29 The *Broadcasting Services Act*, and codes under that Act, regulate broadcasting services and the content of television in ways that are not directly related to classification—including, for example, in relation to program standards for children's content and Australian content.[5] The new National Classification Scheme would govern television content only in so far as it relates to classification. Other content matters would continue to be regulated by the ACMA under the *Broadcasting Services Act* and codes.[6]

The new Classification of Media Content Act

5.30 The ALRC proposes that a new National Classification Scheme should be established through the enactment of a new Classification of Media Content Act.

5.31 The ALRC proposes that the Act should provide, among other things, for:

- what types of media content may, or must be classified;
- who should classify different types of media content;
- a single set of statutory classification categories and criteria applicable to all media content;
- access restrictions on adult content;
- the development and operation of industry classification codes consistent with the statutory classification criteria; and
- the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.

5.32 Each of these matters is discussed in more detail in following chapters.[7] However, the new Act would be likely to draw on concepts already contained in the *Classification Act* (or complementary state and territory enforcement legislation) and the *Broadcasting Services Act*. For example, the new Act would:

- establish a Classification Board, with similar functions to those currently performed by the existing Classification Board (see Chapter 7);
- prescribe a single set of classification categories similar to those currently prescribed by the *Classification Act* for films (see Chapter 9);

---

5 See *Broadcasting Services Act 1992* (Cth) pt 9.

6 And under the *Australian Broadcasting Corporation Act 1983* (Cth) and *Special Broadcasting Service Act 1991* (Cth).

7 A table summarising what content must be classified and by whom, and what must be restricted, is in Appendix 4.

- establish a mechanism for industry codes similar to those currently provided for under the *Broadcasting Services Act* (see Chapter 11);
- provide for a new Regulator that would exercise a combination of powers currently exercised by the Director of the Classification Board and the ACMA (see Chapter 12);[8] and
- provide for a regime of offences and penalties based on those currently existing in the *Classification Act* (and complementary state and territory enforcement legislation) and the *Broadcasting Services Act* (see Chapter 14).

5.33 While adapting some existing concepts, the new model should also constitute a significant modification and consolidation of existing regulation. In this context, the ALRC recognises that the arguments made by the ACMA that the process of convergence can be said to have 'broken, or significantly strained, the legislative concepts that form the building blocks of current communications and media regulatory arrangements'.[9] Some aspects of the new Act will have to be drafted more or less 'from scratch', including, for example, provisions dealing with the framework for the training and accreditation of industry classifiers.

Proposal 5–1 A new National Classification Scheme should be enacted regulating the classification of media content.

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

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

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

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

(d) access restrictions on adult content;

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

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

---

8 Such as a power to require that a content provider submit a film for classification (the equivalent of the existing call in power of the Director of the Classification Board): *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 23A; and a power to issue 'take-down' notices with respect to online content: *Broadcasting Services Act 1992* (Cth) sch 7 cl 47.

9 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 5.

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

Media content

5.34 The ALRC proposes that, under the new scheme, some media content must be classified and access to other media content restricted to adults.[10] Those with the primary responsibility to comply with these laws are referred to as 'content providers'. The proposed Classification of Media Content Act will, therefore, require definitions of 'media content' and 'media content provider'. These definitions should be both broad and platform-neutral, and should include content:

- published online;
- published on media such as books, magazines, and DVDs; and
- broadcast on free-to-air and subscription television.

5.35 Schedule 7 of the *Broadcasting Services Act* contains definitions of 'content' and 'content service', which might form one useful starting point,[11] expanded to apply to books, magazines, films and DVDs.[12]

Proposal 5–4 The Classification of Media Content Act should contain a definition of 'media content' and 'media content provider'. The definitions should be platform-neutral and apply to online and offline content and to television content.

Alternative approaches to implementation

5.36 The proposals set out in this Discussion Paper are framed on the basis that a new Classification of Media Content Act will be enacted. However, in many instances, the provisions that form the basis of a new National Classification Scheme could equally form part of broader content regulation under a revised *Broadcasting Services Act* or successor legislation. Alternatively, the policies behind the ALRC's proposals may be able to be implemented under the existing classification cooperative scheme, or as amendments to the existing *Broadcasting Services Act*.

5.37 The ALRC's proposal that the Classification Board should classify online and offline computer games likely to be classified MA 15+ or higher[13] could be implemented by amendments to the *Classification Act*, with the agreement of the states

---

10 See Ch 6.
11 *Broadcasting Services Act 1992* (Cth) sch 7 cl 2.
12 Including its exclusions for content such as SMS and emails.
13 Proposal 6–2.

and territories. Similarly, the ALRC's proposal for a range of offences and criminal and civil penalties relating to contraventions of the Act or codes of practice[14] might also be implemented by amendments to the existing *Classification Act*, together with mirror amendment of state and territory enforcement legislation.

5.38 It is the ALRC's strongly held view, however, that such amendments to the existing framework would be very much 'second-best' options for reform, and that the need has now arisen for a new National Classification Scheme based on new legislation.

14 Proposal 14–3.

Part 2

A New Classification System

6. What Content Should be Classified?

Contents

Summary 85
How to determine what should be classified 86
    Volume of content 87
    Cost and regulatory burden 87
    Media platform 88
    Likely classification 89
    Complaints 90
    Major producers and distributors 91
    Size and composition of the audience 92
    Public or private 94
Feature-length films, television programs and computer games 95
    What is a feature-length film or television program? 96
    Why only computer games likely to be MA 15+ or higher? 96
    Exempt films, television programs and computer games 97
All content likely to be X 18+ 99
All content likely to be RC 100
Modifications—when content should be reclassified 101
    Changing platforms 101
    3D content 102
    Computer game 'mods' and expansion packs 102
Voluntary classification 103

Summary

6.1 This chapter considers what content should be classified under the proposed National Classification Scheme. It starts by considering distinguishing features of content that might be used to determine whether something must be classified. The ALRC then proposes that the following content (subject to some exemptions) must be classified before it is sold, hired, screened or distributed in Australia:

- feature-length films produced on a commercial basis;
- television programs produced on a commercial basis;
- computer games produced on a commercial basis and likely to be MA 15+ or higher;

- all media content likely to be X 18+ (ie, sexually explicit adult content); and
- all media content that may be RC (Refused Classification).

6.2 The classification of most other media content—for example, books, magazines, websites, music and computer games now likely to be G, PG and M[1]—should become or remain voluntary. However, the ALRC proposes that industry bodies should develop codes of practice that encourage the voluntary classification of some of this other content, such as lower-level computer games, using the categories, criteria, and markings of the National Classification Scheme. In Chapter 8, the ALRC proposes that access must be restricted to all media content that is likely to be R 18+, including content that is not required to be classified.

6.3 In this chapter, the ALRC also proposes that media content should be classified before: enforcement agencies require someone to stop distributing content (whether on the internet or otherwise); enforcement agencies prosecute someone for distributing content; and before the content is added to any proposed list of content that must be filtered by internet service providers (ISPs).

6.4 In Chapter 7, the ALRC proposes that much of the content required to be classified may be classified by authorised industry classifiers, subject to review by the Classification Board, but some content must continue to be classified by the Classification Board.[2]

How to determine what should be classified

6.5 Determining what should be classified might be expected to follow from the primary purposes of regulating content. If the purpose of classification is to give Australians information about content they might choose to view, hear or play, and to protect people from harmful or distressing material, then this might suggest that most content—and certainly as much potentially harmful content as possible—should be classified. However, even if it were thought useful for everything to be classified—to provide Australians with as much information as possible—this is unlikely to be practically possible or cost-effective. Any new or reformed classification scheme must therefore consider which types of content should be classified or regulated.

6.6 There are a number of possible ways of thinking about content for the purpose of deciding which content should be classified. In the Issues Paper, the ALRC asked a number of questions related to how to determine what content should be classified or regulated. This section will briefly summarise submissions in response to these questions.

6.7 However, two preliminary points should be noted, one concerning the meaning of 'classify' and the other concerning restricting access without classifying content. First, when this chapter asks whether something should be classified, it does not

---

1 New classification categories are proposed in Ch 9.

2 A table summarising what content must be classified and by whom, and what must be restricted, is in Appendix 4.

necessarily mean classified by the Classification Board. In Chapter 7, the ALRC proposes that some content may be classified by authorised industry classifiers.

6.8 Secondly, limiting access to certain content may not need to depend on a formal classification decision. If the purpose of classifying some content is to warn potential viewers and to restrict access to adults, and the provider of the content does both, then there may be no need to classify the content. In Chapter 8, the ALRC proposes that all media content that is likely to be R 18+ must be restricted to adults, even though this chapter proposes that only some of this content must be classified.

Volume of content

6.9 There are over one trillion websites, hundreds of thousands of 'apps' are available to download to mobile phones, and every minute over 48 hours of video content is uploaded to YouTube.[3] Submissions to this Inquiry consistently noted the sheer volume of content that is now available, particularly online content, and the impossibility of having Australian classifiers watch and formally classify it all. The Arts Law Centre, for example, submitted:

> It is clearly impractical and too costly for the Government to classify all content being delivered via the internet. This inevitably must lead to the conclusion that there should be less formal regulation of content in Australia.[4]

6.10 As Civil Liberties Australia remarked, if 'the content is freely available, then the requirement for classification becomes absurd and hard to justify':

> The sheer volume of content available today simply makes mandatory classification impractical.[5]

6.11 A number of submissions suggested that the practical reality, or feasibility, of requiring content to be classified should therefore influence what content, and how much content, should be classified. According to Telstra, the feasibility of those laws being complied with and enforced was also a relevant consideration:

> Ineffective or inconsistently enforced classification obligations aid nobody. End users are disadvantaged as ineffective classification obligations risk giving a false sense of security reducing self vigilance or creating confusion about remedies.[6]

6.12 If industry had a greater role in classification, as proposed in Chapter 7, it may be possible to classify more content.

Cost and regulatory burden

6.13 The more regulation, the greater the likely cost to industry and to the public. Excessive regulation might also be particularly disadvantageous to sole traders and small-to-medium enterprises who form the backbone of an emergent digital media

---

3 The Official YouTube blog, 25 May 2011, <http://youtube-global.blogspot.com/2011/05/thanks-youtube-community-for-two-big.html> at 15 August 2011.
4 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.
5 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
6 Telstra, *Submission CI 1184*, 15 July 2011.

content sector.[7] The high cost of classifying and regulating certain content might call for increased industry involvement in classification or for some content to be excluded completely from the regulatory regime, provided that the other overall objectives of the National Classification Scheme can be met.

6.14 There is also a need for cost-effective solutions for the large number of start-up businesses, sole traders and small-to-medium enterprises engaged in the emergent digital content industries. As Telstra submitted,

> Identical regulatory requirements can have dramatically different compliance burdens when applied in differing contexts. For example, requiring formal *ex ante* classification of both high cost, professional film productions intended for mass market theatre distribution to low cost and amateur video productions intended for a niche online audience would have a dramatically different impact on each party.[8]

6.15 These obligations, Telstra submitted, can also 'inhibit innovation and discourage new entrants from developing new content'.[9]

Media platform

6.16 The convergence of media technologies has arguably undermined some of the distinctions between media that underpin the current classification scheme, and may suggest that the platform on which content is delivered should not determine whether the content should be classified.[10]

6.17 Currently, similar content may be subject to different regulatory requirements, classification processes and rules, depending on the medium, technology, platform or storage device used to access and deliver the content. For example, the same film may be subject to different regulation, depending on whether it is shown in a cinema, sold or rented as a DVD, accessed through the internet, and broadcast on free-to-air or subscription television. Film media and print media are also treated differently. Each has separate guidelines and although most films must be classified to be sold, only some publications must be classified (sexually explicit magazines, for the most part).

6.18 Some argue that the media used to deliver content is not relevant to the question of whether the content should be classified. A child may be no less distressed watching a violent film downloaded from the internet than watching a film hired from a DVD store. Such reasoning may lie behind the submissions to this Inquiry that called for the classification of 'everything'.

---

7 See Australian Mobile Telecommunications Association, *Submission to Parliament of Australia Senate Legal and Constitutional Affairs Reference Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2010. More generally on small-to-medium enterprises in the creative economy, see T Cutler, *Venturous Australia: Building Strength in Innovation* (2008) Department of Innovation, Industry, Science and Research.

8 Telstra, *Submission CI 1184*, 15 July 2011.

9 Ibid.

10 In the Issues Paper, the ALRC asked whether the technology or platform used to access content should affect whether content should be classified, and, if so, why: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 3. Convergence is discussed further in Ch 3.

6.19 More broadly, some submitted that consumers simply do not recognise—or care about—the distinctions between platforms.[11] The Senate Legal and Constitutional Affairs Committee also noted this difficulty:

> Significantly, one of the shortcomings of the scheme is that it is not platform neutral. That is, it does not provide for a consistent classification decision-making framework in a converged media environment ... The committee recommends that, to the extent possible, the National Classification Scheme should apply equally to all content, regardless of the medium of delivery.[12]

6.20 However, the same factors might be used to argue for less regulation. If it is prohibitively costly to regulate content delivered by one medium (for example, the internet), then it may be argued that the content should also not be regulated when delivered on other media (for example, DVDs). The argument for consistency or parity could therefore lead to less regulation.[13]

6.21 The proposals later in this chapter regarding what must be classified are largely platform-neutral.

Likely classification

6.22 The need to protect children from harmful or distressing content, and to warn all consumers about potentially distressing content, might suggest that it is more important to regulate content that is likely to have a high classification.[14] This is reflected in the current regulation of online content, which targets material that is or would be restricted offline, and in government proposals to introduce ISP-level filtering of content classified RC. This idea is also reflected in laws that provide that only 'submittable publications'—publications not suitable for minors (such as sexually explicit magazines), or likely to be RC—must be classified before they are sold or distributed in Australia.[15]

6.23 It may be that some content does not need to be classified at all, because it is likely to have only a negligible impact on any viewer. A former Director of the Classification Board, John Dickie, suggested that 'there is a large amount of material—

---

11 For example, MLCS Management, *Submission CI 1241*, 16 July 2011.

12 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011).

13 See L Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33 *University of New South Wales Law Journal* 581, 594: 'The desire for similar outcomes for offline and online content regulation is, however, a contested ambition. If similar outcomes are impossible or can only be achieved with significant costs or negative side effects not encountered offline, then an attempt to achieve parity of outcome is undesirable'.

14 In the Issues Paper, the ALRC asked whether the potential impact of content should affect whether it should be classified: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 5. Some questioned whether the 'potential impact' was the right test, noting that it was too subjective: see, eg, Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.

15 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 19.

publications, instructional films, low level computer games and puzzles—which really do not have to be classified'.[16]

6.24 The Interactive Games and Entertainment Association (iGEA) said that 'the potential impact of Small Online Content Products would affect whether such products should be classified'.[17] For other content, however, iGEA would prefer the content to be classified, regardless of its potential impact, to 'ensure that the community is well informed of the suitability of content across the full range of impact levels'.[18]

6.25 A number of ALRC proposals in this chapter and in Chapter 8 turn on the likely classification of content, that is, the classification something would likely be given if it were classified.

Complaints

6.26 Another way of distinguishing content for the purpose of deciding whether it needs to be classified is whether the content has been the subject of a complaint or has otherwise been singled out by regulators.[19]

6.27 The classification of online content largely relies on complaints: online content will often only be classified if someone has lodged a complaint with the ACMA. On the other hand, submittable publications, films and computer games must usually be classified whether or not anyone has complained about their content.[20]

6.28 However, complaints may be a useful way to identify and target the content that should be classified. The NSW Council of Churches suggested that while 'the intent should be to classify all content', the 'volume of content and the public resources available for monitoring' may require such an approach.[21] The Arts Law Centre of Australia considered that 'there is a good argument that self-regulation coupled with a complaints based system may be the most effective way to proceed into the future':

> This would require content providers to self-regulate and to provide a mechanism for members of the public to be able to make complaints about the extreme and offensive content.[22]

---

16 J Dickie, *Submission CI 582*, 11 July 2011.

17 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

18 Ibid.

19 In the Issues Paper, the ALRC asked whether some content should only be required to be classified if the content has been the subject of a complaint: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 4. It should be noted that a complaint may highlight the need for a piece of content to be classified or restricted, or it may highlight the need for a classification decision to be reviewed. The review of classification decisions made by the Classification Board and by industry classifiers is discussed in Ch 7.

20 The Director of the Classification Board may, upon receiving a complaint about unclassified offline content, issue a notice 'calling in' the content for classification. See, eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46–48.

21 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.

22 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

6.29 Telstra likewise submitted that end-user complaints are 'a useful gating mechanism for targeting classification exercises':

> such a complaint driven process empowers users to influence the content that they consume and target the compliance costs of the classification scheme to areas of genuine end user concern.[23]

6.30 However, if complaints were the *only* factor that determined whether something should be classified, then only a very small proportion of content would ever be classified. The Australian Council on Children and the Media submitted that complaint-based systems

> rely on a public who, having seen content that is inappropriate, knowing where to lodge a complaint, takes the trouble to do so, and then perseveres through to the end result. All this takes too much time, especially for busy parents.[24]

6.31 Some said that a complaints-based system does not work.[25] If something is not classified unless there is a complaint then, by the time there is a complaint, it will often be 'too late'.[26] However, others were concerned that complaints could be used by a small minority to seek the censorship of material that most Australians would not wish to have censored. If there were a complaints-based system, it was noted, 'efforts must be made to dissuade frivolous and malicious complaints'.[27]

Major producers and distributors

6.32 Classification laws could also be directed at content distributed by companies and corporations and exclude content distributed by individuals, such as 'user-generated content'.[28] Classifying content comes at a considerable cost, particularly when done by an independent statutory body. Large organisations and companies, such as the major distributors of publications, films and computer games, may have the resources to ensure their material is classified and, under a new scheme, may also be able to employ their own classifiers for some content. The Australian Independent Record Labels Association, for example, submitted that 'costs associated with classification can only be reasonably borne by record labels with a history and potential of mass market reach'.[29]

6.33 Some submissions noted that smaller producers of content may not be able to bear the cost of having their content classified, and so should be exempted from classification laws. Civil Liberties Australia, for example, argued that:

---

23 Telstra, *Submission CI 1184*, 15 July 2011.

24 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

25 See, eg, Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011; Australian Family Association of WA, *Submission CI 918*, 12 July 2011.

26 For example, Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

27 A Hightower and Others, *Submission CI 2159*, 15 July 2011.

28 In the Issues Paper, the ALRC asked whether the size or market position of particular content producers and distributors, or the potential mass market reach of the material, should affect whether content should be classified: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 6.

29 Australian Independent Record Labels Association, *Submission CI 2058*, 15 July 2011.

> It is unfair to hold an individual or small group to the same standards as a corporation that has the time and resources to advertise and comprehensively research issues ... When profit motive is the dominant factor in producing content, classification becomes more justifiable as a feature of fair trading.[30]

6.34 However, a large number of submissions argued that market position or reach should have no bearing on whether content should be classified. One submission called this an 'an entirely subjective and impractical measure'.[31] The NSW Council of Churches emphasised that:

> The goal should always be to maintain classification standards that reflect accepted community standards and not to make special allowances for so-called special audiences or market segments.[32]

6.35 The iGEA also said the classification laws should be capable of being applied to 'all content producers, regardless of their size or market position and regardless of the size and composition of the audience for the content'.[33]

6.36 Some submissions expressed concern over whether there was any acceptable standard by which market position or reach could be judged as sufficiently large to warrant classification. Telstra thought it was unclear what benchmark the 'size' of producers or distributors could be usefully measured against.[34]

6.37 The ALRC proposes that certain content should only be required to be classified if it is produced on a commercial basis: see Proposals 6–1 and 6–2.

Size and composition of the audience

6.38 If content will only be seen by a small audience of adults, then there may be less demand for classification information. The more people are likely to see a piece of content, the greater the likely demand for classification information. If children are likely to see the content, then the need for classification information may also grow. Such arguments might justify expecting popular television channels to classify content they broadcast, but not overseas television channels that may also be watched on the internet.

6.39 In the Issues Paper, the ALRC asked whether the potential size and composition of the audience should affect whether content should be classified.[35] Many submissions argued that classification should be based on content rather than audience, and that small audiences also need classification information. Free TV Australia said that viewers 'have a right to expect the same acceptable community standards with respect to any material they access'.[36]

---

30 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
31 A Hightower and Others, *Submission CI 2159*, 15 July 2011.
32 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.
33 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.
34 Telstra, *Submission CI 1184*, 15 July 2011.
35 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 9.
36 Free TV Australia, *Submission CI 1214*, 15 July 2011.

6.40 It is also difficult, some submissions noted, to predict the size and composition of an audience—especially for online content.[37] Telstra commented that:

> Recent experience shows that the size and audience composition of differing types of content has changed dramatically in relatively short periods of time ... This rapid pace of change creates the risk that classification distinctions based on the potential size and composition of audience could quickly become outdated leading to inconsistencies and perverse outcomes.[38]

6.41 Another stakeholder submitted that internet content can 'become popular or fade in popularity within days, depending on which channels it is promoted in'.[39]

6.42 However, many submissions noted that classification of content creates an economic burden on smaller producers. Some said that content produced by small producers, or for a niche audience, should therefore be exempted from any requirement to be classified, and independent and niche developers should not be caught up in red tape. The Australian Independent Record Labels Association said that music for 'a small audience should not be subject to costly or resource dependent classification systems'.[40]

6.43 Some submissions argued that the composition of the audience (though not necessarily its size) should influence whether or not classification is necessary. The Arts Law Centre of Australia, for example, submitted that persons who attend galleries to view artworks are 'a discrete section of the community'—they are 'knowledgeable about the material they are going to view and attend by choice'. There should therefore be 'an explicit exemption to classification for works of art exhibited in a gallery space'.[41]

Children's content

6.44 Many parents and guardians rely on classification information to guide their choice of entertainment for young children. Children may also be more likely to be distressed or even harmed by content they view.[42] In light of these and other concerns, some call for the classification of 'everything'. The Australian Christian Lobby submitted that content 'designed for children should be subject to classification across all media.'[43] Similarly, Media Standards Australia argued that:

> All material should be checked by the Classification Board, and some should be refused classification. Content designed for children should definitely and automatically be classified across all media, as well as content which will be available to children within their viewing or listening hours.[44]

---

37 See, eg, Telstra, *Submission CI 1184*, 15 July 2011; Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.
38 Telstra, *Submission CI 1184*, 15 July 2011.
39 Endless Technology Pty Ltd, *Submission CI 1786*, 13 July 2011.
40 Australian Independent Record Labels Association, *Submission CI 2058*, 15 July 2011.
41 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.
42 In the Issues Paper, the ALRC asked whether content designed for children should be classified across all media: Issues Paper, Question 5.
43 Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.
44 Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011.

6.45 Civil Liberties Australia described the protection of minors as the 'crux of classification today':

> Adults are deemed capable of making decisions for themselves and held responsible for the decisions they do make. Parents, however, want to have some control over the messages their children receive and seek some help to ensure that the content their children are exposed to is age-appropriate ... There is therefore greater need to have content classified when it is specifically directed at children.[45]

6.46 Others have said the real risk is children's access to content that is not designed for children—adult content, such as violent films and pornography. The Australian Council on Children and the Media noted children have access to a lot of content that is not 'designed for them'. The classification system should, therefore, be 'based on what children have access to rather than the intent of the material's producer'.[46]

6.47 However, as noted above, it is arguably not possible to mandate that all media content must be classified. It may not even be possible to require all media content designed for children to be classified. However, as Telstra submitted, content producers and distributors might voluntarily submit their material for classification as child friendly.

> Parents would benefit from such a system by being able to direct their children to content with an appropriate classification rather than content that has not been classified at all, and content providers and distributors would benefit by being able to market their content as child friendly on the basis of an independent benchmark.[47]

Public or private

6.48 Many submissions stated that whether content is publicly or privately available should not affect whether it should be classified.[48] Many stressed the importance of maintaining a focus on content itself, rather than the platform from which that content may be accessed. The organisation Bravehearts, for example, submitted that:

> Whether or not the content is accessed in the public or private sphere should not impact on whether or not content should be classified ... [Such] conditions will only create loopholes that may be exploited.[49]

6.49 A smaller number of submissions suggested that content selectively viewed from home should not be subject to the same restrictions as content displayed in a public forum. Civil Liberties Australia submitted that 'the fact that content is accessed in public or at home should absolutely affect whether it should be classified':

> Public spaces are all about community, and therefore community standards should apply. In private spaces, by contrast, community standards are irrelevant.[50]

---

45 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
46 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.
47 Telstra, *Submission CI 1184*, 15 July 2011.
48 In the Issues Paper, the ALRC asked whether the fact that content is accessed in public or at home should affect whether it should be classified: Issues Paper, Question 10.
49 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.
50 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

6.50 Whether stricter restrictions should be placed on media shown in public—such as outdoor advertising—is discussed further in Chapter 8.

Feature-length films, television programs and computer games

6.51 Providing advice or information to consumers, in particular parents and guardians, to inform their entertainment choices is arguably the primary function of classification law.[51] The fact that most films and computer games that are classified by the Classification Board receive advisory classifications to which no legal restrictions apply (now G, PG and M), highlights that providing advice is central to classification policy.[52]

6.52 From the user's perspective, there may in time be little or no difference between content on ABC television or Channel 10, and content on YouTube or an overseas internet television channel. Why, then, require the ABC and Channel 10 to classify much of their content, but not YouTube? Why impose the cost of classification only on Australian publishers, television stations and other content providers?

6.53 Despite the impossibility of classifying all media content, a few reasons remain for continuing to require some content to be classified.

6.54 First, as noted above, the Australian community appears to expect classification information for feature-length films, television programs and computer games. This is a useful and valued service that many Australian content providers have given their customers for many years. However, although some have called for the classification of everything, there appears to be only a limited community expectation that books, magazines, websites and other online content be formally classified. As many have stressed, there is simply too much media content, even if it were desirable to classify it all. Requiring most content to be classified, even using industry classifiers, would also place a significant cost and regulatory burden on those who provide the content.

6.55 Secondly, the content traditionally classified in Australia, and that the ALRC considers should continue to be classified, has a large Australian audience. Feature-length films and television programs, and computer games in particular, are likely to be watched by a significant Australian audience. Short clips on the internet may also be watched by a large number of people, but the quantity of such clips may mean that any one clip is rarely watched by as many Australians as the more developed, commercial content traditionally shown on television channels and in cinemas and available to buy on DVDs or download from the internet.

---

51 There are no legal restrictions on material classified G, PG and M—these are 'advisory' classifications. The other classifications—MA 15+, R 18+, X 18+, RC, Category 1 Restricted, and Category 2 Restricted—are restricted classifications, meaning that legal restrictions apply to their sale and distribution. New classification categories are proposed in Ch 9.

52 The annual reports of the Classification Board indicate that 71% of the films and computer games classified by the Classification Board between July 2005 and June 2010 were classified either G, PG or M.

6.56 The ALRC proposes that while most content does not need to be classified, the new Act should provide that the following content must be classified before it is sold, hired, screened or distributed in Australia—whether delivered online or offline:

- feature-length films produced on a commercial basis;
- television programs produced on a commercial basis; and
- computer games produced on a commercial basis and likely to be classified MA 15+ or higher.[53]

6.57 Other content—for example, websites, books and audio books, music, radio content, podcasts, artworks, advertising—usually should not need to be classified, unless it is likely to be X 18+ or RC.[54] In Chapter 8, the ALRC also proposes that access to any content that is likely to be R 18+ should be restricted to adults.

What is a feature-length film or television program?

6.58 The description 'feature-length films and television programs produced on a commercial basis' is intended to capture only the content Australians now most expect to be classified—the films traditionally shown in cinemas and sold on DVDs and television programs traditionally broadcast on television and often repackaged for sale on other media. This content is now also available on the internet, which is why the ALRC proposes that the definition in the proposed Classification of Media Content Act should not be platform-specific.

6.59 This is the content that is traditionally classified in Australia. A more precise definition in the proposed Act should, however, clarify that other content does not need to be classified. In particular, this definition is not intended to capture other film-like internet content such as user-generated videos.

6.60 Television programs, other than exempt programs, are already classified before they are broadcast in Australia. This proposal should not greatly affect the number of television programs classified before broadcast on Australian television. Overseas television programs made available on the internet before they are broadcast in Australia should also be classified under this proposal. The ALRC uses the phrase 'television program' in the absence of a popularly understood, media-neutral alternative phrase.

Why only computer games likely to be MA 15+ or higher?

6.61 The ALRC proposes that only computer games likely to be classified MA 15+ or higher must be classified. These are the games that parents and guardians arguably most need to be warned about—the games with strong or high levels of violence,

---

53 Later in this chapter, the ALRC proposes that some content be exempt from this requirement. In Ch 7, the ALRC proposes that most of this content should be able to be classified by an authorised industry classifier or the Classification Board.

54 In Ch 8, the ALRC proposes that access must be restricted to all media content that has been, or is likely to be, classified R 18+ or X 18+.

coarse language and other content.[55] This is consistent with the ALRC's principles for reform concerning protecting children from material likely to harm or disturb them and providing consumers with classification information.[56]

6.62 Content providers may choose to classify other lower-level computer games voluntarily. There are arguably too many games developed and released each year, and developed by too diverse a range of persons, to formally classify before they are sold or distributed in Australia. Hundreds of thousands of small games, often played online or on mobile devices and developed by small developers or individuals, are now available for sale. The iGEA submitted:

> Small Online Content Products should only require classification if such products have the potential to be classified within a restricted category.[57]

6.63 Rather than exempt all of these games from the classification obligation, or introduce a category of 'small online content product' or 'small and simple computer game', the ALRC proposes that only those games likely to have a higher classification should be classified.

6.64 In the United States and the United Kingdom, computer games are classified voluntarily in response to market demand for classification information. Industry codes of practice in Australia might facilitate this voluntary classification, so that the statutory classification categories, criteria and markings proposed in Chapter 9 are used for all classified computer games in Australia.

Exempt films, television programs and computer games

6.65 The proposed Classification of Media Content Act should provide that 'exempt content' is content exempt from the laws that provide that certain content must be classified, but not from the laws proposed in Chapter 8 that require restrictions on adult content. The Act should contain a definition of 'exempt content' drawn from the existing exemptions in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), the *Broadcasting Services Act 1992* (Cth), and television codes. This exempt content would include, for example:

- news and current affairs programs;
- sporting events;
- recordings of live performances; and
- films for training, instruction or reference.

6.66 Although this content should not need to be classified, it should still be restricted to adults if it is likely to be R 18+. In other words, this content should not be exempt

---

55 Of the computer games classified by the Classification Board between July 2005 and June 2010, only 8% were classified MA 15+ or RC. See annual reports of the Classification Board for this period. This statistic does not account for the many online games not submitted to the Classification Board for classification.

56 Ch 4, Principles 3 and 4.

57 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

from the rule in Proposal 8–1. This safeguard should largely obviate the need to exclude higher level content from the definition of exempt content.[58] The recording of a live performance that is likely to be R 18+, for example, would still need to be restricted to adults, even though it may not need to be classified. The definition of exempt content should, however, exclude content likely to be X 18+ or RC.[59] The ALRC proposes below that this content should be classified.

6.67 The safeguard proposed in Proposal 8–1 (that all media content likely to be R 18+ must be restricted to adults) also means that more content can be 'exempt content' in the new Act. In the ALRC's view, the definition of exempt content in the new Act should be expanded to capture films and computer games shown at:

- film festivals; and
- art galleries and other cultural institutions.[60]

6.68 This should replace the formal—and reportedly cumbersome—exemption arrangement, under which film festivals and cultural institutions currently apply to the Director of the Classification Board to have content exempted from classification laws.[61]

Proposal 6–1 The Classification of Media Content Act should provide that feature-length films and television programs produced on a commercial basis must be classified before they are sold, hired, screened or distributed in Australia. The Act should provide examples of this content. Some content will be exempt: see Proposal 6–3.

Proposal 6–2 The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA 15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6–3.

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

---

58 The *Classification Act* now provides that films and computer games are not exempt if they are likely to be classified M or higher: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5B(3).

59 Under Proposal 6–4, all media content likely to be X 18+ must be classified.

60 For example, the National Film and Sound Archive.

61 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 51.

All content likely to be X 18+

6.69 The X 18+ classification is an adults-only classification for films with 'real depictions of actual sexual intercourse and other sexual activity between consenting adults'.[62] In Chapter 9, the ALRC proposes that any media content, rather than only films, may be classified X 18+. This does not mean the ALRC proposes that this content should be legal to sell or distribute; the ALRC review does not address this question.[63] However, if the Australian Government determines that the sale and distribution of some or all X 18+ content should be legal, then the ALRC proposes that media content that is likely to be classified X 18+ must be classified and then appropriately marked and restricted to adults. This media content may include not only films and computer games, but also magazines and websites.[64]

6.70 The primary benefit of classifying this content may be to warn potential viewers that the content is sexually explicit. However, classifying this content also serves to help prevent RC content—much of which is sexually explicit—from being sold and classified as X 18+ content.[65] If publishers of adult content must have trained classifiers review their content against criteria that prohibits certain depictions (for example, of sexual violence), then they may be less likely to sell films with RC content.

6.71 Despite this, some might argue that if access to the content is restricted to adults, there is no need to have the content classified at all. Sexually explicit adult content could arguably be treated in the same way as the ALRC proposes that most R 18+ content be treated: if access is restricted to adults and the content is properly marked, the content should not need to be classified. Laws designed to prohibit RC content, some might say, should target RC content, not X 18+ content.

6.72 This argument might also be supported by the observation that many providers of adult content, particularly those outside Australia, will simply not comply with a law requiring them to classify their content. Unclassified adult content is rife on the internet and sold in sex shops throughout the country; many providers of this content do not comply with existing Australian laws and may be no more likely to comply with these proposed laws. In any event, the sheer quantity of sexually explicit adult content on the internet also means that it is highly unlikely that even law-abiding publishers would arrange to classify all of this content before distributing it in Australia.

6.73 Nevertheless, the ALRC proposes that, if the sale of some X 18+ content is legal in Australia, the content should be required to be classified before it is sold, hired, screened or distributed, either online or offline. Even if it is highly unlikely that most adult content will be classified, by insisting that it should be, the law makes clear Australia's standard on what may be acceptable to display in sexually explicit content.

---

62 *Guidelines for the Classification of Films and Computer Games* (Cth).

63 Currently, it is illegal to sell X 18+ films in the Australian states, but not in most parts of the territories. It is not illegal, however, to sell magazines classified Category 1 Restricted or Category 2 Restricted (the publications classifications equivalent to the X 18+ film classification).

64 In Ch 7, the ALRC discusses who should classify content likely to be X 18+.

65 The scope of the RC category is discussed in Ch 10.

Proposal 6–4 If the Australian Government determines that X 18+ content should be legal in all states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.

All content likely to be RC

6.74 Another reason to classify media content is to determine whether something should be banned entirely—perhaps prohibited to sell or even possess; perhaps to be taken down from the internet; perhaps to be filtered or blocked from the internet.

6.75 It is currently illegal to sell, hire, exhibit and distribute content that has been classified RC or would, if it were classified, be classified RC.[66] In Western Australia, it is also illegal to possess or copy RC content and in prescribed areas of the Northern Territory it is illegal to possess or supply RC content.[67] The Australian Government has also announced a policy that would require internet service providers to block or filter certain content on an RC content list.[68]

6.76 This chapter does not review these laws that ban certain content, but if such laws remain, or are introduced, then relevant offences may turn in part on the classification of content. If someone is to be convicted of an offence for selling RC content, for example, it is important that the content be classified.[69] Accordingly, the ALRC proposes that the new Regulator must apply for the classification of media content that is likely to be RC before taking enforcement action in relation to that content.[70]

6.77 Content providers should also apply for the classification of any content they intend to publish that may be RC. Ideally, content providers should assess content before they publish it, but of course many provide such a large quantity of content that this is clearly impractical. These content providers should have mechanisms that allow users to flag content that may be R 18+, X 18+ or RC.

Proposal 6–5 The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.

Proposal 6–6 The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:

66 The scope of the RC category is discussed in Ch 10.

67 *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) ss 62, 81, 89. *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 102, 103.

68 See Chs 8, 10.

69 In Ch 7, the ALRC proposes this classification decision should only be made by the Classification Board.

70 The role of the Regulator is discussed in Ch 12.

(a) charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;

(b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or

(c) adding the content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).

Modifications—when content should be reclassified

6.78 If content that must be classified, and that has been classified, has changed significantly, the content should be reclassified. This idea is reflected in s 21 of the *Classification Act*, which provides that, subject to some exceptions, 'if a classified film or a classified computer game is modified, it becomes unclassified when the modification is made'. A common modification to a film is to add 'extras', such as interviews with actors. These extras often appear on a DVD disc, which is why a film on DVD must usually be classified again, even though a version without the extras was classified before being screened in cinemas.

6.79 Section 21(2) of the *Classification Act* prescribes a list of changes that do not amount to a modification of a film or a computer game.[71] This prescriptive modification rule has been the subject of many complaints from industry. Some claim that it is too narrow, and results in content being unnecessarily classified many times over, at considerable expense to distributors. A prescriptive, statutory modification rule is also unlikely to keep pace with technology, and does not adequately account for the fact that much online content is dynamic and changes constantly.

6.80 The ALRC considers that the proposed Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. However, the Act should also define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'. Neither the Act nor industry codes need to prescribe specific types of modifications that would or would not be likely to change the classification of content. Whether something has been modified should depend on the content itself, not on the type of modification.

Changing platforms

6.81 Under a scheme with this modification policy, changing platforms alone should not usually amount to a modification of that content. Accordingly, if a content provider has content classified for one media format (for example, television), then it or another content provider may use that classification decision for the same content published on

71 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 21.

another media format (for example, DVD or the internet), so long as the change in media format has not changed the content so significantly that the modified content is likely to have a different classification to the original content. Alternatively, the second content provider may have the content classified again, unless the content was classified by the Classification Board.

6.82 This proposal also means that the classification decisions of the Classification Board should usually be used by all subsequent providers of the classified content. For example, if the Classification Board classifies a film for cinema release, and a year later a television station broadcasts the same film, then the television station must use the classification given to the film by the Classification Board—unless the film has been changed such that the modified film is likely to have a different classification from the original film. If the film has not changed, the television station may not give it a new classification.

3D content

6.83 Currently, the Classification Board treats a 3D version of a film as a different film from the 2D version of the film, so that both versions are classified by the Classification Board before being exhibited in Australia. Film distributors have criticised this, arguing that it is wasteful and unnecessary to classify what is essentially the same film twice. Distributors argue that the two versions always receive the same classification, and that any theoretical possibility that one version will have a higher impact than the other may be met by applying the classification of the 3D version to the 2D version.

6.84 The ALRC agrees that it should not be necessary to classify both the 2D and 3D versions of a film—or any other type of content—unless one version of the content is likely to have a different classification from the other version. Whether one version of a piece of content is likely to have a different classification from another version should depend on the specific piece of content, rather than the abstract question of whether one type of modification tends to alter impact.

6.85 The definition of 'modify', proposed below, places upon content providers, such as film distributors, the obligation to consider whether a version of their classified content should be classified afresh. As with other obligations placed upon content providers under the new scheme, this obligation would be monitored and enforced by the Regulator.

Computer game 'mods' and expansion packs

6.86 If an expansion pack or computer game 'mod' is unlikely to change the classification of the original game, and the expansion pack or mod cannot be used without the original game, then the expansion pack or mod could carry the same classification as the original game.

6.87 However, if an expansion pack or computer game mod increases the impact of a computer game, such that the modified game is likely to have a different classification, then the expansion pack or mod may need to be classified. For example, if an original game were classified M, and the expansion pack were likely to make the game

MA 15+, then the expansion pack should be classified. Similarly, if the original game were classified MA 15+, and an expansion pack were likely to make the game R 18+, then again, the expansion pack must be classified.

6.88 This is further complicated when a mod is released by someone other than the developer of the original game. If a mod developed by a third party were to increase the classification of game, and in such a way that the game became likely to be classified MA 15+ or higher, then arguably providers of that third-party mod should be responsible for ensuring the mod is properly classified.

6.89 An expansion pack may not require the original game and may be sold separately to the original game. However, in the ALRC's view, this does not sufficiently justify treating the expansion pack as a different game to the original game. The original game and the expansion pack may be essentially the same game. It may therefore be more efficient to treat the expansion pack as a modification of the original game, rather than a new game.

6.90 In the ALRC's view, the rule proposed below regarding modified content should adequately ensure that computer games that are changed in such a way as to increase their likely classification are treated appropriately. In the new Act, it may prove unnecessary to have a definition of 'add-on' along the lines of the existing definition in the *Classification Act*.

6.91 This is consistent with the recommendation of the iGEA that add-on content (which it defines as 'content that is additional to the core game such as expansion packs and in-game micro-transactions') should only be required to be classified:

> if the potential impact of the Add-On Content is higher than the impact of the computer game to which the Add-On Content will be applied. In circumstances where the Add-On Content has the same or lower level of impact, such Add-On Content would inherit the classification of the computer game to which the Add-On Content will be applied.[72]

Proposal 6–7 The Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. The Act should define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'.

Voluntary classification

6.92 Although the ALRC only proposes that a limited range of content must be classified, content providers may choose to have their content classified to meet market demand for classification information or perhaps to avoid direct government regulation. Films and computer games are classified voluntarily in the United States

72 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

and the United Kingdom. The idea of voluntary classification was very popular in submissions to this inquiry. Some noted that content providers may have an interest in classifying their content. The Pirate Party Australia, for example, submitted that:

> the voluntary frameworks already in force on various content distribution networks like the Apple App Store and YouTube already provide consumers with both accurate information about content and a means to register complaints about inappropriate content. These distribution networks are managed by single entities who have a commercial interest in providing users with accurate information about content and voluntarily classify their content accordingly.[73]

6.93 Content providers will be more likely to choose to meet this consumer demand for classification information if, as is proposed in Chapter 7, this content may be classified by an authorised industry classifier or a person using an authorised classification instrument.

6.94 Consumers may demand more classification information for particular types of content. For example, although the ALRC proposes that only computer games likely to be MA 15+ or higher must be classified, distributors of popular games may choose to classify lower level games, because parents and guardians value this information.

6.95 Music is another type of content for which some people call for further classification information. The ALRC suggests that the Australian Recording Industry Association (ARIA) and the Australian Music Retailers Association (AMRA) consider adapting their industry code so that it provides that music distributors, online and offline, should classify music with a strong impact using the classification categories and criteria of the National Classification Scheme. This may be music that would be likely to be classified MA 15+ or R 18+ under the National Classification Scheme, or Level 1, 2 or 3 under the existing ARIA/AMRA code. This would mean using the statutory classification markings of the National Classification Scheme, which are perhaps more widely understood and recognised by Australians than the existing ARIA/AMRA Level 1, 2 and 3 markings, and have the additional benefit of giving advice on the appropriate age of persons listening to the content. This outcome would also harmonise music classification with the classification of other classified media in Australia.

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

73 Pirate Party Australia, *Submission CI 1588*, 15 July 2011.

7. Who Should Classify Content?

Contents

Summary 105
Who currently classifies content? 106
Films, computer games and publications 106
Television content 107
Online content 108
How to determine who should classify content 108
Volume of content 108
Cost and administrative burden 109
Likely classification category 109
Straightforward content 110
Efficiency of decision making 110
Independence 110
Content that must be classified by the Classification Board 111
Feature-length films for cinema release 112
Computer games likely to be MA 15+ or higher 113
Content that may be RC 113
Content that may be classified by authorised industry classifiers 114
Content likely to be X 18+ 116
New classification instruments 118
Classification checks and safeguards 119
Authorisation of industry classifiers and instruments 120
Who provides classification training 120
Reviews of classification decisions 122
Audits of industry classification decisions 124
Complaints processes 124
Sanctions regime 125
Industry bodies and their relationship with the Regulator 125

Summary

7.1 Any system that requires mandatory classification of content gives rise to questions about who should be responsible for making classification decisions. In this chapter, the ALRC proposes that some classification decisions now made by the Classification Board (the Board), may instead be made by authorised industry classifiers, subject to review and regulatory oversight.

7.2 The ALRC proposes that the Board should continue to classify:

- feature-length films produced on a commercial basis for cinema release;
- computer games produced on a commercial basis and likely to be MA 15+ or higher;
- content that may be RC;
- content submitted by the Minister, the Regulator or another government agency; and
- content that needs to be classified for the purpose of enforcing classification laws.

7.3 The ALRC proposes that, apart from the media content that must be classified by the Board, all other media content may be classified by authorised industry classifiers, including:

- feature-length films not for cinema release, and television programs (for example, films and television programs on DVD, the internet, and television); and
- computer games likely now to be classified G, PG and M.[1]

Who currently classifies content?

7.4 Responsibility for classification, content assessment and other related regulatory activities is allocated across independent classification boards, government and industry, as described below.

Films, computer games and publications

7.5 Films, computer games and certain publications are subject to direct government regulation, which involves mandatory classification by independent boards using statutory criteria and guidelines. Matters pertaining to the establishment of the boards and classification decision making are detailed in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*).

The Classification Board and Classification Review Board

7.6 The Board and the Classification Review Board (the Review Board) are separate statutory bodies independent of government and each other. Members are recruited through a competitive merit selection process and, while formal qualifications are not specified, the *Classification Act* requires that members be broadly representative of the community.[2] Membership turns over periodically as appointments are generally for a three-year fixed term, and no member can serve more than a total of seven years.

1 New classification categories are proposed in Ch 9. A table summarising what content must be classified and by whom, and what must be restricted, is in Appendix 4.

2 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 48.

7.7 The Boards' classification decision-making processes are expected to reflect sound administrative law practices. The Boards are required under legislation to prepare annual reports[3] and their activities are subject to parliamentary scrutiny.

Industry authorised assessors

7.8 Authorised industry-based assessors play a significant role in classification under schemes that provide for the classification of certain computer games, certain films for sale or hire and advertising for unclassified films and computer games.[4]

7.9 Using the same classification tools as the Board, industry assessors may make classification and consumer advice recommendations which are submitted to the Board with an application for classification. Assessors provide details about the content against each of the classifiable elements plus other information that substantiates their classification recommendation. Under these schemes, applicants pay a reduced application fee, but the final classification decision rests with the Board and is recorded as a decision of the Board. The only exception to this is the advertising scheme, which is a fully industry self-assessed process, that does not involve the Board at all.

7.10 The operation of these schemes is governed by provisions in the *Classification Act* and other legislative instruments that set out eligibility criteria, application conditions, training requirements and sanctions and safeguards to maintain the integrity of classification decisions and deal with misconduct by assessors.[5]

Other government decision makers

7.11 Although they do not make formal classification decisions, some government employees also assess content pursuant to obligations outlined in other Commonwealth and state and territory legislation. These include employees of the Attorney-General's Department (the Department), who are delegated content assessment responsibilities; the Australian Customs and Border Protection Service (Customs), who assess and intercept prohibited imports and exports at the border; the Australian Communications and Media Authority (the ACMA), who investigate complaints about online content; and some state and territory law enforcement officers, who may issue notices regarding the likely classification of material for the purpose of prosecutions.

7.12 Government decision makers may receive Board approved classification training. They may also seek advice from the Board about content matters or refer content for classification as necessary.

Television content

7.13 Commercial television broadcast licensees, the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) and subscription

3 Ibid s 67.
4 Ibid ss 14, 14B, 17.
5 Ibid ss 21AA, 21AB, 22D–J; *Classification (Authorised Television Series Assessor Scheme) Determination 2008* ; *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* .

television companies all engage classifiers to classify programs, films and, in some cases, other content such as promotions or advertising. Codes of practice concerning programming are a legislative requirement. Each respective broadcaster or industry sector has its own code[6] that governs classification activities, including exemptions, classification guidelines, time-zone restrictions, marking requirements and complaint mechanisms.

Online content

7.14 'Trained content assessors' are engaged by industry mobile and online content service providers to determine whether content should be provided behind a restricted access system in accordance with requirements under sch 7 of the *Broadcasting Service Act 1992*. The circumstances under which content must be referred for assessment and the assessment process are set out under the internet industry content services code of practice, approved by and registered with the ACMA.[7]

7.15 Online and content service providers may submit media content to the Board for classification if they choose. The ACMA may also refer online content to the Board for classification if it has been the subject of a complaint alleging that the media content is either 'prohibited content' or 'potential prohibited' content.

How to determine who should classify content

7.16 In Chapter 6, the ALRC proposes that all feature-length films and television programs produced on a commercial basis, computer games produced on a commercial basis likely to be classified MA 15+ or above and all media content likely to be X 18+ or RC, must be classified before being sold, hired, screened or distributed in Australia.[8] The following section discusses the factors that might influence which segment of this content should be classified by the Board and which may be classified by industry.

Volume of content

7.17 As discussed in Chapter 6, the volume of media content available today inevitably restricts what can practically be classified. Submissions noted that, with the 'huge range of content being produced both online and offline, it is economically and practically unrealistic that a government body be charged with the classification of all content'.[9]

7.18 Submissions commented that the quantity of content is also a factor that influences the division of classification responsibilities, and that industry should

---

6 Codes of practice registered with the ACMA: The *Commercial Television Industry Code of Practice 2010* the *ABC Code of Practice 2011*; the *SBS Codes of Practice 2006 (incorporating amendments as at August 2010)*; the *ASTRA Codes of Practice 2007 Subscription Broadcast Television;* and *ASTRA Codes of Practice 2007 Subscription Narrowcast Television*.

7 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008).

8 See Chapter 6 for a discussion of what content must be classified.

9 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

therefore be permitted to classify the content it publishes.[10] For example, Daniel Bryar argued that:

> Where the volume of content is too large for a classification body to adequately address every article, suitable industry codes are more effective and practical. This is particularly true for the adult entertainment industry, both online and offline.[11]

7.19 The Australian Home Entertainment Distribution Association (AHEDA) also suggested that DVD distributors should be allowed to classify children's content, as the 'amount of pre-school aged children's specific TV programming is immense and the cost to classify is great'.[12]

Cost and administrative burden

7.20 The Board recovers fees for making classification decisions on a cost-recovery basis. The Board model of classification is resource intensive and therefore also costly. Financial and administrative burdens may therefore be a reasonable consideration in determining what content should be classified by whom. As Telstra explained:

> the economics of the provision of online content are very different to that of publishing, film or television. In fact, given the costs of preparing a formal classification application and the scale of the classification fees charged by the Classification Board ($810–$2040 per assessment plus), it is likely that requiring large scale formal classification by the Classification Board would make the provision of most online content by Australian providers uneconomic.[13]

7.21 Allowing for industry classification that reduces costs, and the regulatory burden, was considered particularly important for independent developers and publishers of niche products.

Likely classification category

7.22 The features of particular content may also be useful for distinguishing what the Board or industry should classify. For example, submissions suggested that 'low impact content' or material that is not likely to be classified in a legally-restricted category could be classified by industry.[14]

7.23 Other submissions argued that a varied range of content could be classified by industry. For example, the Australian Christian Lobby, stated that:

> media such as publications, music and sound recordings, websites, and so on could be self regulated when the content is likely to receive a rating below MA15+. Anything that is likely to be rated MA15+ or above should be referred to the Classification Board.[15]

---

10 F Hudson, *Submission CI 402*, 8 July 2011.
11 D Bryar, *Submission CI 1278*, 12 July 2011.
12 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.
13 Telstra, *Submission CI 1184*, 15 July 2011.
14 R Palmer, *Submission CI 2296*, 15 July 2011.
15 Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.

7.24 AHEDA asserted that industry should classify all content, except for content likely to be classified R 18+ and X 18+, because such content is high impact and often controversial in nature.[16]

Straightforward content

7.25 Some submissions suggested that, where the classification of content may be straightforward, it may not need to be classified by the Board, for example, children's content.[17] Other submissions supported industry classification of some G content, where an industry specialises in it and the producer's intention is clear and fair.[18] It was suggested that sexually explicit content was another type of content that it would be easy for industry to classify, because it is provided by a sector that 'caters only towards adults'.[19]

Efficiency of decision making

7.26 A key benefit of industry classification is that it is likely to generate cost savings and create other efficiencies, such as reducing the time it takes to classify products. Efficiency of classification may therefore be another useful way to decide what content should be classified by industry.

7.27 Submissions referred to speed of classification and familiarity with content as factors that supported industry classification.[20] Given the volume of media content and the dynamic nature of online content, submissions observed that the Board would not necessarily be able to keep pace with certain content-generating industries.[21] It was also suggested that industry should classify content where there are critical deadlines for publishing particular content.[22]

7.28 Industry classification may have particular advantages in relation to media content that can be accurately classified quickly, especially where that content is also published in large volumes and is subject to pressing time frames.

Independence

7.29 Given the apparent support for industry classification, some might question the need for an independent classification body at all. Despite the limits of the Board to classify all content that may be subject to classification requirements under a new system, some submissions asserted that 'it is imperative that a government agency, rather than industry bodies, devise and apply the classifications'.[23]

7.30 Submissions variously referred to the importance of a 'separate', 'impartial' classification body while others, such as the Australian Council on Children (ACCM)

---

16 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.
17 Ibid.
18 Confidential, *Submission CI 2037*, 15 July 2011.
19 J Bui, *Submission CI 873*, 11 July 2011.
20 C McNeill, *Submission CI 1997*, 15 July 2011.
21 E Barker, *Submission CI 1781*, 13 July 2011.
22 D Bryar, *Submission CI 1278*, 12 July 2011.
23 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

and the Media, also remarked that 'classification is a highly technical process, and having one central body will ensure accuracy and consistency'.[24] John Dickie emphasised the need for an independent standard-setting body:

> There needs to be a base classification decision making body applying agreed upon criteria and with guidelines to assist in making the decision. In Australia that is most likely to be a government agency. That agency sets the standards and other agencies—government or industry—can take their cue from that.[25]

7.31 Some submissions noted that classification becomes more justifiable as a feature of fair trading in relation to content produced primarily for profit. Submissions highlighted the importance of unbiased decision making, particularly in relation to the classification of content where there may be profit or market advantages in under-classifying. Family Voice Australia observed, for example, that lower classifications generally lead to increased market share, 'which is why classification applicants sometimes appeal against the classification of a film for public exhibition because it is higher than the applicant would prefer'.[26]

7.32 Independent classification decisions that are not influenced by commercial imperatives may be behind the suggestion in some submissions that films and computer games continue to be classified by the Board. 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.

Content that must be classified by the Classification Board

7.33 While the ALRC proposes that most content that must be classified may be classified by authorised industry classifiers (or the Classification Board, if the content provider chooses), the ALRC also proposes that some content should continue to be only classified by the Classification Board.

7.34 The Classification Board's greatest value perhaps lies in its role in providing an expert benchmark for classification standards and classification decisions. In line with the principle that communications and media services available to Australians should broadly reflect community standards, the independent Board, whose members are intended to be broadly representative of the Australian community, is suited to a bench-marking role.

7.35 Benchmarked standards are far more important under a system that anticipates decision making by many different decision makers and where more content may be classified directly by industry. There is already a high level of public confidence in the Board's decisions, given its independence, depth of experience and expertise.

7.36 While post-classification audits might be one way to signal benchmarks, original classification decisions made by the Board provide frequent, proactive and publicly

---

24 Ibid.
25 J Dickie, *Submission CI 582*, 11 July 2011.
26 FamilyVoice Australia, *Submission CI 85*, 3 July 2011.

visible benchmarks by an independent statutory authority. The benchmarking benefit is amplified as Board decisions must carry over to the same content subsequently delivered in any other media format on any other platform.[27]

7.37 As an independent expert body, the Board's decisions are perceived to be objective and free of self-interest. However, in order to maintain the level of expertise and experience expected of a benchmark decision maker, the Board needs to continue to routinely make classification decisions across media content that must be classified and is produced across the range of classification categories.

7.38 Industry should also have certainty and clarity regarding the content that must be submitted to the Board for classification. This is best achieved by identifying a discrete and distinct group of content from the mass of media content that must be classified, for which the Board will have statutory responsibility. This also means having regard to what constitutes a manageable volume of media content that would allow the Board to continue to deliver decisions in a timely manner.

Feature-length films for cinema release

7.39 The ALRC considers that feature-length films for cinema release provide a useful category of content that may be used to benchmark classification decisions. These films have a high public profile and a large audience reach over time and across other media platforms—they may be downloaded online, sold on DVD, or screened on television subsequent to their cinema release. Cinema release films also often spawn major franchises, including merchandise and other media content such as computer games. Ultimately, this is media content that, in all its forms, will be consumed by a significant proportion of the Australian population.

7.40 Furthermore, there appears to be stronger consumer expectation of reliable and independent classification information for films screened in cinemas. This is due, in part, to the costs incurred by people attending the cinema relative to other media content. This expectation may be reflected in the higher number of complaints and reviews of decisions for this content.

7.41 Films screened in cinemas generally account for the most classification reviews annually and the largest proportion of complaints relative to the number of classification decisions for this type of content.[28] In 2009–10, five of the eight applications for review were for cinema release films and there were 194 complaints for 422 cinema release films classified: these films represent 6% of Board classification decisions but they account for 18% of complaints received.[29] While the complaints relate to a small number of titles, they spanned the range of classifications including content classified G and PG and the complaint ratio is markedly different to

---

27 Only media content, that is modified to the extent that the modified content is likely to have a different classification to the original content, must be classified anew. For example, this means that the 2D version of a 3D film for cinema release does not need to be classified if the 2D version is likely to have the same classification as the 3D version already classified by the Classification Board. Under such a scenario, both versions of the film would carry the original Classification Board classification.

28 See Classification Board's Annual Reports from 2005–06 to 2009–10.

29 Classification Board, *Annual Report 2009–10*, 45.

the 91 complaints received about films and television series sold on DVD compared with 4,361 titles classified.[30]

7.42 A consistent feature of classification systems in other jurisdictions, even where classification is voluntary and may be industry led, is the classification of films for cinema release by an entity that is 'independent' of industry. Organisations such as the Classification and Rating Administration in the US, established by the Motion Picture Association of America and responsible for the classification of theatrical product, emphasises that its classifiers are parents who have no other connections to the film industry.[31]

7.43 A number of industry stakeholders, including the National Association of Cinema Operators, expressed the view that the current policy for cinema release films should not change and that these films should continue to be classified by the Classification Board.[32]

Computer games likely to be MA 15+ or higher

7.44 In Chapter 6, the ALRC proposes that only computer games likely to be classified MA 15+ or higher must be classified. As a popular form of media content that is produced for both children and adults, computer games should also be included in the range of content for which the Board provides a decision-making benchmark.

7.45 The ALRC also observes that computer games with strong or high level content have been the subject of extensive public debate and controversy.[33] Although some of this controversy is likely to abate in light of the decision by the July 2011 Standing Committee of Attorneys-General to introduce an R 18+ classification for computer games, the newness of this classification, as well as continued community concern about computer games, may generate ongoing expectations for closer scrutiny of this content. This is another justification for the classification of these categories of computer games by the Board.

Content that may be RC

7.46 Classification of potentially RC content is complex for several reasons. The nature of the content that lies at the boundaries of R 18+/RC and X 18+/RC classifications is such that it is often controversial, morally contentious and highly emotive. The RC classification is also the only classification that is associated with laws that result in outright bans on the sale, hire or distribution of media content. The

---

30 Ibid, 46.

31 Some classification schemes also use 'independent' bodies for the classification of other content such as DVDs or computer games, however, this is not always the case. For example, in Canada, each of the provinces is responsible for classification of films for theatrical release using various classification mechanisms while DVDs are 'classified' by averaging the decisions of all the provinces in relation to the theatrical release.

32 National Association of Cinema Operators - Australasia, *Submission CI 1155*, 15 July 2011.

33 Some sections of the community continue to express strong concerns about computer games. Censorship Ministers, at the Standing Committee of Attorneys-General meeting in December 2010, echoed these concerns by requesting separate classification guidelines for computer games that have regard to the concerns raised by Ministers generally and the interactive nature of computer games in particular.

Board, as a body independent from government and industry, is the appropriate body to classify this content on the basis that it is often very complex and the risk of harm that may arise from a wrong decision is arguably greater than with other types of content.

7.47 The Board, as opposed to industry, also has the experience and expertise necessary to classify content that may be RC, which spans a wide range of content, including extreme content such as child sexual abuse material. The same expertise is important in relation to media content that is required to be classified in order to enforce classification laws or which the Australian Government Minister responsible for censorship, the Regulator or another government agency submits for classification—including that submitted by law enforcement authorities such as Customs or state and territory police.

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

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

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

(c) content that may be RC;

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

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

Content that may be classified by authorised industry classifiers

7.48 The ALRC proposes that, apart from the media content specified above that must be classified by the Board, all other media content—including the remaining content that must be classified and any content that a content provider chooses to have classified—may be classified by authorised industry classifiers.[34] Such media content will commonly include:

- feature-length films and television programs not for cinema release (for example, films on DVD, the internet, and television);
- media content classified by the Classification Board but later modified; and
- computer games likely to now be classified G, PG and M.[35]

34 Content providers would not be compelled to use authorised industry classifiers. It would be open to them to submit content to the Board accompanied by the relevant fee for classification if they choose to do so.

35 New classification categories are proposed in Ch 9.

7.49 There may be a view that some feature-length films not for cinema release and television program content might sometimes raise concerns sufficient to justify classification by the Board (for example, content at the MA 15+ or R 18+ classification). However television has always been responsible for producing content and editing higher-level film content so that it may be accommodated at the MA 15+ classification. Moreover the new system proposes checks and safeguards, including mechanisms for consumer complaints, audits and reviews by the Board, all of which are designed to identify and manage content that has been erroneously classified by industry classifiers. These are discussed later in this chapter. Furthermore, the content ordinarily sold on DVD, downloaded from the internet or screened on television is similar—and, consistent with the objectives of platform neutrality—as far as possible the same content should be treated the same way.

7.50 The content that industry may classify represents the greater proportion of content that must be classified under the ALRC's proposals. It recognises industry's longstanding involvement in the classification of television content and existing arrangements whereby industry assessors make classification recommendations to the Board in relation to similar such content.[36]

7.51 This class of media content represents content for which industry is not likely to get the classification wrong (because it is relatively straightforward to classify or industry has experience in classifying or assessing similar content); and the level of harm that might arise if it was incorrectly classified (that is, eg, the difference in G and PG content is not so great that it would cause much alarm if a DVD was classified G instead of PG).

7.52 Allowing industry to classify this media content should significantly reduce the cost and administrative burden of classification. The efficiency and ease of industry classification compared to sending content to the Board also potentially motivates industry to comply with classification requirements and may encourage the classification of a greater volume of content.

7.53 While a key benefit of the new classification system is that media content is not required to be classified again simply because it is being released on a different platform, a content provider may choose to reclassify content that has been previously classified by another industry classifier. The ALRC does not consider it is appropriate or acceptable to compel a content provider to use the classification of another industry classifier in circumstances where they disagree with the original decision (for example, classified television series episodes may be reclassified when the series is distributed on DVD because the DVD distributor regards the original classifications were too low).

---

36 The existing authorised assessor schemes would no longer be necessary under the ALRC's proposed model for industry classification—as most of this content would be the responsibility of industry to classify if they so choose.

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

Content likely to be X 18+

7.54 If government determines that content classified X 18+ may be lawfully sold and distributed in some or all of Australia, the ALRC proposes, in Chapter 6, that this content must be classified. Although some might argue that this content could be marked X 18+ and restricted without also being classified, the ALRC argues that classifying the content should help content providers to ensure their content does not feature RC material, such as sexual violence.

7.55 Sexually explicit material is widely available and is being consumed by a large number of Australians. In 2001–02, research conducted by La Trobe University involving 20,000 Australians found that 25% had watched an X18+ film in the past 12 months.[37] The proliferation of adult and specialist sex retail shops would also indicate there is considerable demand for sexually explicit DVDs and publications. Moreover, the amount of content likely to be X 18+ available on the internet is enormous.

7.56 Currently, most sexually explicit adult content available in Australia is not classified. The Eros Association submitted that the number of X 18+ classified films has fallen from over 2,000 in the mid-1990s to less than 600 films a year at present—arguing that the high costs of classification by the Board and uncertainties about the legality of its distribution across Australia were major factors in this decline.[38]

7.57 In the ALRC's view, it is important that this content be classified. However, the sheer volume of this content means that, in practice, it is not possible for the Board to classify all of it. An alternative means of classification is needed, and classification must be efficient and inexpensive.

7.58 It is highly unlikely that international providers of sexually explicit content will have their content classified before distributing it online. However, allowing industry to classify X 18+ content—efficiently and inexpensively—removes existing barriers to classification of this content. It may mean, therefore, that responsible hosts and providers of adult content in Australia will have their content classified. Industry representatives such as the Eros Association assert that this indeed would occur.

7.59 On the other hand, if this content may only lawfully be classified by the Board, the current situation will likely prevail and most of it will not be classified at all.

7.60 It is important to note that industry classification of this content does not mean that the adult industry will be self-regulated. As proposed later in this chapter, industry

---

37 Eros Association, *Submission CI 1856*, 20 July 2011.
38 Ibid.

decisions would be monitored by the Regulator and audited and reviewed by the Board. Industry classifiers would be trained, and have to be authorised by the Regulator. Additionally, classifiers who erroneously classify sexually explicit content would have their authorisations revoked and strong penalties would apply for content that is wrongly classified.

7.61 Under codes of practice, industry bodies could be better utilised to support and encourage the classification of X 18+ content by its members. Industry bodies, the Regulator and other law enforcement agencies might also be expected to work cooperatively to identify and prevent the distribution of material that may be RC.

7.62 Finally, if much of the Board's current workload is shifted to industry, as proposed above, but the Board must classify all content likely to be X 18+ and all content that may be RC, then Board members will be spending most of their time viewing sexually explicit and content that may be RC—noting that RC content often includes highly disturbing and extreme content.

7.63 It is estimated that X 18+ content constitutes about 14% of the Board's current workload. Moreover, 44% of items actioned in relation to the ACMA's online content investigations in May 2011 comprised X 18+ content, while RC content accounted for 50%.[39] Content investigated by the ACMA is often referred to the Board for classification—which has seen its online referrals treble between 2008–09 and 2009–10. It is questionable whether resource commitments in this area are sustainable, particularly in light of the health and safety issues that arise for people at both the ACMA and the Classification Board from constant viewing of large amounts of this material. Given that much X 18+ content 'self classifies'—allowing industry to classify this content would reduce this exposure and mitigate some of the health and safety concerns.

7.64 The ALRC recognises that there are strongly held views on the nature of sexually explicit material and how to balance the rights of adults to access such material with questions of community standards and the potential for harm.[40] As part of its deliberations, the ALRC is undertaking a pilot study to assist with future research that might inform the content to be included in the RC category, which is discussed in Chapter 10. By its nature, such a study also will consider the relationship of the R 18+ and X 18+ categories to RC.

Question 7–1 Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier? In Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.

39 *ACMAsphere 65 – Investigations*, Online content complaints, May 2011.

40 See A McKee, C Lumby and Kath Albury *The Porn Report* (2008); and M Tankard Reist and Abigail Bray (eds) *Big Porn inc.: Exposing the Harms of the Global Pornography Industry* 2011.

New classification instruments

7.65 The ALRC considers that the proposed classification model should have the utility and flexibility to encourage content providers to classify more content over and above the content that must be classified by law. Therefore a new classification system should also include the option to use simple, accessible, cost-effective classification instruments—such as online, interactive questionnaires—that have been authorised for this purpose by the Regulator.

7.66 To be consistent with statutory requirements that must be met by classifiers, classification instruments should reflect the statutory classification criteria and categories.

7.67 An instrument might take the form of an online questionnaire and declaration that seeks information about the content provider and specific details about the nature of the content based on the statutory classification criteria and the broader classification process. Ideally the instruments would provide for an automated classification decision that would also be simultaneously notified to the Regulator. In future more sophisticated web-based applications might be possible.

7.68 Online content assessment forms and online classification applications already feature as part of some jurisdictions' classification process:

- The Pan European Games Information organisation (PEGI) uses an online content assessment and declaration form which the publisher completes taking into account the possible presence of violence, sex and other sensitive visual or audio content. On this basis, PEGI allocates a provisional age rating that is subsequently verified by PEGI administrators against PEGI classification criteria before the publisher is issued with a licence authorising the use of the age-rating label and related content descriptors.[41]
- The Entertainment Software Ratings Board (ESRB) in the US requires publishers of online games only available for download directly through console and handheld storefronts to complete a form containing questions that address content across relevant categories. The responses to these questions determine the game's rating, which is issued to the publisher once a DVD reflecting all disclosed content is received by the ESRB.[42]
- The British Board of Film Classification (BBFC) allows new online-only content to be submitted for classification through an online process under their 'Watch and Rate' service for which they guarantee a decision within 7 days of submitting the content.[43]

---

41 See PEGI's online content assessment and declaration form at <www.pegi.info/en/index/id/1184/media/pdf/235.pdf> at 15 August 2011.

42 For more information about the ESRB's process for classifying computer games see <www.esrb.org/ratings/ratings_process.jsp> at 2 August 2011.

43 For more information on the BBFC's Watch and Rate system see <www.bbfc.co.uk/customers/watch-and-rate/> at 1 September 2011.

7.69 These systems still incorporate additional classification activity by the relevant classification entity, whereas the ALRC envisages classification instruments that go further by generating stand-alone classification decisions that do not rely upon additional input or action by the Regulator, the Board or an industry classifier.

7.70 While the Regulator may develop instruments, there are opportunities for industry to innovate in this area and potentially develop different classification instruments that might be useful for classifying particular types of content for their own industry sector.

Proposal 7–3 The Classification of Media Content Act should provide that content providers may use an authorised classification instrument to classify media content, other than media content that must be classified.

Classification checks and safeguards

7.71 Allowing industry to classify its own content raises genuine concerns in relation to the balance between content providers' self-interest and community standards. Some submissions argued against further industry involvement in classification because under existing co-regulatory or self-regulatory arrangements inadequate enforcement of breaches and penalties is insufficient to act as a deterrent to media content providers oriented towards maximising profits.[44] For example ACCM stated:

> There is too much risk of a conflict of interest if industry classifies content. Such a system is currently in place for television, as the ACMA acts as a co regulator with TV stations. The system does not work because industry is under too much pressure to downgrade content to fit time zones. We can point to a number of instances where the industry was found to have broadcast inappropriately classified material.[45]

7.72 The ALRC considers moving to significantly greater classification of content by industry requires meaningful government oversight to incorporate appropriate checks and balances to address such concerns—including complaint handling and review mechanisms that apply across all classification decision makers.

7.73 Industry classification will largely be managed under codes of practice administered by the Regulator—these elements of the proposed model are discussed in Chapters 11 and 12 respectively.

7.74 The proposed checks and safeguards for industry classification build upon the strengths of existing arrangements in relation to the current authorised assessor schemes and use of the Board's expertise in developing classification training and considering classification recommendations made by industry assessors. There are also elements that draw upon checks and safeguards incorporated under existing broadcasting codes of practice.

---

44 For example, FamilyVoice Australia, *Submission CI 85*, 3 July 2011; Collective Shout, *Submission CI 2450*, 7 August 2011.

45 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011

Authorisation of industry classifiers and instruments

7.75 Public confidence in the classification process and classification decisions is founded on decision makers consistently applying specified classification criteria, adhering to agreed standards, and employing sound decision-making practices.

7.76 To 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.

7.77 Industry codes of practice should refer to obligations on classifiers relevant to the proper performance of classification duties including:

- requirements for renewal of industry classification authorisations;
- requirements for minimal periods of supervision following training; and
- requirements concerning frequency of refresher training.

7.78 The Regulator should also authorise industry-developed classification instruments as being suitable for use in making classification decisions for content available in Australia. The Regulator should only authorise instruments that incorporate the statutory classification criteria and classification categories—as minimum requirements that must be used by all other classification decision makers. The Regulator may determine that instruments need to integrate other elements of the classification process, such as providing for automatic lodgement of the classification decision with the Regulator.

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

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

Who provides classification training

7.79 The Department currently develops all classification course material (with input from the Board) and delivers classification training for industry clients that wish to participate in the authorised assessor schemes and organisations, such as television companies, that employ industry classifiers. These training arrangements would serve as a useful model for the Regulator’s training of industry classifiers.

7.80 The proposed expansion of industry classification will result in a considerable increase in demand for training. While the Regulator might continue to deliver classification training, particularly for the Board, additional demand may be best met by introducing a program to accredit external training providers.

7.81 A corollary of greater direct engagement of industry in classification decisions, overseen by a government regulator, is the need for a more formalised training framework for classifiers. Consistent and rigorous training that meets accredited training standards is essential in a co-regulatory environment, in order to secure a high level of public trust in the quality of all classification decisions.

7.82 The classification training currently provided by the Classification Branch of the Attorney-General's Department is not formally accredited and there is no award attached to such training that would allow for it to be a transferable qualification across media industries.

7.83 There have also been questions raised about inconsistent training requirements for industry assessors as compared with classifiers. Free TV Australia submitted:

> We note that the Classification Board conducts an intensive three-month program which includes mentorship and practical experience. In comparison, the training programs for certified industry assessors are very brief (half-day or one-day). Anecdotal evidence suggests that this contributes to inconsistencies in classification decision-making, undermining the effectiveness and integrity of the National Classification Scheme. The ALRC should consider recommending changes to the accreditation process to include consistent and rigorous training requirements, with classifiers required to undergo minimum periods of supervision following training.[46]

7.84 As industry classification expands, it is conceivable that private providers may wish to become involved in accredited training programs, or that universities or the vocational education and training sector may wish to offer approved short courses in media classification. In developing a consistent accredited training framework for media classifiers that is recognised across industries, a threshold question is whether such a qualification would be recognised within the Australian Qualifications Framework (AQF). If training is to be formally accredited through the AQF, this requires a formal statement of the context for, and application of, knowledge and skills. This could allow for different levels of qualification: for example, a lower-level qualification may be awarded to those making routine classification decisions, and a higher-level award for trainers or managers responsible for auditing the quality of training processes.

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

46 Free TV Australia, *Submission CI 2452*, 5 September 2011.

Reviews of classification decisions

7.85 The ALRC considers that classification decisions for all media content that must be classified should be reviewable, including television program content. This would involve a 'strengthening' of the current regulatory arrangements. Reviews of television content are arguably more feasible and more relevant in a converged environment where broadcasters are increasingly hosting content online which extends audience reach and makes content available beyond a single screening—not unlike films, computer games and other classified content that may be subject to review.

Who conducts reviews

7.86 The *Classification Act* currently provides for reviews of classification decisions. The Review Board makes a fresh merits decision after considering the material and hearing submissions by the applicant and other parties with an interest in the decision. This is generally in response to an application for review from the original applicant or the publisher of the media content.

7.87 A common criticism of the current review arrangements is that the cost of reviews is too high.[47] Operations of the Review Board are expensive, as Review Board members travel to Sydney from across Australia to attend Review Board hearings and high-level secretariat support is provided by the Department for all Review Board activities. As Review Board members are part-time and not located in Sydney, organising reviews can also be logistically and administratively time-consuming.

7.88 Some submissions also questioned the reliability of Review Board decisions given the limited number of reviews annually and hence members' limited exposure to some types of content.[48] Any lack of classification experience may have implications for reviewing decisions of industry classifiers who are more regularly engaged in the classification of more media content. [49]

7.89 The ALRC recognises the value of a review mechanism and therefore proposes that the new classification system continue to provide for classification decisions to be appealed, but that the function should reside with the Board itself. This means that the Review Board would cease to exist. This proposal is intended to streamline the review process, simplify administrative arrangements and create other efficiencies that potentially generate cost savings.

7.90 The Board would only be reviewing its 'own' decisions in relation to the content that must always be classified by the Board. In all other cases the Board would be reviewing an industry classifier's classification decision.

---

47 The fee for review of a classification decision is $10,000. This only recovers part of the full cost of a review, stated to be $28,000 per review (of which the remainder is funded by government): Attorney-General's Department, *Cost Recovery Impact Statement: Classification Fees*, September 2011 – June 2013.

48 MLCS Management, *Submission CI 1241*, 16 July 2011.

49 Since 2007 to date, the Review Board has conducted between two and eight reviews annually.

7.91 There may be some concern about the Board's objectivity in relation to reviewing its own decisions and its lack of independence from the primary decision maker. A risk that may also arise in giving the Board the power to review its own decisions is that doing so may increase the chance of applicants or stakeholders reasonably apprehending a bias in decision making and seeking judicial review.

7.92 If a statute requires an organisation to take multiple roles (such as primary and reviewing decision maker), this will exclude the application of the bias rule to the extent that bias is perceived merely because of these multiple roles.[50] However, the bias rule will not necessarily be excluded if bias is apprehended for other reasons. For example, if the statute does not specify which members of the Board may sit on reviews, and a Board member involved in a primary decision sits on the panel reviewing that decision, this may give rise to an apprehension of bias.

7.93 The new Classification of Media Content Act should provide statutory requirements for the composition of review panels, including making explicit whether primary decision makers are to be allowed to sit on reviews. In addition, in order to allow for review panels to be constituted as larger or completely different panels there should be legislative provisions prescribing the maximum size of panels for original classification decisions.

Who may apply for a review

7.94 The *Classification Act* provides that an application for review of a classification decision generally must be made within 30 days after the applicant received notice of the decision.[51] The Australian Government Minister responsible for the *Classification Act* may seek a review at any time. The Act also sets limits on the persons that may seek a review as follows:

- applicants for the classification of content and publishers of the content that was classified;
- the Minister responsible for the *Classification Act* (either on his own initiative or if requested to do so by a State or Territory Minister responsible for censorship); and
- a 'person aggrieved' by the decision, as defined in the *Classification Act*.[52]

7.95 To provide industry with a level of certainty regarding classification decisions without undermining access to a review mechanism, these limits should be retained. In addition, the ALRC considers that the Regulator should be provided with powers to submit an application for review in response to serious complaints, or as a result of audit activity undertaken by the Board.

7.96 The current high review fee may operate to deter potentially vexatious or speculative applications that may compromise the review process or result in delays

---

50 *Builders' Registration Board (Qld) v Rauber* (1983) 47 ALR 55, 65, 71–73.

51 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 34.

52 Ibid s 42.

that adversely affect the original applicant. In order to afford industry greater certainty—noting that increased industry classification may provide the impetus for more spurious applications for review—there may be merit in considering a narrowing of the definition of 'person aggrieved' by the decision. This would need to have regard to principles of natural justice and procedural fairness in relation to people who may be affected by the decision.

Proposal 7–6 The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:

(a) reviewing industry and Board classification decisions; and

(b) auditing industry classification decisions.

This means the Classification Review Board would cease to operate.

Audits of industry classification decisions

7.97 As part of the process of monitoring the accuracy of industry classification decisions, the Board should undertake routine post-classification audits of media content that must be classified. Audits should be the responsibility of the Board, rather than the new Regulator, because the Board is the independent benchmark decision maker and the audit process incorporates classification decision-making activity.

7.98 To ensure that industry classification is properly monitored and to better understand whether any problems might be industry or media content specific, audit activity should be conducted in relation to the types of media content, specific industry sectors and across industry classifiers that regularly classify content. There was support, even among submissions that supported industry classification, for industry to be subject to regular government checks.[53]

7.99 Audits are not necessarily directed to correcting decisions but rather would be designed to proactively manage industry classifiers, so that erroneous decisions and poor classification decision making can be prevented or minimised. Audits by the Board would provide a basis for the Regulator to monitor industry classifiers more closely where there is evidence of repeated and continuing problems. The Regulator would have options to impose sanctions to address serious and repeated misconduct, as discussed below.

Complaints processes

7.100 Similar to current arrangements concerning complaints about television program content, complaints would, in the first instance, be made directly to the organisation that made the classification decision. A complainant may lodge a complaint with the Regulator where that complainant considers the complaint has not been satisfactorily resolved. The Regulator would then have powers to investigate complaints and, where

53 G Menhennitt, *Submission CI 2017*, 15 July 2011.

necessary and appropriate, refer the content to the Board for a review of the classification decision.[54]

7.101 Codes of practice should include guidance on establishing complaint-handling mechanisms in relation to content that must be classified. Guidance should cover awareness and accessibility of the complaints mechanism, response time frames, recording and reporting, processes for escalating serious complaints and revisiting classification decisions as a means to address complaints as appropriate.

Sanctions regime

7.102 The ALRC proposes that a regime of sanctions that might be applied against industry classifiers who repeatedly classify content wrongly should also be set out in legislation. This would be similar to the range of sanctions in the current *Classification Act* and related legislative instruments that apply under authorised assessor schemes.

7.103 These sanctions are another means of protecting consumers and ensuring that the integrity of the entire classification system is maintained. The sanctions are targeted at classifiers to ensure that if they are not classifying products properly and in accordance with the statutory classification criteria, they will not be able to continue to making classification decisions. The sanctions are intended to be applied if other informal actions, such as refresher training, have not remedied the situation.

7.104 In order to provide industry classifiers with guidance on best practice and to assist them to avoid making incorrect decisions, industry codes of practice should include information on maintaining records of classification decisions and summaries, advising decisions to the Regulator and internal quality assurance controls.

Proposal 7–7 The Classification of Media Content Act should provide that the Regulator has power to:

(a) revoke authorisations of industry classifiers;

(b) issue barring notices to industry classifiers; and

(c) call-in unclassified media content for classification or classified media content for review.

Industry bodies and their relationship with the Regulator

7.105 Links between industry peak bodies and government regulatory bodies regarding classification and content regulation would continue to be important as industry takes responsibility for more classification under the ALRC's proposed model.

---

54 The costs of reviews arising from an unresolved complaint concerning an industry classification decision would be expected to be covered by the content provider or publisher who sought the original classification.

7.106 Industry bodies would be central to rolling out the new industry classification system, including liaising with the Regulator on the development of practical and robust codes of practice, which are discussed in more detail in Chapter 11. The Regulator would expect peak bodies' support in promoting the new classification system and encouraging industry 'buy-in'.

7.107 In an ongoing capacity, industry bodies should assist the Regulator to reinforce industry classification requirements, by informing members about classification training options, disseminating information about authorised industry classifiers and collating industry classification reports that include decisions data and complaint statistics.

7.108 The proposed new classification system also opens up opportunities for government and industry to work together to improve classification processes and information provided to the public. This might involve collaborating on the development of classification instruments, increasing compliance, encouraging industry to classify content even if it is not required to be classified and potentially administering industry classification schemes in future.

8. Markings, Advertising, Display and Restricting Access

Contents

Summary 127
Restricting access to content likely to be classified R 18+ 128
Must content be formally pre-assessed? 129
Restrict or classify notices 130
Restricting access to content classified R 18+ and X 18+ 130
Removing mandatory access restrictions on MA 15+ content 130
Methods of restricting access 131
Restricting access online 132
Restricting access offline 136
Television time-zone restrictions 137
Industry codes or legislation 139
Markings for content that must be classified 139
Advertising for content that must be classified 141
Public display of media content 143
Outdoor advertising 144

Summary

8.1 This chapter proposes that access to all media content—online and offline—that is likely to be R 18+ must be restricted to adults. Content providers should restrict access so that minors are protected from high-level content, even if it is not possible to have all of the content formally classified. The ALRC also proposes that access to content classified R 18+, or X 18+ where it is legal to distribute, must also be restricted to adults.

8.2 The chapter then reviews methods of restricting access, including prohibitions on sale and hire to minors, restricted access systems, parental locks on televisions, home filters, internet service provider (ISP) level filters, and broadcasting time-zone restrictions. The ALRC proposes that methods of restricting access to online and offline content should be set out in industry codes, approved and enforced by the Regulator. For content that must be classified and has been classified, content providers should have to display a suitable classification marking.

8.3 The new scheme should also provide for a principled rule that ensures advertisements for classified content—such as advertisements for films, television programs and computer games—are suitable for their audience. In assessing suitability, industry must have regard to the likely audience of the advertisement, the impact of

content in the advertisement, and the classification or likely classification of the advertised content. The chapter concludes by considering whether the public display of some media content should be prohibited.

Restricting access to content likely to be classified R 18+

8.4 Access to adult content, where it is legal to distribute at all, must be restricted to adults under Australia's current classification laws. Films classified R 18+ must not be sold or hired to minors.[1] Some books, such as the Bret Easton Ellis novel *American Psycho*,[2] have also been given a restricted classification and may only be sold in a sealed wrapper and to adults. Online content hosted in Australia that has been classified R 18+, or is substantially likely to be classified R 18+, should only be accessible behind a restricted access system.[3]

8.5 The ALRC proposes that under a new classification scheme, certain films, computer games and television programs[4] must continue to be classified, and if classified R 18+, access should be restricted to adults. However, most media content will not fall into the proposed definitions of content that must be classified. How will the new scheme treat all the other adult content, for example, content on websites and in magazines and books? Will children be protected from this other adult content?

8.6 The ALRC proposes that access to all media content likely to be R 18+ must be restricted to adults, but that unless it is content that must be classified (see Chapter 6), this content should not be required to be classified. This media content includes online and offline content, including: websites, magazines, books and audio books, music, radio content, podcasts, artworks, advertising, and user-generated content. The community appears not to expect advisory classification information for this content but, in the ALRC's view, access should be restricted to adult content.

8.7 Under the *Guidelines for the Classification of Films and Computer Games*, R 18+ films may have a 'high' impact and 'may be offensive to sections of the adult community'. The Guidelines provide:

- There are virtually no restrictions on the treatment of themes;
- Violence is permitted. Sexual violence may be implied, if justified by context;
- Sexual activity may be realistically simulated. The general rule is 'simulation, yes—the real thing, no';
- There are virtually no restrictions on language;

---

1 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 9(2).

2 In 1991, this book was classified Restricted Category 1, which means it must only be sold to adults and in a plastic wrapping with the appropriate marking.

3 *Broadcasting Services Act 1992* (Cth) sch 7, cls 20, 21. Restricting access to sexually explicit adult content is discussed further below.

4 See Ch 6.

- Drug use is permitted;
- Nudity is permitted.[5]

8.8 Relatively little content is likely to hit this high threshold. Less than 5% of films classified by the Classification Board are classified R 18+.[6]

8.9 In Chapter 6, the ALRC proposes that obligations to classify content, other than X 18+ and RC content, should only apply to content produced on a commercial basis. However, access to content likely to be R 18+ or higher should be restricted whether or not the content is produced on a commercial basis.

8.10 Many responsible content providers already endeavour to prevent minors from accessing adult content. Online content providers such as YouTube might require persons to confirm their age or sign in before accessing some content. Other organisations might not prevent access, but might warn patrons that content may not be suitable for children. Some Australian art galleries, for example, use signage for this purpose. Under the ALRC's proposal, if a content provider is unsure whether their content is likely to be R 18+, they may choose to have the content classified.[7] Responsible content providers might also employ other mechanisms, such as user flags, to highlight potentially offensive content.

Must content be formally pre-assessed?

8.11 Ideally, content providers should assess content before they publish it, to determine its likely classification, but this will often be impractical or impossible for providers or hosts of large quantities of content, much of which is dynamic and user-created. Requiring pre-assessment would be almost as onerous as requiring the content to be classified, which as discussed in Chapter 6 is impractical and prohibitively costly. Accordingly, the ALRC does not propose that content-providers should be expected in all cases to assess content to determine whether it is likely to be R 18+, although responsible content providers should also have mechanisms that allow users to flag certain content that may be R 18+, X 18+ or RC.

8.12 This differs from the current provisions in sch 7 of the *Broadcasting Services Act 1992* (Cth) (*Broadcasting Services Act*) and related industry codes, which provide that commercial content likely to be classified MA 15+ or R 18+ must be assessed by trained content assessors.[8] The ALRC proposes that providers of content that is likely to be R 18+ should not need to be trained to determine the likely classification of content. If access to the content is restricted, the objectives of the law—particularly the protection of minors from adult content—are met.

---

5 *Guidelines for the Classification of Films and Computer Games* (Cth).
6 See annual reports of the Classification Board, 2005–06 to 2010–11.
7 The content might be classified by an accredited industry classifier, the Classification Board or a person using an authorised classification instrument: see Ch 7.
8 *Broadcasting Services Act 1992* (Cth) sch 7 cl 81(1)(d).

Restrict or classify notices

8.13 The ALRC considers that if the Regulator, perhaps after receiving a complaint, considers that a piece of content is likely to be R 18+, the Regulator should issue a notice to the content provider requiring it to restrict access to the content or have the content classified. This notice might be called a 'restrict or classify notice'. The proposed Classification of Media Content Act should not provide an offence for simply publishing R 18+ content without restricting access (a law that hosts of large quantities of user-created content may be unable to comply with), but rather should provide for an offence of failing to comply with a 'restrict or classify notice'.

8.14 This proposal should be broadly consistent with those provisions in sch 7 of the *Broadcasting Services Act* that provide that certain 'prohibited' content online must be subject to a restricted access system, and if it is not, the ACMA may issue various notices. The ALRC proposes that the new Classification of Media Content Act apply a similar rule to both online and offline content.

Proposal 8–1 The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.

Restricting access to content classified R 18+ and X 18+

8.15 Chapter 6 proposes that under the new scheme, a limited range of content must be classified. One of the purposes of classifying content is to determine whether the content should be restricted to adults, so that minors may be protected from distress or harm. Accordingly, the ALRC proposes that the Classification of Media Content Act should provide that access to all content that has been classified R 18+ or X 18+ (where X 18+ content is legal to distribute at all) must be restricted to adults. Later in this chapter, the ALRC proposes that methods of restricting access should be set out in industry codes of practice, approved and enforced by the Regulator.

Proposal 8–2 The Classification of Media Content Act should provide that access to all media content that has been classified R 18+ or X 18+ must be restricted to adults.

Removing mandatory access restrictions on MA 15+ content

8.16 The ALRC proposes that mandatory access restrictions should no longer apply to content that has been, or is likely to be, classified MA 15+. Currently, MA 15+ is a classification to which certain restrictions apply, but restrictions vary considerably between platforms and jurisdictions. For example:

- MA 15+ television programs may only be shown on free-to-air television after 9pm, but may be shown on subscription television at any time;

- MA 15+ films and computer games on media discs may not be sold or hired to persons under 15, unless the minor is accompanied by a parent or guardian;
- MA 15+ content online does not need to be restricted at all, unless it is commercial content; and
- cinemas must not permit persons under 15 to watch an MA 15+ film unless the minor is with a parent or guardian (precise restrictions vary between states).

8.17 Preventing persons under the age of 15 from seeing MA 15+ films and playing MA 15+ games is problematic offline and almost completely impossible online. The existing laws that endeavour to restrict online access to MA 15+ content are widely seen as ineffective and unenforceable.[9] The classification symbol and warnings may serve a useful purpose as consumer advice, but there is little or no further practical benefit in legal access restrictions for this content. Furthermore, restricting access at the R 18+ level, rather than the MA 15+ level, is more consistent with international norms concerning the regulation of online content, as the focus is on restricting access to adults.

8.18 This is not to say that MA 15+ content is suitable for persons under 15. Many violent films and computer games are now classified MA 15+, including some horror films. In the ALRC's view, some content providers should continue to refuse to sell or admit young unaccompanied minors to these films and computer games, even if they are not required by law to do so. There are also arguments for maintaining the existing prohibitions on broadcasting MA 15+ content on television during the day and early evenings. This matter is discussed further below, but such time-zone restrictions are not necessarily inconsistent with the following proposal. Voluntary restrictions on MA 15+ content may be set out in industry codes of practice.

Proposal 8–3 The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA 15+ or likely to be classified MA 15+.

Methods of restricting access

8.19 In this Discussion Paper, the ALRC proposes that access to certain content—classified and unclassified—should continue to be restricted to adults.[10] This paper also assumes that certain content will continue to be prohibited even to adults (although what this content should be is discussed in Chapter 10). This section considers methods of restricting access, online and offline. The ALRC proposes that while the Classification of Media Content Act should provide for minimum requirements for restricting access, the details of these methods should be prescribed in industry codes, approved and enforced by the Regulator.

9 For example, I Graham, *Submission CI 1244*, 17 July 2011.
10 Proposals 8–1 to 8–3.

Restricting access online

8.20 Many submissions suggested that restricting access online is very costly and almost impossible in practice.[11] Civil Liberties Australia submitted:

> there are simply no effective methods to control access to online content anything like the manner sought by most advocates. What is possible is to restrict access to some small subset of particular copies of restricted online content, and then only in particular controlled environments. The real question is whether the costs of such limited controls are worth the relatively minor, and largely symbolic, benefits.[12]

8.21 The Australian Independent Record Labels Association agreed that high impact music 'should not be available to minors for purchase online' but submitted that labelling guidelines would be sufficient as it is not 'practicable to deny consumer access to content, offensive or not, through firewalls, passwords, blacklists or any other means'.[13]

8.22 The Australian Recording Industry Association and the Australian Music Retailers Association also pointed to the 'inherent difficulties in controlling access to online content', difficulties replicated in relation to illegal file sharing. Access to physical products can be restricted, but 'the issue of controlling access to online content is fraught and will require cooperation that spans multiple industries, territories and international jurisdictions'.[14]

8.23 Some submissions opposed any mandatory regulation of internet content. One person, reflecting a common sentiment in submissions, argued that there 'should be no restricted access to online content':

> Online content cannot be completely enforced or policed. Parents should take responsibility for their child's online presence. Adults should be able to control their own access to online content.[15]

Restricted access systems

8.24 Restricted access systems or access control systems have been used to try to prevent minors from accessing certain content online. Schedule 7 of the *Broadcasting Services Act* provides that certain content online must only be provided behind a restricted access system.[16] Under the *Restricted Access System Declaration 2007*, for R 18+ content, an access-control system must:

- require an application for access to the content; and

---

11 In the Issues Paper, the ALRC asked what were the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme. The ALRC also asked how children's access to potentially inappropriate content can be better controlled online. Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011) (Issues Paper), Questions 12, 13.

12 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

13 Australian Independent Record Labels Association, *Submission CI 2058*, 15 July 2011.

14 The Australian Recording Industry Association Ltd and Australian Music Retailers' Association, *Submission CI 1237*, 15 July 2011.

15 Double Loop, *Submission CI 1124*, 12 July 2011.

16 *Broadcasting Services Act 1992* (Cth) sch 7 cl 14.

- require proof of age that the applicant is over 18 years of age; and
- include a risk analysis of the kind of proof of age submitted; and
- verify the proof of age by applying the risk analysis; and
- provide warnings as to the nature of the content; and
- provide safety information for parents and guardians on how to control access to the content; and
- limit access to the content by the use of a PIN or some other means; and
- include relevant quality assurance measures; and
- retain records of age verification for a period of 2 years after which the records are to be destroyed.[17]

8.25 Few submissions directly referred to the merits of these restricted access systems, but some of the broader concerns about the effectiveness of controlling access to online content are clearly relevant.

8.26 The NSW Council of Civil Liberties has in the past expressed its concern that 'the proposed methods of restricted access systems (PIN, passwords, etc) are ineffective, intrusive and encourage identity theft'.[18] Verifying a person's age using a credit card is perhaps undermined by the fact that minors may be able to buy prepaid credit cards from supermarkets.

8.27 However, some content providers report that they have successfully used restricted access systems. Telstra submitted that to access some of its website content, customers must provide their credit card details, which 'constitutes verification that they are at least 18 years of age and allows them to access age-restricted content'.[19]

Home filters and parental locks

8.28 Many submissions indicated that the best means of controlling access is to provide filtering software and parental control, which could be used voluntarily. This was thought particularly useful to help control children's access to inappropriate content. Dr Gregor Urbas and Tristan Kelly, for example, submitted:

> Dynamic filters may be of some use to users, including parents, who wish to voluntarily filter material. In particular, PC-based filters provide parents with the best option to control and monitor their children's browsing habits.[20]

8.29 Another submission commented that 'optional filters on client-side computers are a more efficient way of controlling online access, without blocking any adult's

---

17 Australian Communications and Media Authority, *Explanatory Statement, Restricted Access Systems Declaration 2007*.

18 New South Wales Council for Civil Liberties, *Submission on the ACMA Restricted Access System Declaration* (2007), 3.

19 Telstra, *Submission CI 1184*, 15 July 2011.

20 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

right to view what they wish to'.[21] The Arts Law Centre of Australia likewise submitted that resources should be dedicated to

> providing [filtering] software to those who would like it and educating the community about the best ways to take responsibility for themselves and their children.[22]

8.30 Many submissions emphasised the parent's role in controlling what children could see online. SBS submitted that 'consumer education (including media literacy education in school curricula)' and 'the availability of tools such as parental locks and filtering software in conjunction with a consistent classification marking scheme should be relied on to control access to content'.[23]

8.31 Parental locks may also be used to block certain television content. Free TV Australia noted that most digital televisions and digital set-top-boxes have a parental lock function.

> Parental Locks allow you to block programs based on their classification (for example, G, PG, M or MA), or in some cases block whole channels, via the use of a PIN (personal identification number). Once the function is activated, only those with access to the PIN can view the blocked programming or channel.[24]

Education

8.32 Many submissions observed that the education of parents and consumers is one of the most important means of regulating access to online content. The Australian Mobile Telecommunications Association, for example, submitted that the most effective method of controlling access to online content:

> lies in empowering and educating consumers so that they can exercise their own controls over the content they choose to access and/or restrict their children from accessing online.[25]

8.33 The NSW Council of Churches submitted that children's access to potentially inappropriate content may be better controlled online by 'funding effective education strategies including advertisements, parental education and child education including in all public schools'.[26] Likewise, the child protection association, Bravehearts, submitted that 'Online safety should be part of the personal safety curriculum taught to children in schools':

> Components of cyber-safety curriculum should include: Unwanted contact; Inappropriate content; Safe behaviour online and protecting personal identity information; Cyberbullying.[27]

---

21 S Gillespie, *Submission CI 191*, 7 July 2011.
22 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.
23 SBS, *Submission CI 1833*, 22 July 2011.
24 Free TV Australia, *How does the Parental Lock work?* <http://www.freetv.com.au/content_common/pg-how-does-the-parental-lock-work.seo> at 9 September 2011.
25 Australian Mobile Telecommunications Association, *Submission CI 1190*, 15 July 2011.
26 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.
27 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

Mandatory and voluntary ISP-level filtering

8.34 The Australian Government proposes to require internet service providers to filter or block RC content that is included on a list—popularly called a 'blacklist'—maintained by the ACMA.[28] The Government has said the 'RC content list' will be compiled in two ways:

> - overseas-hosted content that is the subject of a complaint from the public made to ... ACMA and
> - incorporation of international lists of overseas-hosted child sexual abuse material from highly reputable overseas agencies following a detailed assessment of the processes used by those agencies to compile their lists.[29]

8.35 Submissions were divided on the merits of this policy. The Australian Christian Lobby was among those who supported mandatory ISP-level filtering, though it submitted that 'all pornography should be filtered at the ISP level with the option for adults to contact their ISP and request access to that material'.[30] Similarly, the National Civic Council submitted that mandatory filtering of the internet at the ISP level is the most effective method of controlling access to restricted online content as:

> ISP filtering empowers parents to more easily monitor and regulate the content to which their children are exposed across a range of devices.[31]

8.36 Based on its own technical evaluation, which tested a blacklist of up to 10,000 URLs, Telstra submitted that:

> blocking of URLs on a blacklist is feasible and practical to implement at 100% accuracy (not under or over blocking), without noticeably impacting on network performance or customer experience provided it is limited to a defined number of URLs.[32]

8.37 Telstra stated that it would voluntarily block sites on a blacklist of child abuse websites compiled by the ACMA, but would like the Australian Government to 'legislate its approach to ensure that it applies across the industry, is clearly spelt out and is enforceable by law'.[33]

8.38 Other submissions argued that such filters were not effective. Urbas and Kelly submitted that 'ISP filters can be easily circumvented through proxy servers or virtual private networks'.[34] Another submission criticised the policy as being 'fundamentally flawed, unbelievably cost-inefficient and a staggeringly autocratic move' and characterised it as 'both philosophically and practically hopeless'.[35] The views of some

---

28 The RC classification is discussed in Ch 10.

29 Department of Broadband, Communications and the Digital Economy, *Mandatory Internet Service Provider (ISP) Filtering: Measures to Increase Accountability and Transparency for Refused Classification Material (Consultation Paper)* (2009) 2.

30 Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.

31 National Civic Council, *Submission CI 2226*, 15 July 2011.

32 Telstra, *Submission CI 1184*, 15 July 2011.

33 Ibid.

34 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

35 S Walker, *Submission CI 2133*, 15 July 2011.

critics of mandatory ISP-level filtering are also discussed further above, in relation to the broader question of whether online content can or should be restricted at all, and in Chapter 10.

An integrated approach

8.39 Telstra submitted that 'there is no silver bullet' to make the internet safe. Instead, a holistic response must include:

> user-based PC filtering, the creation of safer learning and social networking environments, appropriate supervision and involvement by parents and teachers, education, law enforcement and international cooperation. ... ISP level blocking of a blacklist of RC sites could also usefully form one element of such a multi-faceted approach to this issue.[36]

8.40 Bravehearts also proposed that an integrated approach was needed:

> This includes not only the ISP filter, but the resourcing and expansion of Federal and State Police online investigation units, education and awareness campaigns, research, as well as the continuation of the Consultative Working Group on Cyber-Safety (made up of government, industry and NGO's, including Bravehearts Inc) and the adjunct Youth Advisory Group.[37]

Restricting access offline

8.41 The sale and display of sexually explicit adult magazines has been the subject of criticism and debate in recent years.[38] Access to other offline adult content, such as R 18+ films in cinemas, and even content that is entirely illegal to sell in Australian states, such as X 18+ DVDs, has received less attention. State and territory laws provide that it is an offence to sell or hire adult films and publications to minors. There are also laws relating to how this content—particularly sexually explicit magazines—may be packaged and displayed.[39] The Senate Legal and Constitutional Affairs References Committee recommended that where adult publications and R 18+ films are sold in general retail outlets, they 'should only be available in a separate, secure area which cannot be accessed by children'.[40]

8.42 Some submissions expressed surprise that there is concern about the offline sale and display of this content at all, considering how widely and freely much of the content may be found online, where digital offerings are 'cheaper, more varied and subject to fewer restrictions'.[41] Civil Liberties Australia, for example, submitted that it 'is hardly clear that this should be a pressing concern':

---

36 Telstra, *Submission CI 1184*, 15 July 2011.

37 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

38 See questions asked to the Classification Board by members of the Senate Legal and Constitutional Affairs Committee in *Senate Estimates Review* (20 October 2008, 25 May 2009 and 18 October 2010).

39 Enforcement laws are discussed in Ch 14.

40 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011).

41 A Hightower and Others, *Submission CI 2159*, 15 July 2011. In the Issues Paper, the ALRC asked how access to restricted offline content, such as sexually explicit magazines, can be better controlled: Question 14.

> The magazine industry is dying and most sexually explicit content is now accessed online. This 'problem' will almost certainly go away by itself over the next few years anyway. ... As for other offline content, it is unclear what more can be done. Australians seem generally happy in this regard.[42]

8.43 The Pirate Party Australia submitted:

> The current system of sealed magazines and restricted premises is adequate to regulate sexually explicit content offline. Legal, unclassified material should be restricted, not banned.[43]

8.44 Others submitted that greater restrictions should be imposed. Bravehearts submitted that restricted offline material, such as sexually explicit magazines and DVDs, should be 'out of sight and out of reach of children'.[44] Media Standards Australia stated that:

> All material with an R 18+ classification should be in an isolated, restricted area, and removed from all other material. This includes magazines and videos. ... Children should not be confronted by adult content images as they browse shelves in a store, whether it be for computer games, DVDs, books or magazines.[45]

8.45 Another submission suggested that the display and sale of content, such as sexually explicit magazines, should be prohibited entirely in 'physical environments to which children have access'.[46]

8.46 Restricting access to sexually explicit adult content offline may be achieved more consistently and effectively under the ALRC's proposed National Classification Scheme. Perhaps most importantly, the ALRC proposes that all of this content should be marked with the one, commonly-understood classification marking—X 18+.[47] If the content is legal to sell in Australia at all, the rules regarding where it may be sold and how it should be packaged and displayed should be simplified and uniform, and provided for under the one piece of Commonwealth legislation, rather than under multiple state, territory and Commonwealth laws.[48] Furthermore, one Regulator will be responsible for monitoring compliance and enforcing classification laws.[49]

Television time-zone restrictions

8.47 Free-to-air television broadcasters are currently subject to time-zone restrictions, which means that, for example, they may only broadcast films classified:

- MA 15+ after 9pm, and
- M after 8:30pm, and between noon and 3pm on school days.[50]

---

42 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
43 Pirate Party Australia, *Submission CI 1588*, 15 July 2011.
44 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.
45 Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011.
46 NSW Council of Churches, *Submission CI 2162*, 15 July 2011.
47 See Ch 7.
48 See Ch 14.
49 See Ch 12.
50 *Broadcasting Services Act 1992* (Cth) s 123 and related codes of practice.

8.48 The same limitations are not imposed on subscription broadcast and narrowcast television, or for online content such as television streamed on the internet (IPTV). Converging media environments, discussed in Chapter 3, may suggest to some that time-zone restrictions on free-to-air television are obsolete. Content at the MA 15+ level may, in practice, now be watched at any time of day in any Australian home with subscription television or an internet connection.

8.49 Free TV Australia submitted that time-zone restrictions on free-to-air television may no longer be relevant or effective for a number of reasons, including that:

- time-zones were developed 'in an analogue world, prior to the emergence of pay TV, the Internet, IPTV and video on demand';
- the same type of content is readily available on other platforms at any time of day;
- time-zones may be 'contrary to the strong trend in media consumption towards viewers accessing what they want, when they want', using time-shift programming and 'on demand' content services;
- parental locks give users greater control over content; and
- regulation should not 'place an unjustifiably higher burden on some content platforms'.[51]

8.50 Free TV Australia also submitted that market dynamics dictate that:

> when material is restricted on one medium, it merely redistributes to other, less regulated media. This leads to the inequitable outcome of having disproportionate financial impact on the more regulated platform while at the same time resulting in no overall decrease in the public's exposure to the content.[52]

8.51 However, the logic of convergence may lead to policy outcomes for which Australia may not be ready. Convergence might suggest, for example, that the existing prohibitions on the broadcasting of R 18+ content, and perhaps even X 18+ content, are anachronistic. However, a community expectation that television channels are safe, particularly for children, at certain times of the day, may suggest that time-zone restrictions are still relevant. More popular content providers may also have a greater responsibility for providing classification information and restricting access to adult content.

8.52 In the ALRC's view, if time-zone restrictions on free-to-air television were to be removed, at the very least, a comprehensive public education campaign about how to use parental locks would be necessary.[53]

---

51 Free TV Australia, *Submission CI 1214*, 15 July 2011.
52 Ibid.
53 The ALRC notes that the Convergence Review is also seeking community feedback on the continuing relevance of time-zone restrictions on television content.

Industry codes or legislation

8.53 The ALRC proposes that methods of restricting access to R 18+ and X 18+ content should be set out in industry codes, rather than in the Classification of Media Content Act. As submissions have highlighted, methods of restricting access have a number of commercial and technical complexities. New technologies to restrict access without compromising privacy or safety may also be developed in time. For these reasons, methods of restricting access are best placed in codes developed by industry, approved by the Regulator, and regularly reviewed and updated to account for developments in technology.

Proposal 8–4 The Classification of Media Content Act should provide that methods of restricting access to adult media content—both online and offline content—may be set out in industry codes, approved and enforced by the Regulator. These codes might be developed for different types of content and industries, but might usefully cover:

(a) how to restrict online content to adults, for example by using restricted access technologies;

(b) the promotion and distribution of parental locks and user-based computer filters; and

(c) how and where to advertise, package and display hardcopy adult content.

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

Markings for content that must be classified

8.54 The primary purpose of requiring some content to be classified is to provide people with information or warnings to help guide their choice of entertainment. Classification markings and consumer advice are the primary methods of communicating that information.[54]

8.55 Currently, classification symbols or markings must usually be displayed on packaging and advertisements for submittable publications, films and computer games.[55] Where and how these markings must be displayed is determined by

---

54 The classifications themselves (eg, PG, R 18+) are discussed in Ch 7. This section relates to when and how the markings for those classifications should be displayed. Proposed classification markings appear in Appendix 3.

55 For example, 'A person must not sell a film unless the determined markings relevant to the classification of the film, and any consumer advice applicable to the film, are displayed on the container, wrapping or casing of the film': *Classification (Publications, Films and Computer Games) Enforcement Act 1995*

legislative instruments.[56] The objective of the *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) is to 'ensure that consumers have ready access to clear classification information to inform their choices about films and computer games'.[57] The legislative instruments prescribe how the markings must be shown in some detail.

8.56 For classified television content, the markings requirements are prescribed in industry codes, approved by the ACMA. For example, the code for commercial free-to-air television provides that for any program required to be classified:

> an appropriate classification symbol of at least 32 television lines in height, in a readily legible typeface, must be displayed for at least 3 seconds at the following times: as close as practicable to the program's start; as soon as practicable after each break; ... in any promotion for the program.[58]

8.57 The ALRC agrees that it is important that the packaging of classified content and advertising for classified content should display classification markings, and that these markings should be as clear and consistent as possible. Content providers should not be free to mark their product in whichever way they please.

8.58 However, content and advertising is now delivered in so many different ways—on various platforms or devices and through various websites, applications and computer programs—that markings rules may be better placed in industry codes. Such codes can be more flexible and informed by industry and recent technology developments. Accordingly, the ALRC proposes that the Classification of Media Content Act contain a high-level principled rule concerning the display of classification markings. The detail of how and where such markings should be displayed—where this detail is necessary—should be in industry codes.

Proposal 8–5 The Classification of Media Content Act should provide that, for media content that must be classified and has been classified, content providers must display a suitable classification marking. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be streamed or downloaded, and on advertising for the content.

(NSW) s 15(1). 'A person must not publish an advertisement for a classified film, classified publication or classified computer game unless: (a) the advertisement contains the determined markings relevant to the classification of the film, publication or computer game and relevant consumer advice': *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 42(1).

56 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 8. The current instruments are the *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) and the *Classification (Markings for Certified Exempt Films and Computer Games) Determination 2007* (Cth).

57 *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) s 5.

58 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 1 September 2011, cl 2.18, 2.19.

Advertising for content that must be classified

8.59 The current classification scheme provides for restrictions on the advertising of films, computer games and submittable publications. If the content has been classified, advertisements must usually display the determined classification marking,[59] and should only be shown to 'commensurate audiences' (for example, advertisements for MA 15+ films should not be shown before films classified G, PG or M).[60] If the content has not been classified, the advertising must display a 'Check the Classification' ('CTC') marking. Advertisements for unclassified films and computer games must be assessed by an 'authorised assessor' to determine their likely classification; advertising is then restricted by this likely classification (for example, advertisements for films *likely* to be classified MA 15+ should not be shown before films classified G, PG or M).

8.60 Advertisements for television programs are subject to comparable restrictions, prescribed in the industry code. Section 3 of the code for commercial free-to-air television, for example, provides for program promotions and is intended to ensure that:

- no program classified higher than PG is promoted in programs directed mainly to children;
- higher classified programs are only to be promoted elsewhere in the G and PG viewing periods if the excerpts shown comply in every respect with the classification criteria of those viewing periods and with other the more stringent content restrictions specified [in the code].[61]

8.61 The code for free-to-air television also provides that:

> Clearly visible classification symbols must accompany all press advertising of programs on behalf of a licensee, and all program listings in program guides produced by a licensee.[62]

8.62 The Australian Council on Children and the Media recommended that the 'promotion of legally restricted cinema films and games to under-age audiences or in public places' should be prohibited.[63]

8.63 Many films are advertised well before they are classified; restrictions on the advertising therefore often turn on the likely classification of the film. One criticism of this is that it is difficult to predict the likely classification of a film. Some say that the

---

59 For example, 'A person must not publish an advertisement for a classified film, classified publication or classified computer game unless: (a) the advertisement contains the determined markings relevant to the classification of the film, publication or computer game': *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 42(1).

60 For example, 'A person must not, during a program for the exhibition of a classified film (the feature film), publicly exhibit an advertisement for another film or a computer game unless the advertised film or advertised computer game has the same classification as (or has a lower classification than) the feature film': Ibid s 40(1).

61 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 1 September 2011, s 3.

62 Ibid, cl 2.18, 2.19.

63 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

advertisement itself should therefore be classified, and restrictions should attach to the actual classification of the trailer, rather than the likely classification of the film. This is essentially how trailers are dealt with in the United States and in the United Kingdom. In the United States, for example, advertisements are placed into one of three categories (All Audience, Appropriate Audience, and Mature or Restricted Audience), but where an advertisement is placed depends on both the content of the film and the content of the advertisement.[64] The British Board of Film Classification classifies trailers for feature films as stand-alone works.[65]

8.64 It is also argued that, because trailers and film clips are widely available on the internet well before they appear in cinemas, restrictions on when the advertisements may be shown in cinemas is unnecessary.

8.65 The suitability of an advertisement for a film, computer game or television programs should not depend, in the ALRC's view, solely on the content of the advertisement. Rather, it should also depend on the advertised product itself. That an advertisement for an alcoholic beverage may only feature a cuddly bear does not mean the advertisement should be shown in or with media content designed for children. In the ALRC's view, the likely classification of advertised media content is a relevant and convenient—if imperfect—measure of the suitability of an advertisement.

8.66 However, a strict commensurate audience rule is perhaps ill-suited to a media environment in which users move freely between different types of content. Such a strict rule, applied consistently, might also mean that many films, computer games and television programs could not be advertised in public spaces.

8.67 Accordingly, the ALRC proposes that the new Classification of Media Content Act feature a principled rule regarding advertising for content that must be classified, such as the following: 'An advertisement for content that must be classified must be suitable for the audience likely to view the advertisement. In assessing suitability, regard must be had to: (a) the likely audience of the advertisement; (b) the impact of the content in the advertisement; and (c) the classification or likely classification of the advertised content.'

8.68 This principled rule is intended to allow more flexibility in relation to where advertisements for classified media content may appear. For example, an advertisement on the side of a bus for an MA 15+ film may have a very low impact; the low impact of the advertisement may mitigate any potential harm caused by young minors seeing an advertisement for a film that is not suitable for them. Industry codes, discussed in Chapter 11, may usefully elaborate on how suitability may be measured and assessed. Industry codes may also provide that advertisements for some classified content (such as films likely to be R 18+) should never be shown with children's content.

---

64 Motion Picture Association of America, *Advertising Administration Rules* (2009) <http://www.filmratings.com/filmRatings_Cara/downloads/pdf/advertising/cara_advertising_rules.pdf> at 20 September 2011.

65 British Board of Film Classification, *FAQs* <http://www.bbfc.co.uk/about/faqs/> at 15 August 2011.

8.69 The new scheme should not need a separate scheme for assessing advertisements. Instead, authorised industry classifiers (proposed in Chapter 7) would be suitable persons to assess the likely classification of this content.

8.70 Advertisements for classified content should continue to be subject to other advertising standards, such as those in industry codes relating to misleading or deceptive advertisements, and portrayals of violence, sex and nudity, and obscene language in advertisements.[66]

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

(a) the likely audience of the advertisement;

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

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

Public display of media content

8.71 Australians exercise some control over the content they choose for themselves and their families. Not only may they switch television channels and supervise children, but they may use home internet filters and parental locks on televisions. Consumers do not, however, have this level of control over media content shown in streets, shopping centres, parks and other public areas. Some submissions argued that stricter rules should therefore be applied to media content displayed in public. Civil Liberties Australia, for example, submitted:

> the fact that content is accessed in public or at home should absolutely affect whether it should be classified ... Public spaces are all about community, and therefore community standards should apply.[67]

8.72 Dr Nicolas Suzor argued that there is 'a very strong distinction between access in public and in private':

> Classification policy should accordingly restrict public access to content that is likely to cause offence in a way that is consistent with community standards, but should generally not restrict private access.[68]

8.73 The ALRC considers that restrictions on the display of media content in public should be stricter than restrictions on the sale and distribution of content to be viewed in homes and cinemas. However, formal classification may not be the only means to impose such a restriction. The ALRC proposes earlier in this chapter that the Classification of Media Content Act should provide that material likely to be classified

66 See Australian Association of National Advertisers, *AANA Code of Ethics* 2009, s 1.2.
67 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.
68 N Suzor, *Submission CI 1233*, 15 July 2011.

R 18+ must be restricted to adults, but otherwise does not need to be classified. Likewise, the Act might provide for a rule in relation to the public display of media content, perhaps prohibiting the public display of media content likely to be classified MA 15+ or higher. If the Regulator considered that a piece of content were likely to be classified MA 15+ or higher, the Regulator could issue a notice to the content provider, requiring the content to be removed or classified.

Outdoor advertising

8.74 The media content currently most commonly displayed in public is advertising—notably billboards. Outdoor advertising is largely self regulated, underpinned by the Australian Association of National Advertisers' *Code of Ethics*[69] (currently under review) and a complaints-handling system administered by the Advertising Standards Bureau and adjudicated by the Advertising Standards Board.

8.75 In July 2011, the House of Representatives Standing Committee on Social Policy and Legal Affairs finalised its inquiry into the regulation of billboard and outdoor advertising with the release of its report, *Reclaiming Public Space*. The Committee made a number of recommendations, including the following:

> The Committee recommends that the Attorney-General's Department review by 30 June 2013 the self-regulatory system for advertising by evaluating the industry implementation reports and assessing the extent to which there has been effective implementation of the recommendations contained in this report. If the self-regulatory system is found lacking, the Committee recommends that the Attorney-General's Department impose a self-funded co-regulatory system on advertising with government input into advertising codes of practice.[70]

8.76 In its report, the Committee concluded that the current classification scheme was inappropriate for regulating outdoor advertising.[71] The Committee expressed concern about the regulatory burden on industry if all outdoor advertisements were required to be classified by the Classification Board. The report also noted that advertising industry self-regulation 'is the standard practice in the developed world'.[72]

8.77 The ALRC has not proposed that advertising be made subject to the National Classification Scheme. However, this Discussion Paper provides for authorised industry classifiers and industry-specific codes. This means that, if advertising were brought into the proposed scheme, outdoor advertising could continue to be assessed or classified by industry, but decisions might be monitored by the Regulator and subject to review by the Classification Board. Industry assessment or classification might minimise any expected financial and administrative burden on industry, which the Senate Committee was concerned could come with 'Government classification'.[73]

---

69 Australian Association of National Advertisers, *AANA Code of Ethics* 2009

70 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Reclaiming Public Space: Inquiry into the Regulation of Billboards and Outdoor Advertising: Final Report* (2011), Rec 2.

71 Ibid, par 3.55.

72 Ibid, par 2.7.

73 Ibid, par 3.57.

8.78 If the Australian Government chose to bring outdoor advertising into the co-regulatory National Classification Scheme, the ALRC would suggest that a law prohibiting the display in public places of media content likely to have a higher-level classification may be suitable.

9. Classification Categories and Criteria

Contents

Summary 147
The existing classification categories 148
    Films, computer games and publications 148
    Television programs 149
Classification categories under the proposed classification system 149
    PG 8+ 150
    M, MA 15+ and T 13+ 151
    C (Children) 152
Common classification categories for all media content 153
    What this means for publications 154
    What this means for television 155
    Consumer advice 156
Existing classification criteria 157
    Films, computer games and publications 157
    Television programs 158
Common classification criteria for all media content 158
Legislation or industry codes 160
Researching community standards 161

Summary

9.1 This chapter considers the classification categories and criteria used to classify content across different media, formats and platforms in Australia. The ALRC proposes that these be consolidated and harmonised, and that the Classification of Media Content Act should provide for the following set of classification categories:

- C (Children);
- G (General);
- PG 8+ (Parental Guidance);
- T 13+ (Teen);
- MA 15+ (Mature Audience);
- R 18+ (Restricted);

- X 18+ (Restricted); and
- RC (Refused Classification).[1]

9.2 The ALRC also proposes that classifiers must assign consumer advice (such as 'Strong violence' or 'Moderate coarse language') to all content they classify, except content classified C or G. Classifiers operating under the proposed new National Classification Scheme should also use the one set of statutory classification criteria to make classification decisions, although industry codes of practice may describe the criteria in more detail and explain their application to specific media. The statutory criteria and their elaboration in industry codes should be reviewed every five years in consultation with stakeholders and the community and in light of relevant research.

The existing classification categories

Films, computer games and publications

9.3 There are currently seven classification categories for films and five for computer games:

- G (General);
- PG (Parental Guidance);
- M (Mature);
- MA 15+ (Mature Accompanied);
- R 18+ (Restricted); [2]
- X 18+ (Restricted);[3] and
- RC (Refused Classification).[4]

9.4 There are also four classification categories for publications:

- Unrestricted;
- Category 1 restricted;
- Category 2 restricted; and
- RC (Refused Classification).[5]

---

1 Proposed classification markings appear in Appendix 3.
2 The R 18+ classification currently applies to films only however in July 2011 Commonwealth, State and Territory Censorship Ministers agreed to introduce an R 18+ classification for computer games.
3 The X 18+ classification currently applies to films only.
4 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7.
5 Ibid s 7.

Television programs

9.5 The television codes of practice for commercial free-to-air television, subscription television, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) provide for the following classifications:

- P (Pre-school);
- C (Children);
- G (General);
- PG (Parental Guidance);
- M (Mature);
- MA 15+ (Mature Audience);
- MA 15+ (Not suitable for people under 15);[6]
- MAV 15+ (Not suitable for people under 15: Strong Violence);[7]
- AV (Adult Violence);[8] and
- R 18+ (Restricted).[9]

Classification categories under the proposed classification system

9.6 In the Issues Paper, the ALRC asked about the community's understanding of the existing categories and the merits of other possible classification categories.[10] Many submissions argued that classification categories are not themselves a significant problem. The Arts Law Centre of Australia, for example, observed that the current classification categories are well-promoted and appear to be well understood.[11] Civil Liberties Australia said there is little need for new classification categories.[12]

9.7 Some submissions cautioned against major change in this area, because significant resources have been expended since the early 1990s to harmonise classification categories across media (for example, between television and films and computer games) and to educate consumers about their meaning.[13] The Australian

---

6 SBS uses a different descriptor for the MA 15+ classification category.

7 This classification category is unique to SBS.

8 This classification category is unique to commercial broadcasters.

9 R 18+ programs are only allowed to be screened on subscription television.

10 In the Issues Paper, the ALRC asked whether the existing classification categories are well understood in the community; which classification categories, if any, cause confusion. Is there a need for new classification categories, and if so, what are they. Should any existing categories be removed or merged? Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Questions 20 and 21.

11 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

12 Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

13 J Dickie, *Submission CI 582*, 11 July 2011.

Home Entertainment Distributors Association (AHEDA) submitted that it 'would not support any changes to a system that is on the whole well understood and supported'.[14] The Australian Subscription Television and Radio Association (ASTRA) thought that additional or merged categories would cause confusion, and submitted:

> there would need to be compelling evidence that the current categories are ineffective or inappropriate, and that a reconfiguration of categories would be more effective, before any substantial changes are contemplated.[15]

9.8 On the other hand, there were submissions that pointed to the need for better descriptions of each classification category to assist consumers in distinguishing between existing categories. Others suggested that age references be incorporated into the classifications. In particular, numerous submissions identified the M and MA 15+ classifications as problematic, as discussed below.

9.9 Many submissions called for the introduction of an R 18+ classification for computer games. In July 2011 Commonwealth, state and territory censorship Ministers agreed to introduce this classification for computer games. This is consistent with the ALRC's proposed classification model. Many submissions also questioned the scope of the RC category. This is discussed separately in Chapter 10.

9.10 Well understood categories are essential if a classification system is to inform and guide people's entertainment choices and assist parents to choose content for their children. The ALRC considers there is merit in modifying the names and markings of some of the existing categories in order to achieve greater clarity and better fulfil the consumer information role of classification—particularly for parents.

PG 8+

9.11 Some submissions proposed that age references should be included as part of the classification, to provide a better guide for parents and carers on the suitability of content for children.[16] Currently, the only film, television and computer game classifications that have age references built into the classification marking are those categories with legal age restrictions: MA 15+, R 18+ and X 18+. While the classification guidelines include recommendations of appropriate ages for the other classifications, this information is arguably unhelpful, because 'too many categories centre around the age of 15 years'.[17]

9.12 The ALRC agrees that adding unique age references to the categories and markings will provide greater clarity and consistency of appearance across all the classifications. This will assist consumer understanding of the categories, including how they relate to each other.

---

14 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.

15 ASTRA Subscription Television Australia, *Submission CI 1223*, 15 July 2011.

16 For example, T Holland, *Submission CI 2172*, 15 July 2011; A Hightower and Others, *Submission CI 2159*, 15 July 2011; N Mennega, *Submission CI 1981*, 14 July 2011; D Lane, *Submission CI 1742*, 13 July 2011; Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; S Bennett, *Submission CI 860*, 17 July 2011.

17 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

9.13 The ALRC therefore proposes that, in addition to the T 13+ category proposed below, the PG category should be amended to incorporate the age reference 8+.[18] The classification guidelines might also state that parental guidance is recommended, but this content is not recommended for persons under eight years of age.

M, MA 15+ and T 13+

9.14 Many submissions stated that the M and MA 15+ classifications are confusing. It is important that parents and guardians understand the difference between these classification categories because MA 15+ content is strong in impact and not suitable for persons under fifteen.

9.15 MLCS Management, for example, stated that 'the overlap/confusion around M and MA 15+ should be addressed'.[19] Another submission suggested 'at least change the M letter in one of them to avoid confusion'.[20] SBS suggested that the confusion arises because 'the M category is not recommended, while the MA 15+ category is not suitable, for people under 15 years of age'.[21]

9.16 The MA 15+ classification was introduced in 1994 to address community concerns about the significant gap between the M and R 18+ classifications. There was particular concern that stronger content that did not warrant restriction to adults, but was nevertheless unsuitable for persons under 15, was being wrongly classified as M. Similar concerns have been cited in support of an R 18+ classification for computer games.[22] If, on the other hand, the M classification were removed, a similarly problematic gap would exist between PG and MA 15+ content.

9.17 Rather than remove a category, the ALRC proposes renaming the M classification as 'T 13+ Teen: Teenage audiences and above'. The classification guidelines for the T category should be amended to state that 'T classified material is not recommended for persons under 13 years of age'. This proposed change clearly distinguishes the classification from the MA 15+ classification in its visual representation, the category descriptor and by referring to a different age.[23]

9.18 'Teen' has particular utility as a familiar term that is intuitively understood to mark a stage of life often associated with developmental milestones such as commencing high school. There was support in submissions for a category that referred to age 12 or 13 years,[24] and similar categories exist in the computer games

---

18 Ibid. ACCM proposes a set of new classification categories. While they propose different letters for some of the classification categories, they suggest 8 as the appropriate age for mild content which corresponds to the impact threshold for the current PG category.

19 MLCS Management, *Submission CI 1241*, 16 July 2011.

20 M Tolhurst, *Submission CI 757*, 10 July 2011.

21 SBS, *Submission CI 1833*, 22 July 2011.

22 See transcript of radio interview by Ian Henschke with the Minister for Justice, Brendan O'Connor, 891 ABC Adelaide, 23 June 2011.

23 Three of the existing classification categories for films and computer games: PG, M and MA 15+, use 15 as the point of reference age. Additionally, the current category descriptors are very similar M—Mature and MA 15+—Mature Accompanied: *Guidelines for the Classification of Films and Computer Games* (Cth).

24 For example, I Graham, *Submission CI 1244*, 17 July 2011; L Pomfret, *Submission CI 109*, 6 July 2011.

classification system in the US and Europe and for the film classification system in Britain.[25]

9.19 While the current classification guidelines explain that material classified M is not recommended for persons under 15, and this would change to age 13 under the above proposal, the Australia Council on Children and the Media suggested age 13 as the appropriate age for moderate impact content in its recommendations for changes to categories. This is consistent with the moderate impact threshold for the current M classification.[26]

9.20 The ALRC proposes that the MA 15+ classification should be retained unchanged except that the category descriptor should be amended from 'Mature Accompanied' to 'Mature Audience' and the black 'restricted' tag removed from the marking. This change is necessary to reflect the proposal in Chapter 8 that the MA 15+ classification no longer impose legally enforceable access restrictions (although the classification guidelines should continue to state that content at this classification is not suitable for persons under 15). Changing the reference to 'Mature Audience' also achieves consistency across media platforms—this is the meaning of the MA 15+ classification as applied for some time under most of the television codes of practice, including subscription television.

C (Children)

9.21 The C (Children) and P (Preschool Children) classifications are currently only used by free-to-air commercial television networks. These classifications are in addition to the G classification which is used across all the classification regimes. C and P classifications are granted by the Australian Communications and Media Authority (the ACMA) on application. C and P classified programs are different from material produced for a family or general audience. They are not simply 'suitable for' children, but designed specifically to meet children's needs and interests.

9.22 A television program may carry the C or P classification if approved by the ACMA and if it satisfies the requirements of its Children's Television Standard (CTS),[27] which includes that it:

- is made specifically for children;
- is entertaining;
- is well produced using sufficient resources to ensure a high standard of script, cast, direction, editing, shooting, sound and other production elements;
- enhances a child's understanding and experience; and
- is appropriate for Australian children.

---

25 The Entertainment Software Ratings Board in the US has a Teen 13+ classification; the Pan European Games Information system has a 12 classification and the British Board of Film Classification has 12 and 12A classifications.

26 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

27 Australian Media and Communications Authority, *Children's Television Standards 2009*.

9.23 AHEDA submitted that content designed for children 'should be industry self-assessed and it should apply and be consistent across all platforms', indicating that some content providers may be interested in using a children's classification for certain media content.[28]

9.24 It is also inconsistent that the ABC, SBS and subscription television services use the G classification for children's programming in accordance with requirements set out under their respective codes of practice; and the Board uses the G and PG classifications for content that is appropriate for younger children in accordance with criteria as set out in the classification guidelines for films and computer games. Free TV Australia maintained that:

> television programs granted a C certification by the ACMA (as required under the CTS), are regularly classified as PG by the Board. This causes difficulty for free-to-air broadcasters, who will often be influenced by the Classification Board in their own classification decisions, and increases the likelihood of accidental breaches in cases where the ACMA and the Board have different views on the same piece of content. It also creates confusion for viewers, who may be unclear as to the appropriateness of material where different classifications apply in different formats.[29]

9.25 The ALRC considers that consistent and targeted classification information that is useful to parents, such as that provided by a children's specific classification, should be encouraged, particularly if it leads to more media content being classified. A more widely used C classification might have other benefits, such as assisting content providers or parents to establish 'white lists' of safe, child-friendly online content. Parents and carers can also be confident that they are selecting content exclusively for young children as distinct from G content that is not always or necessarily intended for children.

9.26 The ALRC therefore proposes the inclusion of a C category that may be used by all classifiers under the new National Classification Scheme.

Common classification categories for all media content

9.27 The ALRC proposes that the introduction of common classification categories and markings would be a considerable improvement to Australia's classification landscape. This would mean that the same classifications and markings are used in cinemas, on television, on DVD and games packaging, and on websites with classified content. In line with two of the guiding principles for reform discussed earlier in this Discussion Paper, consumers would benefit from information that is clear and consistent and the approach reflects the goal of platform-neutrality.[30]

9.28 Many submissions argued that 'different classification of the same content, according to different criteria, across cinema and DVD as compared to television is inconsistent and confusing'.[31] Others described it as 'illogical' and 'archaic'.[32] In

---

28 Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011.
29 Free TV Australia, *Submission CI 1214*, 15 July 2011.
30 See Chapter 4, Principles 4 and 8.
31 S Ailwood and B Arnold, *Submission CI 2156*, 15 July 2011.
32 S Bennett, *Submission CI 1277*, 12 July 2011.

particular, submissions referred to the different categories for publications (which are not well known or understood) and for some television content screened by certain television broadcasters.[33] The disparate range of categories across media platforms contributes to consumer uncertainty in relation to the meaning of respective classifications which ultimately undermines the value of classification information. As MLCS Management asserted:

> Simply use the same classification categories and markings for all types of content. There is no reason to differentiate. Consumers find understanding and applying information easier if it is not complicated.[34]

9.29 The ALRC agrees that simple, clear and consistent classification information should be applied uniformly across all media content and platforms.[35] The full range of classification categories should also be available for all media content; laws and other rules relating to access can be managed separately. For example, that material may be classified X 18+ does not necessarily mean it is legal to sell. Similarly, there may continue to be restrictions on commercial broadcasters screening R 18+ content. The policy and legislative framework should be adaptive and able to manage media content developed in the future flexibly, rather than have to 'catch up' after the fact.

What this means for publications

9.30 In Chapter 6, the ALRC proposes that all media content—including publications—likely to be X 18+, must be classified. However, publishers may also choose to classify some of their other content. Classified publications could then be given any one of the proposed classifications: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ or RC, accompanied by consumer advice where required or appropriate.[36]

9.31 These classifications are not only more familiar to consumers than those currently used for publications, but they provide more guidance. The broader range of categories also provides classifiers with greater flexibility to assign a classification that better reflects the content of the material. For example, a sexually explicit adult magazine would be assigned the X 18+ classification, while a book such as *American Psycho* by Bret Easton Ellis might be classified R 18+, with appropriate consumer advice for high level violence and sexual violence.[37]

9.32 Most publications that are currently required to be classified are sexually explicit magazines. Under the scheme proposed by the ALRC, these publications would be classified X 18+, rather than Category 1 restricted or Category 2 restricted. In the ALRC's view, this is the appropriate classification for this content, because the X 18+ classification is specifically for depictions of consensual sexually explicit

---

33 For example, I Graham, *Submission CI 1244*, 17 July 2011; Collective Shout, *Submission CI 2450*, 7 August 2011.

34 MLCS Management, *Submission CI 1241*, 16 July 2011.

35 For example, Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; D Self, *Submission CI 466*, 8 July 2011.

36 See discussion later in the chapter that refers to combining the classification guidelines and criteria to provide for one set of criteria that is used to make classification decisions across all media content.

37 The novel *American Psycho* is currently classified Category 1 restricted.

activity.[38] The proposed change also reduces the risk that industry classifiers would misclassify sexually explicit adult magazines—because they could only be classified either X 18+ or RC.

9.33 Proposing that sexually explicit adult magazines should be classified X 18+ is distinct from the issue of the legality or illegality of selling and distributing these magazines or that all X 18+ content should necessarily be restricted in the same way. Whether some or all X 18+ media content may be legally sold or distributed in Australia is a matter for government and is a matter separate from classification of the content.

What this means for television

9.34 To harmonise the classification categories, the ALRC also proposes the removal of the MAV 15+[39] and AV[40] classifications used by SBS and commercial television broadcasters respectively. The 'V' in these classifications refers to violence, but, in the ALRC's view, consumer advice is the better place to refer to the level of violence in a television program. Consistent with this view, SBS has submitted that it may drop the MAV 15+ category in its next codes review, as the content which falls within that category could be classified MA 15+ with the consumer advice for 'strong violence'.[41] SBS said this would lead to greater consistency across industry.

9.35 Family Voice Australia also observed that the distinction between MA 15+ and AV in the *Commercial Television Code of Practice* is arguably unnecessary and potentially unhelpful:

> While many parents are rightly concerned about the adverse impact of violence on their children, many are equally concerned about the adverse impact of sexual depictions, coarse language, adult themes and drug use. Such parents see no reason to differentiate these elements by separate classifications. The provision of consumer advice meets the needs of those parents who wish to permit their older children to view some but not all material from the adult classification range.[42]

9.36 Free TV Australia indicated that it would be open to a harmonised approach based on research to assess whether 'this inconsistency should be rectified by removing the category and subsuming the content within the MA15+ category.[43]

---

38 The X 18+ classification currently only applies to films. The classification is a special and legally restricted category which contains only sexually explicit material. That is material which contains real depictions of actual sexual intercourse and other sexual activity between consenting adults: *Guidelines for the Classification of Films and Computer Games* (Cth).

39 This classification is used by SBS for content warranting an MA15+ classification for the element of violence.

40 This classification is used by commercial television broadcasters for content that is unsuitable for the MA 15+ classification due to the intensity or frequency of the violence or because violence is central to the theme.

41 SBS, *Submission CI 1833*, 22 July 2011.

42 FamilyVoice Australia, *Submission CI 85*, 3 July 2011.

43 Free TV Australia, *Submission CI 1214*, 15 July 2011.

9.37 As noted below, the ALRC has identified that ongoing research into community standards and their relationship to classification categories will be a vital component of the proposed new National Classification Scheme.

Proposal 9–1 The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ and RC. Each item of media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.

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

Consumer advice

9.38 Consumer advice refers to the words that appear alongside the classification marking, and is designed to give specific information about the content. It is a short description that highlights the classifiable elements in a film, computer game or publication with the most impact, for example, 'Strong violence' or 'High level sex scenes'—in other words, the elements that led to the classification.

9.39 The *Classification Act* currently requires the Classification Board (the Board) to provide consumer advice for all films and computer games it classifies, with the exception of content classified G (for which consumer advice is optional) and RC (consumer advice is unnecessary for RC content, because the content is illegal to sell).[44]

9.40 Submissions confirmed that consumers value this extra information.[45] Consumer advice also has other useful applications, as the Interactive Games and Entertainment Association observed:

> Australia's classification framework should allow for the introduction of new content descriptors or consumer advice to address technological advances and any emerging consumer concerns.[46]

9.41 Consumer advice is an efficient way to highlight content that may be of particular concern as well as demonstrate to the community that the Board has considered a specific matter in its deliberations. For example, a 1994 version of the children's film *Lassie* was classified PG with the consumer advice 'some smoking by

44 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 20.

45 For example, A Wells, *Submission CI 166*, 6 July 2011;S Farrelly, *Submission CI 245*, 7 July 2011.

46 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011. See also Hunter Institute of Mental Health, *Submission CI 2136*, 15 July 2011 that suggested consumer advice be used to provide better guidance in relation to media content that may include suicide themes or depictions of suicide.

minors', reflecting concerns of the Australian community about smoking but particularly in relation to depictions of children smoking.[47]

9.42 The ALRC agrees that consumer advice is important and consistent with the principle that consumers should be provided with information about media content in a timely and clear manner.[48] The ALRC therefore proposes that consumer advice must be provided for all classified media content, except content classified C and G. Consumer advice should be optional for C and G content, but classifiers should be encouraged to provide it whenever content may raise issues for young children.

9.43 In the interests of consistency, the ALRC also suggests that the Classification Board publish guidelines for generating standardised consumer advice including a list of familiar consumer advice lines that classifiers may choose to use with each classification category.

Proposal 9–3 The Classification of Media Content Act should provide that all content that must be classified, other than content classified C, G or RC, must also be accompanied by consumer advice.

Existing classification criteria

Films, computer games and publications

9.44 Films, computer games and publications that advocate the doing of a terrorist act must be classified RC,[49] but otherwise, must be classified in accordance with the National Classification Code (the Code) and either the Guidelines for the Classification of Publications or the Guidelines for the Classification of Films and Computer Games (Classification Guidelines).[50]

9.45 In *Adultshop.Com Ltd v Members of the Classification Review Board*, the Federal Court explained that the Code 'describes' the classification categories and 'contains the general principles which form the basis of the Classification Guidelines'[51]—principles such as that 'adults should be able to read, hear and see what they want' and 'minors should be protected from material likely to harm or disturb them'.[52] The Code features separate tables—with distinct criteria—for publications, films and computer games.

47 Classification database, <http://www.classification.gov.au/www/cob/find.nsf/Search?OpenForm> at 15 September 2011.
48 See Ch 4, Principle 4.
49 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A(1).
50 Ibid s 9.
51 *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 [89].
52 *National Classification Code 2005* (Cth) cl 1. The principles that classification decisions are required to give effect to under the existing National Classification Code might usefully be reviewed in future against the principles discussed in Chapter 4.

9.46 The classification guidelines assist in the application of the criteria in the Code,[53] as they 'explain the scope and limits of each classification category' in more detail.[54] A separate set of guidelines exists for publications. Films and computer games are currently covered by the one set of combined guidelines, but separate guidelines for computer games—as agreed at the July 2011 Standing Committee of Attorneys General meeting—will be introduced with the introduction of an R 18+ classification for computer games.

9.47 In addition, the *Classification Act* sets out the following matters that must be taken into account in the making of a classification decision:

- the standards of morality, decency and propriety generally accepted by reasonable adults;
- the literary, artistic or educational merit (if any) of the publication, film or computer game;
- the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
- the persons or class of persons to or amongst whom it is published or intended or likely to be published.[55]

Television programs

9.48 The television codes of practice each contain details on the classification criteria and process for making decisions in relation to the media content they broadcast. While some of the codes incorporate elements of the current national classification scheme, the extent and manner in which they do this varies between broadcasters.

9.49 Subscription television content is classified using the film and computer games guidelines, but free-to-air television has developed its own criteria, provided for in an industry code of practice.

Common classification criteria for all media content

9.50 Many submissions favoured common classification criteria for application to all media content regardless of the type of media. As suggested by the Arts Law Centre of Australia:

> It would also be useful to consolidate the various codes and guidelines so there was one set of rules or guidelines that applied to classifiable content, regardless of the platform by which it was delivered.[56]

---

53 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 12(1).

54 *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752, 765 [93].

55 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9. The Classification Board must take these matters into account, or 'have regard' to them; they are not criteria or standards: See *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31, [42],[44].

56 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

9.51 The Classification Board also questioned whether the existing separate and media-specific classification guidelines are the best system for the future,

> with new technology, formats and platforms to see/hear/read material (digital ebooks, digital magazines, downloads of movies direct from the internet to mobile phone, ipad, TV, computer), and material no longer being confined to being a physical product.[57]

9.52 One set of guidelines for all media content removes the current anomaly whereby a webpage is classified under the film and computer game guidelines.

9.53 Importantly, classification guidelines need to adequately guide decision makers in their consideration of the unique features of an item of media content such as text, moving images, interactivity, sound, still images. Dane Armour submitted that:

> The classification scheme should be consistent across all media formats and as such should take into account any themes, concepts or imagery which may be depicted more vibrantly in any given media format. For example, in literature, violence is described through descriptive language as opposed to the visual imagery of violence and gore found in film.[58]

9.54 In the context of media convergence, it is essential that classification guidelines account for features of content regardless of the form it may take. For example, e-books now may contain video content and computer games often incorporate film sequences. As MLCS Management contended, if there is a concern that 'some aspects of computer game content (such as interactivity) need special consideration, that matter should be emphasised for all media types'.[59]

9.55 One combined set of guidelines that refer to the features of media content is therefore also an effective way to keep pace with technological advances, including media convergence. A new classification system must be capable of responding to new forms of media content and new features used to enhance content, quickly and efficiently. MLCS Management argued, for example, for the need to 'future proof the guidelines against technological and content change':

> The combined guidelines for films and computer games have been a useful tool for their users—the Classification Board and industry assessors. Their lack of detail provides flexibility that the Classification Board needs to make decisions that reflect constantly changing community standards. It also serves to make them applicable to different media types.[60]

9.56 Platform-neutral guidelines also provide for the same thresholds and limits on content permitted at each classification category across media content. For example, if strong coarse language is permitted at the MA 15+ classification, then this should be the same threshold for language at MA 15+ for television programs, a computer game or online content. It is the role of the classifier, having regard to the features of the media content and the classification criteria and guidelines, to determine whether an

---

57 Letter from Donald McDonald, Director Classification Board to ALRC, 6 May 2011.
58 Confidential, *Submission CI 1980*, 14 July 2011.
59 MLCS Management, *Submission CI 1241*, 16 July 2011.
60 Ibid.

item exceeds the stated limits of the category and therefore should be assigned a higher classification.

9.57 In the ALRC's view, the same classification criteria and guidelines should be applied to any type of media content. It is neither practical nor meaningful to make classification decisions using multiple sets of guidelines for multiple types of media content with different thresholds and limits for the same classification category. Accordingly the separate tables in the Code should be consolidated to reflect one set of criteria for all media content.

9.58 This logic was the basis for the introduction of common classification categories and markings and combined classification guidelines for films and computer games in 2005. As Dr Jeffrey Brand foreshadowed in his report on the draft combined classification guidelines, convergence issues would necessitate combined classification guidelines for different media forms in the very near future.[61]

9.59 The existing guidelines for the classification of films and computer games could usefully be revised to incorporate criteria that provide guidance to classifiers in considering text and still images (currently outlined in the classification guidelines for publications). The guidelines for the classification of films and computer games provide a suitable template as they were developed following a comprehensive review process.[62] The guidelines were significantly re-engineered including layout, presentation, language and structure with input from academics, classification experts and the public.

Legislation or industry codes

9.60 In the ALRC's view, there should be a consistent process for making classification decisions, regardless of who is classifying the media content, what industry sector they represent and the type of media content or delivery platform. As many submissions agreed, consumers should be confident that a PG classification means the same thing and contains the same level of content no matter what the media type. This is consistent with a guiding principle for reform of the scheme, that consumers should have access to clear information.

9.61 Uniformity and consistency in decision-making are best achieved by establishing statutory classification categories and criteria that represent the same minimum standards and requirements for classification decision-making by all classifiers. As the National Film and Sound Archive notes, 'consistency in criteria

---

61 *A Review of the Classification Guidelines for Films and Computer Games: Assessment of Public Submissions on the Discussion Paper and Draft Revised Guidelines*, (2002), prepared by J Brand for the Office of Film and Literature Classification. See also the Explanatory Statement, *Classification (Markings for Films and Computer Games) Determination 2005*, that noted that the new combined classification symbols address the 'outdated nature of the previous determinations in respect of the marking of emerging technologies which blur the distinction between "films" and "computer games", new storage devices and current marketing techniques'.

62 Ibid.

would promote consistency in classification decision-making for the benefit of all audiences'.[63]

9.62 For this reason, the ALRC proposes that the Classification of Media Content Act provide one set of 'statutory classification criteria' that must be used by all classifiers who make classification decisions under the proposed new classification system.

9.63 Some submissions expressed the view that some matters, such as guiding principles for decision making and matters relevant to the classification framework are appropriately set out in the Act, so that changes can only be made by Parliament following debate by both Houses.[64] There was also consensus that the detailed classification criteria (for example, in the Code and the current classification guidelines) should be separately established so that they can be more readily amended to flexibly respond to changing community attitudes and technological developments.[65]

9.64 The ALRC agrees that legislation should set out the classification categories and the matters that must be taken into account when making a classification decision, but it need not contain the detailed classification guidelines. This would better facilitate periodic review of the classification guidelines, that should be undertaken every five years in consultation with key stakeholders and the broader community.

9.65 To assist classifiers and consumers alike, the 'statutory classification criteria'—the classification categories and matters set out in the Act plus the Code and the detailed classification guidelines—should be contained in a separate legislative instrument that consolidates all decision-making information.

9.66 Industry codes of practice might describe classification criteria in more detail or provide additional guidance on the application of the criteria, for example, by providing relevant examples.

Proposal 9–4 The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions must be made applying these criteria.

Researching community standards

9.67 Classification criteria used in making classification decisions, including the appropriate limits and thresholds for content at each individual category, should reflect community standards and also be evidence-based.[66] Periodic reviews of classification decision-making criteria would therefore be usefully informed by relevant research.

63 National Film and Sound Archive of Australia, *Submission CI 1198*, 16 July 2011.
64 J Dickie, *Submission CI 582*, 11 July 2011.
65 For example, MLCS Management, *Submission CI 1241*, 16 July 2011; ASTRA Subscription Television Australia, *Submission CI 1223*, 15 July 2011; Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.
66 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

9.68 The ALRC proposes that a comprehensive review of community standards in Australia towards media content needs to be undertaken, combining both quantitative and qualitative methodologies, with broad reach across the Australian community. In order to obtain longitudinal data, the exercise should be undertaken at five-yearly intervals.

9.69 Such a study would need to draw upon urban, regional and rural populations, and the full range of culturally and linguistically diverse segments of the Australian population, as well as being representative in terms of age, gender and the state or territories in which people live. This research would be undertaken by an entity independent of government.

9.70 The former Office of Film and Literature Classification also conducted or commissioned research into community standards including the use of Community Assessment Panels,[67] interviews and focus groups involving members of the public viewing and playing films and computer games and assigning classification decisions.[68] While useful and important, such studies were nonetheless limited by their reference to the existing classification guidelines.

9.71 A broader attitudinal survey would provide valuable findings for informing future reviews of classification criteria and guidelines and might also be useful for considering matters raised in some submissions such as:

- the adequacy of the existing classifiable elements, for example, whether there should be other classifiable elements such as ‘fear’ or ‘scariness’; and
- the usefulness of an impact test for determining classification (impact may be a subjective test, but the ALRC doubts it can be avoided).

Proposal 9–5 A comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, with a broad reach across the Australian community. This review should be undertaken at least every five years.

67 *Community Assessment Panels Final Report* (2004) prepared by Urbis Keys Young for the Office of Film and Literature Classification.

68 *Classification Decisions and Community Standards* (2007) prepared by Galaxy Research for the Australian Government Attorney-General’s Department.

10. Refused Classification Category

Contents

Summary	163
RC—Relevance to this review and overview of the concept	164
Background	164
The RC classification	164
The legislative framework	165
The *Classification Act* framework	165
The *Customs Regulations* framework	168
The *Broadcasting Services Act* framework	169
The current scope of RC content	169
Item 1(a) content—certain matters presented in an offensive way	169
Item 1(b) content—offensive depictions or descriptions of children	171
Item 1(c) content—promoting, inciting or instructing in certain matters	172
Section 9A content—advocating a terrorist act	174
Computer games that are unsuitable for minors	175
Criticisms of the current scope of RC	175
The breadth of the current scope of RC	176
The purpose of classification	177
Prohibit what is 'illegal to create or possess'	178
General and specific concerns about the current scope of RC	180
ALRC's views	183
Certain RC content to be specified in the classification decision	184
Researching community standards and RC content	185

Summary

10.1 This chapter outlines the relevance of the Refused Classification (RC) category to this Inquiry and describes the legislative framework for RC content. The current scope of the category is discussed and criticisms are noted of: the breadth of the current RC category; questions relating to its purpose, including the validity of 'community standards' and 'offensiveness' as bases for refusing classification of material; and whether the scope should be narrowed by focusing on content which is illegal to create or possess, such as real depictions of actual child sexual abuse.

10.2 It is argued that the proposed Classification of Media Content Act should provide that, if content is classified RC, the classification decision should clearly state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. Identified in this way, such content may be added to any blacklist of content for the purpose of filtering at the internet service provider (ISP) level. The

chapter also discusses a pilot study being conducted by the ALRC to research community standards with regard to the current higher level classification categories—MA 15+ up to and including RC.

RC—Relevance to this review and overview of the concept

Background

10.3 When the Commonwealth, state and territory Attorneys-General and the Commonwealth Minister for Home Affairs agreed to refer the National Classification Scheme Review to the ALRC, they specifically agreed that the review would include the content of the RC category for films, computer games and publications.[1]

10.4 Further, the Australian Government's proposed mandatory ISP filtering scheme is based on the concept of an 'RC content list'.[2] Given the centrality of the RC category to any form of ISP filtering, the Minister for Broadband, Communications and the Digital Economy, the Hon Senator Stephen Conroy, announced that 'the legal obligation to commence mandatory ISP filtering will not be imposed until the review [of the RC classification] is completed'.[3]

The RC classification

10.5 The RC classification category is the highest classification that can be given to publications, films and computer games in Australia[4]—that is, to content the subject of the classification cooperative scheme described in Chapter 2. The classification applies to content regarded as extreme on a number of levels. It is important to distinguish between the classification category RC (the classification) and the proscription of certain activity for content that has been classified RC (the consequence). Under the classification cooperative scheme, state and territory enforcement legislation proscribes certain dealings with content that has been classified RC—such as selling, publicly exhibiting or possessing with an intention to sell.

10.6 The RC classification reflects the censorship end of the classification spectrum, as material so classified 'is effectively banned'.[5] However, a significant proportion of this material is not actually 'banned' as it is not illegal to possess a considerable amount of RC material in all parts of Australia except in Western Australia and in prescribed areas of the Northern Territory. In its 1991 report, *Censorship Procedure* (ALRC Report 55) the ALRC remarked that:

---

1 Standing Committee of Attorneys-General, *Communiqué 10 December 2010*, 2.

2 See Department of Broadband, Communications and the Digital Economy, *Outcome of Public Consultation on Measures to Increase Accountability and Transparency for Refused Classification Material* (2010); Department of Broadband, Communications and the Digital Economy, *Mandatory Internet Service Provider (ISP) Filtering: Measures to Increase Accountability and Transparency for Refused Classification Material–Consultation Paper* (2009).

3 S Conroy (Minister for Broadband Communications and the Digital Economy), 'Outcome of Consultations on Transparency and Accountability for ISP Filtering of RC Content' (Press Release, 9 July 2010).

4 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7.

5 D Hume and G Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381, 384–385.

> Classification is done for the purpose of controlling dissemination. It is not done for the purpose of controlling what a person is able to have in his or her own home. Accordingly, an RC classification does not of itself mean a person cannot possess that material. It does mean that he or she cannot disseminate it. If the possession of material is to be banned, it should be to achieve some specific policy objective, not just because it has been declared unsuitable for commercial distribution.[6]

10.7 The RC category is also used outside the classification cooperative scheme—either expressly, as in the case of the definitions of 'prohibited content' or 'potential prohibited content' under schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth); or impliedly, as in the case of certain objectionable goods under the *Customs (Prohibited Imports) Regulations 1956* (Cth) and the *Customs (Prohibited Exports) Regulations 1958* (Cth). Certain consequences under other laws may therefore flow from the classification of certain content as RC.

The legislative framework

The *Classification Act* framework

10.8 There are three parts of the framework for classification under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*): the Act itself; the National Classification Code (the Code); and the guidelines—that is, the *Guidelines for the Classification of Publications* and the *Guidelines for the Classification of Films and Computer Games*.

Classification Act

10.9 Section 9A(1) provides that publications, films or computer games that advocate the doing of a terrorist act must be classified RC. However, s 9 provides that in all other cases, publications, films and computer games are to be classified in accordance with the Code and the classification guidelines.

National Classification Code

10.10 As discussed in Chapter 9, cl 1 of the Code outlines a number of classification principles. It then provides that publications, films and computer games are to be classified according to the tables set out in cls 2, 3 and 4 respectively. These tables are prescriptive.[7] Item 1 within each table describes content that is to be classified RC. For the most part, the description of RC content is identical for publications, films and computer games.[8] That is, the Code requires that the RC classification applies to publications, films or computer games that:

- depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena, in such a way that they offend against the standards of morality, decency and propriety generally

---

6 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [5.16].

7 *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31, [43].

8 Note that the table relating to publications also includes descriptions. See *National Classification Code 2005* (Cth) cl 2, item 1(a).

accepted by reasonable adults to the extent that they should not be accorded a classification other than RC—item 1(a); or

- describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)—item 1(b); or
- promote, incite or instruct in matters of crime or violence—item 1(c).[9]

10.11 The main difference between the current three media types to be classified RC is that the Code provides that computer games that are unsuitable for a minor to see or play are to be classified RC.[10] The reason for this is the absence of an R 18+ classification for computer games. However, law ministers from all jurisdictions who together constitute the Standing Committee of Attorneys-General (SCAG) agreed in July and August 2011 to the creation of the R 18+ classification category for computer games.[11] At the time of writing, the Australian Government had not yet introduced a Bill to amend s 7(3) of the *Classification Act*—the relevant legislative provision that designates the classification categories for the three media types.

Classification guidelines

10.12 With respect to the RC classification, the *Guidelines for the Classification of Publications* provide that:

> Publications which contain elements which exceed those set out in the above classification categories are classified 'RC'.
>
> ...
>
> Publications that appear to purposefully debase or abuse for the enjoyment of readers/viewers, and which lack moral, artistic or other values to the extent that they offend against generally accepted standards of morality, decency and propriety will be classified 'RC'.
>
> Publications will be classified 'RC':
>
> (a) if they promote or provide instruction in paedophile activity;
>
> or if they contain:
>
> (b) descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18;
>
> (c) detailed instruction in:
>
> (i) matters of crime or violence,
>
> (ii) the use of proscribed drugs;

9 Ibid cl 2, item 1; cl 3, item 1; cl 4, item 1.

10 Ibid cl 4(1)(d).

11 See Standing Committee of Attorneys-General, *Communique 21 & 22 July 2011*; B O'Connor (Minister for Home Affairs and Justice), 'NSW Agrees to R 18+ Classification for Computer Games' (Press Release, 10 August 2011)..

(d) realistic depictions of bestiality;

or if they contain gratuitous, exploitative or offensive descriptions or depictions of:

(e) violence with a very high degree of impact which are excessively frequent, emphasised or detailed;

(f) cruelty or real violence which are very detailed or which have a high impact;

(g) sexual violence;

(h) sexualised nudity involving minors;

(i) sexual activity involving minors;

or of they contain exploitative descriptions of:

(j) violence in a sexual context;

(k) sexual activity accompanied by fetishes or practices which are revolting or abhorrent;

(l) incest fantasies or other fantasies which are offensive or revolting or abhorrent.[12]

10.13 The *Guidelines for the Classification of Films and Computer Games* relevantly provide that:

> Films that exceed the R 18+ and X 18+ classification categories will be [RC]. Computer games that exceed the MA 15+ classification category will be [RC].
>
> Films and computer games will be refused classification if they include or contain any of the following:
>
> CRIME OR VIOLENCE
>
> Detailed instruction or promotion in matters of crime or violence.
>
> The promotion or provision of instruction in paedophile activity.
>
> Descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years.
>
> Gratuitous, exploitative or offensive depictions of:
>
> (i) violence with a very high degree of impact or which are excessively frequent, prolonged or detailed;
>
> (ii) cruelty or real violence which are very detailed or which have a high impact;
>
> (iii) sexual violence.
>
> SEX
>
> Depictions of practices such as bestiality.

---

12 A large number of these terms are defined in the relevant glossary.

Gratuitous, exploitative or offensive depictions of:

(i) sexual activity accompanied by fetishes or practices which are offensive or abhorrent;

(ii) incest fantasies or other fantasies which are offensive and abhorrent.

DRUG USE

Detailed instruction in the use of proscribed drugs.

Material promoting or encouraging proscribed drug use.[13]

The *Customs Regulations* framework

10.14 The *Customs (Prohibited Imports) Regulations 1956* (Cth) (the import regulations) and the *Customs (Prohibited Exports) Regulations 1958* (Cth) (the export regulations) provide, respectively, that the importation and exportation of 'objectionable goods'[14] are prohibited unless the Attorney-General for Australia or an authorised person has given written permission.[15] This means that the importation or exportation of these goods is controlled—in that specific conditions must be complied with—in contrast to being absolutely prohibited.[16] The Australian Customs and Border Protection Service (Customs) is empowered to identify and confiscate such objectionable goods at Australia's borders. Further, with respect to the importation of objectionable material, there is a tiered penalty regime.[17]

10.15 'Objectionable goods' are largely tangible items related to the 'offline' world: publications, films, computer games, computer generated images, and interactive games.[18] Neither the import regulations nor the export regulations specifically use the term 'RC' or otherwise refer to the classification in the provisions relating to 'objectionable goods'. As Customs has explained, the import regulations are a dedicated border control, so reg 4A 'operates under its own power and does not reference classification legislation'.[19] However, the Australian Government's intention

---

13 Again, some terms are defined in the relevant glossary. The relevant 'List of Terms' explains that undefined terms are to take their usual dictionary meaning.

14 This term is used in the headings of both regulations. See *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A; *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3.

15 *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A(2A); *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(4). Note that the export regulations specifically provide that the Attorney-General may appoint the Director or Deputy Director of the Classification Board to be such an authorised person: *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(3).

16 See *Customs Act 1901* (Cth) s 50(2) (imported goods); s 112(2) (exported goods).

17 See Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011.

18 Each of these terms is defined. See *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A(1); *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(1).

19 Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011. For an explanation of the history of reg 4A see D Hume and G Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381, 388.

was to align the scope of 'objectionable goods' with the RC category used for classification.[20]

10.16 Customs has advised that

> [i]f any recommendation is considered to alter the guidelines to what is deemed to be Refused Classification material, equivalent amendments are required to the [import regulations] to ensure that the controls at the border are consistent with the domestic controls.[21]

10.17 This demonstrates that, while classification and consequence are conceptually distinct, at the higher end of classification there is a clear nexus between them.

The *Broadcasting Services Act* framework

10.18 Aspects of the *Broadcasting Services Act* framework that are relevant to this Inquiry are outlined in Chapter 2. The co-regulatory scheme for online content in schs 5 and 7, 'aims to address community concerns about offensive and illegal material online and, in particular, to protect children from exposure to material that is unsuitable for them'.[22] For the purpose of this chapter, it is important to note that the terms 'prohibited content' and 'potential prohibited content' refer to wider categories of media content than RC—although content that has been classified RC or would be substantially likely to be classified RC is certainly captured by the terms.[23]

The current scope of RC content

10.19 The *Classification Act*, the Code and the relevant guidelines together outline whether certain content is to be classified RC. Some examples of RC content are discussed below. A number of RC classification decisions have been tested in litigation.

Item 1(a) content—certain matters presented in an offensive way

10.20 The idea of certain content being 'offensive' to community standards underpins some of the rationales for the RC classification. In *NSW Council for Civil Liberties Inc v Classification Review Board*, the Attorney-General for Australia submitted that

> in imposing an 'effect' requirement in [item 1] (a) ... the legislature has recognised that while the content specified in th[at] paragraph ... may be offensive to some segments of the community, it may not be to others. In that situation, assessing the content in accordance with the standards and sensibilities of reasonable adults will

---

20 See Explanatory Statement, Customs (Prohibited Imports) Regulations (Amendment) 1995 (Cth) 1; Explanatory Statement, Customs (Prohibited Exports) Regulations (Amendment) 1997 (Cth) 1; Explanatory Statement, Customs (Prohibited Exports) Amendment Regulations 2007 (No 4) (Cth) 1; Explanatory Statement, Customs (Prohibited Imports) Amendment Regulations 2007 (No 5) (Cth) 1.

21 Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011.

22 Australian Communications and Media Authority, *Online Regulation* <http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_90169> at 11 September 2011.

23 See *Broadcasting Services Act 1992* (Cth);*Classification (Publications, Films and Computer Games) Act 1995* (Cth) sch 7 cls 20, 21.

> strike an appropriate balance between the general principle that adults should be able to read, hear and see what they want, and the competing community concerns about such matters as drug misuse or addiction, crime, cruelty or violence.[24]

10.21 In ALRC Report 55, the ALRC observed that '[c]urrent policy sees "offensiveness" mainly in terms of sex and violence and, particularly, any combination of the two'.[25]

Fetish activity

10.22 The guidelines pertaining to RC in the *Guidelines for the Classification of Films and Computer Games* specifically provide that '[g]ratuitous, exploitative or offensive depictions of sexual activity accompanied by fetishes or practices which are offensive or abhorrent'[26] are to be classified RC.

10.23 These Guidelines provide that the X 18+ classification for films and computer games cannot accommodate fetishes such as:

- body piercing;
- application of substances such as candle wax;
- 'golden showers';
- bondage;
- spanking; and
- fisting.

10.24 Adult entertainment films depicting sexual activity between consenting adults have been classified RC for containing live portrayals of such fetishes.[27]

10.25 If a fetish is not on this list, it does not necessarily mean that a live portrayal of it will not be classified RC. Other fetishes that have been depicted in an adult entertainment film and described in a fictional text have been classified RC.[28]

10.26 It should be noted that the *Guidelines for the Classification of Publications* differ from those for film. Descriptions and depictions of 'stronger fetishes'—defined as including bondage and discipline—are permitted in publications that would currently be classified as Category 2 restricted publications. Only publications which describe and depict fetishes where it is apparent that there is no consent or where there is physical harm would constitute RC content.

---

24 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [59].

25 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [2.2].

26 *Guidelines for the Classification of Films and Computer Games* (Cth).

27 For example, Classification Board, *Decision on Elexis Unleashed Vol 2* (2011) which was refused classification because of depictions of the application of candle wax. Another example is Classification Board, *Decision on Rough Sex 2* (2011). However, this film was refused classification because the film depicted bondage and asphyxiation.

28 See Classification Board, *Decision on Abstrakte Dimensionen* (2011); Classification Board, *Decision on ACMA 2011000017 Item 1* (2011). The text the subject of the latter decision had appeared on a website and so was classified as a film. The fetishes depicted or described are urolagnia, erotic asphyxiation, masochism, sadism, coprophilia and forced paraphilic infantilism.

Item 1(b) content—offensive depictions or descriptions of children

10.27 The word offensive is defined in both sets of the guidelines as 'material which causes outrage or extreme disgust'. The phrase, 'likely to cause offence to a reasonable adult', appears in item 1(b) of the tables and in other parts of the Code.[29] The phrase has been subject to judicial consideration in respect of the X 18+ category for films.[30] In that context, the Federal Court determined that the so-called 'offensiveness' test 'is not determined by a mechanistic majoritarian approach. Rather, it calls for a judgment about the reaction of a reasonable adult in a diverse Australian society.'[31]

Child sexual abuse

10.28 Child sexual abuse is a form of child abuse. Bravehearts Inc, a group of child protection advocates, has argued that 'child sexual assault' should be distinguished from 'child abuse and neglect', as they are different and require different responses.[32] However, as one commentator has observed, 'it is generally accepted that children are harmed whenever child pornography is created, disseminated and viewed'.[33]

10.29 The ALRC has elected not to use the term 'child pornography' in this Discussion Paper unless quoting from those who do. The Internet Watch Foundation (IWF) cogently explained the importance of refraining from using such terminology:

> The IWF uses the term **child sexual abuse** content to accurately reflect the gravity of the images we deal with. ... **[C]hild pornography**, **child porn** and **kiddie porn** are not acceptable terms. The use of such language acts to legitimise images which are not pornography, rather, they are permanent records of children being sexually exploited and as such should be referred to as **child sexual abuse images**.[34]

10.30 Child sexual abuse need not be depicted for the media content to be classified RC. It may be so classified if it is a verbal description.[35]

Sexual nudity involving minors

10.31 The *Guidelines for the Classification of Publications* define 'sexualised nudity' as including 'poses, props, text and backgrounds that are sexually suggestive'.

Sexual activity involving minors

10.32 Any representation of persons less than 18 years of age involved in consensual sexual activity could potentially be RC, even though they may be legally permitted to consent to sexual activity. For example, 'sexting', which refers to 'sending sexually

---

29 *National Classification Code 2005* (Cth) cl 2, 2(a) and cl 3(2)(a).

30 *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752; *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31.

31 *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752, [170].

32 See Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

33 L Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33 *University of New South Wales Law Journal* 581, 588.

34 Internet Watch Foundation, *Remit, Vision and Mission* <http://www.iwf.org.uk/about-iwf/remit-vision-and-mission> at 11 August 2011.

35 Classification Board, *Decision on ACMA 2011001035 Item 3* (2011).

explicit or sexually suggestive text messages' as well as 'the electronic transfer of nude and semi-nude images via mobile phone'.[36]

10.33 Further, the depiction of sexual activity involving a minor need not be 'real': the Classification Review Board determined that a Japanese animé film should be classified RC because

> the impact of the sex scenes involving the blonde novitiate [that is, a holy virgin] are exploitative and as she is depicted as a child under 18 years ... [T]he depictions are likely to cause offence to a reasonable adult.[37]

Item 1(c) content—promoting, inciting or instructing in certain matters

10.34 This category encompasses content promoting, inciting or instructing in matters of crime or violence. The legislative history of the relevant provision of the *Classification of Publications Ordinance 1983* (ACT)—upon which item 1(c) of the Code was based—shows that the original expression was 'promotes, incites or *encourages terrorism*'.[38] However, in 1989 the ACT Government amended the relevant provision to 'promotes, incites or *instructs in matters of crime or violence*', because it determined that it needed to delete the term 'terrorism' from the Ordinance.[39] While the explanatory statement suggests why the reference to 'terrorism' needed to be deleted, it does not explain why the new expression was chosen as a replacement.[40]

10.35 Judicial consideration of item 1(c) content has focused on matters of crime. Perhaps this is because, as Merkel J remarked, 'violent conduct will often involve criminal conduct'.[41] The Federal Court of Australia has expressly rejected the contention that the crime must be a serious one.[42] As Merkel J observed, 'what may be a less or more serious crime may often be a matter in the mind of the beholder'.[43]

10.36 The phrase 'matters of violence' in item 1(c) of the tables in the Code has not yet been subject to detailed judicial interpretation.

Content instructing how to commit crime

10.37 The Full Court of the Federal Court has held that, in order for material to instruct in matters of crime, first, it must impart or teach the information as to how the

---

36 For example, see K Albury, N Funnell and E Noonan, 'The Politics of Sexting: Young People, Self-representation and Citizenship' (Paper presented at Australian and New Zealand Communication Association Conference: 'Media, Democracy and Change', Canberra, 7 July 2010) 2.

37 Classification Review Board, *Decision on Holy Virgins* (2008) 5. This is not the only such case. See Classification Board, *Decision on ACMA 2011000559 Item 1* (2011). However, it should be noted that this animated content (hentai) was also refused classification on the basis of item 1(a) of the films table in the Code.

38 *Classification of Publications Ordinance 1983* (ACT) s 19(4)(b) (emphasis added).

39 Classification of Publications (Amendment) Ordinance 1989 (ACT) cl 4(d); Explanatory Statement, Classification of Publications (Amendment) Ordinance 1989 (ACT) 2.

40 Explanatory Statement, Classification of Publications (Amendment) Ordinance 1989 (ACT) 2.

41 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464, 478.

42 Ibid, 478.

43 Ibid, 478.

crime can be committed,[44] and, secondly, there must be 'some element of encouraging or exhorting the commission of crime'.[45] An objective test is used to determine whether the second element is met.[46] Accordingly, the actual intent of the author or publisher is not relevant.[47] Further, the Full Federal Court has determined that it is not necessary to show that the material was, in fact, likely to result in the commissioning of a crime.[48]

10.38 A broad range of behaviour may constitute a crime. For example, an article entitled 'The Art of Shoplifting' in the university student newspaper *Rabelais*, was classified RC on the basis that it 'instruct[ed] in methods of shoplifting and associated fraud'.[49] The decision was confirmed by the Classification Review Board.[50] Both the Federal Court and the Full Federal Court dismissed the editors' applications for judicial review of the Classification Review Board's decision—including the submission that the relevant decision breached the editors' implied constitutional right to freedom of political discussion and communication.[51]

10.39 Another classification decision illustrative of the current breadth of item 1(c) of the Code is the Classification Review Board's decision in respect of Dr Philip Nitschke and Dr Fiona Stewart's book, *The Peaceful Pill Handbook*. This publication relates to assisted suicide and voluntary euthanasia and was 'intended for seriously ill and suffering people for whom there is little hope that their quality of life will ever recover to a level that is satisfactory to them'.[52] The Classification Review Board classified it as RC because it found that 'it instructs in matters of crime relating to the manufacture of a proscribed drug (barbiturates)', amongst other things.[53]

Drug use

10.40 The *Guidelines for the Classification of Publications* provide that publications that contain detailed instruction in the use of proscribed drugs are to be classified RC. The *Guidelines for the Classification of Films and Computer Games* contain a similar provision but they also go further and provide that films and computer games that contain material promoting or encouraging proscribed drug use are also to be classified RC. The Classification Board has classified online content as RC because the text

---

44 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225, 239, 242, 257.

45 Ibid, 242.

46 Ibid, 239, 242, 257.

47 Ibid, 242.

48 Ibid, 240, 241–242, 256–257.

49 Decision of the Chief Censor quoted in *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464, 466.

50 Decision of the Classification Review Board quoted in *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464, 469.

51 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464; *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225.

52 Preface to *The Peaceful Pill Handbook* cited in Classification Review Board, *Decision on The Peaceful Pill Handbook* (2007), [5].

53 Ibid, [1].

constituted detailed instruction in 'recreational' drug use and also promoted such drug use.[54]

Content promoting or inciting crime

10.41 The Federal Court has expressly rejected the argument that the words 'promote' and 'incite' contain a requirement to look to the effect or likely effect of the action.[55]

10.42 In 2006, the Attorney-General for Australia applied to the Classification Review Board for classification of one film and eight publications that some considered incited terrorism. The Classification Board decided that none should be classified RC, but the Classification Review Board classified two of the publications RC on the basis of item 1(c) of the Code. The New South Wales Council for Civil Liberties Inc sought judicial review of the latter two decisions,[56] but the application was dismissed.[57]

Section 9A content—advocating a terrorist act

10.43 When judgment was reserved in this case brought by the NSW Council for Civil Liberties,[58] the Australian Government released a discussion paper about material that advocates terrorist acts. The discussion paper stated:

> There are community concerns about the public availability of material that advocates people commit terrorist acts. It is not certain that the national classification scheme adequately captures such material.[59]

10.44 The Australian Government had hoped that agreement could be achieved through the SCAG to amend the Code and guidelines as they pertain to RC in this respect.[60] However, the required unanimous support was not forthcoming,[61] so the Parliament of Australia amended the *Classification Act* by inserting s 9A.[62] The Act adopted the same use of the terms 'advocates' and 'terrorist act' that are used in the

---

54 Classification Board, *Decision on ACMA 2011000128 Item 2* (2011); Classification Board, *Decision on ACMA 2011000127 Item 1* (2011). The latter case only concerned the promotion or encouragement of proscribed drug use.

55 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [67].

56 Classification Review Board, *Decision on Defence of the Muslim Lands* (2006); Classification Review Board, *Decision on Join the Caravan* (2006).

57 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108.

58 D Hume and G Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381, 393.

59 Australian Government Attorney-General's Department, *Material That Advocates Terrorist Acts: Discussion Paper* (2007) 1.

60 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 August 2007, 18 (P Ruddock—Attorney-General) 18.

61 Ibid, 18–19.

62 *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth); Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 August 2007, 18 (P Ruddock—Attorney-General).

Criminal Code (Cth).[63] The Classification Board has classified some online content as RC on the basis of s 9A of the *Classification Act*.[64]

Computer games that are unsuitable for minors

10.45 As there is currently no R 18+ classification category for computer games—although this position is soon to change—computer game content that is unsuitable for a minor to see or play must be classified RC. The relevant guidelines provide that '[c]omputer games that exceed the MA 15+ classification category will be [RC]'.[65]

10.46 On this basis, in March 2011 the Classification Review Board classified the computer game, *Mortal Kombat*, as RC on the basis of the violence it contained.[66] By contrast, the Classification Board classified the game, *The Witcher 2: Assassins of Kings*, as RC because it 'contains sexual activity related to incentives and rewards'.[67]

Criticisms of the current scope of RC

10.47 A number of criticisms have been made of aspects of the RC classification in the academic literature—for example, in respect of the ambiguity of the terms and concepts used;[68] concerns about the community standards basis;[69] as well as concerns about overly restricting speech[70] (including in respect of the proposed mandatory internet service level filter);[71] and particular concerns about s 9A.[72] A number of submissions to this Inquiry made similar criticisms.

10.48 In the Issues Paper the ALRC asked:

- what content, if any, should be entirely prohibited online;[73] and
- whether the current scope of the RC category reflects the content that should be prohibited online.[74]

---

63 Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 (Cth) 2–3.

64 For example, see Classification Board, *Decision on ACMA 2011003487 Item 7* (2011). Note that this content was also classified RC because of items 1(a) and 1(c) of the Code.

65 *Guidelines for the Classification of Films and Computer Games* (Cth).

66 Classification Review Board, *Decision on Mortal Kombat* (2011) 6.

67 Classification Board, *Decision on The Witcher 2 Assassins of Kings* (2011) 1.

68 For example, see M Ramaraj Dunstan, 'Australia's National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions' (2009) 37 *Federal Law Review* 133, 148.

69 B Harris, 'Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia' (2005) 8 *Canberra Law Review* 25.

70 D Hume and G Williams, 'Advocating Terrorist Acts and Australian Censorship Law' (2009) 20 *Public Law Review* 37; B Kumar, '*Brown v The Classification Review Board*: Robin Hood or Rebel without a Cause?' (1999) 21 *Sydney Law Review* 294.

71 C Govey, '"Won't Somebody Please Think of the Children": Would a Mandatory ISP-level Filter of Internet Content Raise Freedom of Communication Issues?' (2010) 28(4) *Communications Law Bulletin* 14.

72 D Hume and G Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381.

73 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 24.

74 Ibid, Question 25.

10.49 These questions were directed to consideration of what content should be the subject of the Government's proposed mandatory ISP-level filter. Submissions diverged in respect of the first question. Some submissions responded that no content should be censored online by way of a classification system[75] and, rather, that individuals, including parents, should decide what media content they and their children consume. However, there were also many submissions that accepted the need for a classification such as RC to encompass certain content such as child sexual abuse content, as many considered that such content should be prohibited online.[76]

10.50 It should be noted that many submissions responding to these two questions commented on the current scope of RC in general, not simply in respect to whether such material should be prohibited online. Comments directed to the RC category more broadly are also discussed in this chapter. In part this is because a number of submissions argued for parity of treatment—that is, platform neutrality—between the classification category online and offline.[77]

10.51 Some submissions supported the scope of the current RC category. However, there were many submissions that were critical of the scope; some even suggested abolishing the category.[78] A number of submissions considered that the current criteria for RC are broad[79] and/or ambiguous.[80] Some thought it was unclear whom the classification is protecting, from what, and why.[81] Finally, a number expressed specific concerns about the current scope. For example, a very large number of submissions called for the introduction of an R 18+ classification for computer games. Generally the discussion of the scope of the RC category in most of these submissions was focused solely on the fact that the absence of an R 18+ classification for computer games meant that a number of games are being classified RC that should be accessible to adult gamers.

The breadth of the current scope of RC

10.52 There were a number of submissions that suggested that the current scope of RC was appropriate because the content currently within the scope of the RC classification should be entirely prohibited online.[82] For example, the Uniting Church in Australia's

---

75 For example Electronic Frontiers Australia, *Submission CI 2194*, 15 July 2011; The Herb Cottage Partners, *Submission CI 1626*, 13 July 2011; Access, *Submission CI 1172*, 16 July 2011.

76 For example P Papadopoulos, *Submission CI 1321*, 12 July 2011; Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011; D Hames, *Submission CI 895*, 11 July 2011; L Hewitt, *Submission CI 23*, 23 May 2011.

77 For example NSW Council of Churches, *Submission CI 2162*, 15 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011; M Taylor, *Submission CI 632*, 9 July 2011.

78 For example Pirate Party Australia, *Submission CI 1588*, 15 July 2011; I Graham, *Submission CI 1244*, 17 July 2011.

79 For example A Hightower and Others, *Submission CI 2159*, 15 July 2011; K Weatherall, *Submission CI 2155*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

80 For example The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

81 For example I Graham, *Submission CI 1244*, 17 July 2011; Australian Society of Authors, *Submission CI 1157*, 15 July 2011.

82 For example National Civic Council, *Submission CI 2226*, 15 July 2011; NSW Council of Churches, *Submission CI 2162*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; Uniting Church in Australia, *Submission CI 1245*, 18 July 2011; Australian Council on Children and the

Justice and International Mission Unit commented that it ‘supports the existing definition of RC as adequately setting boundaries around what content should be entirely prohibited online’.[83]

10.53 Some thought that more than RC content should be prohibited online.[84] For example, the Family Council of Victoria Inc thought that ‘[a]ll content in today’s X18+ category for films and above’ should be prohibited online.[85]

10.54 Overall however, most submissions to the Inquiry remarked on the breadth of the current scope of RC, with some remarking that it is overly broad.[86] For example, Kimberlee Weatherall, from the TC Beirne School of Law of the University of Queensland, submitted:

> [T]he material [that] could feasibly be deemed RC includes material that may have social value, and which ought to be protected as free expression (in some cases political expression)
>
> - A site devoted to debating the merits of euthanasia in which some participants exchanged information about actual euthanasia practices.
> - A site set up by a community organisation to promote harm minimisation in recreational drug use.
> - A site designed to give a safe space for young gay and lesbians to meet and discuss their sexuality in which some members of the community narrated explicit sexual experiences.
> - A site that included dialogue and excerpts from literary classic[s] such as Nabokov’s *Lolita* or sociological studies into sexual experiences, such as Dr Alfred Kinsey’s famous *Adult Sexual Behaviour in the Human Male*.
> - A site devoted to discussing the geo-political causes of terrorism that published material outlining the views of terrorist organisations as reference material.[87]

The purpose of classification

10.55 In 1991, the ALRC stated that classification is done for the purpose of controlling dissemination—not for the purpose of controlling what a person may possess in their home.[88] The New South Wales Council for Civil Liberties observed that:

Media, *Submission CI 1236*, 15 July 2011; Bravehearts Inc, *Submission CI 1175*, 15 July 2011; Australian Family Association of WA, *Submission CI 918*, 12 July 2011. However, it should be noted that Bravehearts made its comment noting that it was not specialised in the area.

83 Uniting Church in Australia, *Submission CI 1245*, 18 July 2011;

84 For example Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001. Australian Family Association Victoria, *Submission CI 2279*, 15 July 2011 and National Civic Council, *Submission CI 2226*, 15 July 2011 also appear to be of this view.

85 Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001.

86 For example see A Hightower and Others, *Submission CI 2159*, 15 July 2011; K Weatherall, *Submission CI 2155*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

87 K Weatherall, *Submission CI 2155*, 15 July 2011 citing C Lumby, L Green and J Hartley, *Untangling the Net: The Scope of Content Caught by Mandatory Internet Filtering* (2009) iii.

88 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991).

> The current classification system requires that items are classified first, and then distribution is done appropriately to the level of classification. The mindset which led to this approach is ill-suited to the Internet.[89]

10.56 Similarly, Chris Berg and Tim Wilson of the Institute of Public Affairs remarked that '[t]echnological developments have already undermined the basis of classification in Australia'.[90]

10.57 Indeed, there appears to have been a shift in the rationale for classification since the ALRC's 1991 report. For example, in early 2011 the Attorney-General's Department stated that '[t]he aim of the classification process is to assist consumers to make informed choices'.[91] Many submissions responded to the questions about the RC classification by commenting that the purpose of classification is to assist consumers to make informed choices about consumption of media content—not to censor.[92] For example, Dr Cathy Cupitt, Jess Bridges and Elaine Kemp commented:

> Protecting the community from offensive content should not come at the expense of censoring valuable works and already marginalised voices. Our objective should be to give people the information they need in order to choose online content safely, rather than focusing on censorship.[93]

Prohibit what is 'illegal to create or possess'

10.58 MLCS Management submitted that the interface between entertainment and criminal law 'is a major flaw' of the present classification cooperative scheme as

> one of the reasons for banning content (refusing classification) is because it not only offends reasonable adults, but because it may in some way break the law. However, the prime reason for the NCS is to advise consumers about product suitability. There must be very clear and consistent linkages between any classification framework and other legislative schemes, such as criminal codes and customs regulations.[94]

10.59 Dr Lyria Bennett Moses also commented on the problematic nature of the current RC classification in this respect, noting:

> The RC category, as currently defined, contains two types of content:
>
> (RC1) Content that has been internationally condemned, most obviously child pornography, and
>
> (RC2) Content that cannot be sold in Australia.

---

89 New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011.

90 Institute of Public Affairs, *Submission CI 1737*, 20 July 2011.

91 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

92 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; Pirate Party Australia, *Submission CI 1588*, 15 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; C Cupitt, J Bridges and E Kemp, *Submission CI 1220*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

93 C Cupitt, J Bridges and E Kemp, *Submission CI 1220*, 15 July 2011.

94 MLCS Management, *Submission CI 1241*, 16 July 2011.

> Unlike RC1 content, RC2 content can be legally possessed in Australia ... (except in Western Australia).[95]

10.60 She submitted that 'by giving RC1 material and RC2 material separate labels, censorship regulations can be better targeted'.[96]

10.61 A number of submissions that argued for narrowing the scope of RC in general—not just online—relied upon the distinction between acts which are prima facie 'legal' and 'illegal',[97] although it was not always clear what was meant by the distinction. However, some submissions were quite clear: content depicting real acts that are legal to do should not be prohibited whereas content depicting real—as opposed to fictional—acts that are illegal to do should be prohibited, unless part of an educational or news report.[98] A number of respondents argued that to warrant prohibition online or an RC classification, the content must cause harm.[99]

10.62 Dr Nicolas Suzor was of the view that '[o]nly material that is illegal to possess should be entirely prohibited online'.[100] Other submissions explained that the content which should be entirely prohibited online should be that which is 'illegal to create or possess'—child sexual abuse material being an often-mentioned example.[101] Amy Hightower and others submitted:

> The only content that should be entirely prohibited online is those that required the commission of certain illegal acts to produce, such as child abuse material, and do not have any artistic, literary, academic, historic or newsworthiness value.[102]

10.63 Google also acknowledged that

> government intervention is appropriate when it comes to the prevention of child abuse material, primarily through direct law enforcement action and by working co-operatively with industry and governments in other jurisdictions to eradicate this material. Google agrees that there is an in-principle justification for government prohibition of this kind of material (subject to an effective safe harbour for network and platform providers). Google has a global all-product ban on child pornography, which is illegal in almost every country.[103]

---

95 L Bennett Moses, *Submission CI 2126*, 15 July 2011.

96 Ibid.

97 For example Eros Association, *Submission CI 1856*, 20 July 2011; Pirate Party Australia, *Submission CI 1588*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

98 Eros Association, *Submission CI 1856*, 20 July 2011.

99 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011.

100 N Suzor, *Submission CI 1233*, 15 July 2011.

101 For example Google, *Submission CI 2336*, 22 July 2011; I Graham, *Submission CI 1244*, 17 July 2011; A Hightower and Others, *Submission CI 2159*, 15 July 2011.

102 A Hightower and Others, *Submission CI 2159*, 15 July 2011.

103 Google, *Submission CI 2336*, 22 July 2011.

10.64 However, some submissions queried the utility of prohibiting such online content by way of ISP-level filters,[104] or even a classification system.[105] For example, while Irene Graham considered that child sexual abuse material should be entirely prohibited online, she submitted that

> there is a difference between what content should be illegal to make available and/or access online, and what content should be on a secret blacklist and 'blocked' by ISPs ... [N]o government can be trusted not to abuse secret censorship powers and secret censorship is incompatible with democracy.[106]

10.65 Amy Hightower and others argued that 'media classification is not the appropriate tool for prohibition; such material is better handled through law enforcement agencies than media classifiers'.[107] Some submissions instead called for appropriate resourcing of the enforcement of such criminal laws.[108]

General and specific concerns about the current scope of RC

10.66 A number of submissions expressed concern about aspects of the scope of the RC classification. Some of these comments were aimed at specific elements, for example items 1(c) and (d), as well as s 9A. Other comments were aimed at the problematic concept of community standards and offensiveness; that is, impliedly directed at item 1(a). Some comments cannot be so easily assigned to a respective item of the Code tables. For example, the Internet Industry Association's comment was directed to reform of the scope more broadly:

> the refused classification category should be reviewed to ensure that educational, news, scientific medical and political material is not included. We think this is important to the proper flow of information in our society and to ensure that free speech is possible online without risk of restriction.[109]

Community standards and offensiveness

10.67 A number of submissions expressed concern about the notion that media content may offend community standards.[110] Some submissions were concerned about the subjective nature of determining a 'community standard'[111] and noted that such standards will vary across communities[112] (including online communities)[113] and,

---

104 For example I Graham, *Submission CI 1244*, 17 July 2011; J Symon, *Submission CI 1570*, 13 July 2011.

105 For example Electronic Frontiers Australia, *Submission CI 2194*, 15 July 2011; A Hightower and Others, *Submission CI 2159*, 15 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

106 I Graham, *Submission CI 1244*, 17 July 2011.

107 A Hightower and Others, *Submission CI 2159*, 15 July 2011.

108 For example Electronic Frontiers Australia, *Submission CI 2194*, 15 July 2011; Artsource, *Submission CI 1880*, 14 July 2011.

109 Internet Industry Association, *Submission CI 2445*, 28 July 2011.

110 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; I Graham, *Submission CI 1244*, 17 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

111 For example The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

112 For example The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

113 Google, *Submission CI 2336*, 22 July 2011.

further, are likely to change over time.[114] For example, the Arts Law Centre of Australia commented that:

> The difficulty for many people in the arts and broader community is not with the prohibition on material which is illegal under the criminal laws, but the much broader category of 'offensive' materials. An agreed upon 'community standard of morality, decency and propriety' is inherently subjective and will differ enormously across communities.[115]

10.68 Some respondents submitted that the current standards that are determined to be reflective of the community may be unduly narrow.[116] For example, Pirate Party Australia submitted that '[t]he current scope of RC does not reflect the attitudes and morals of today's society'.[117] It argued that

> the ban on bondage (BDSM) pornography, between willing participants, does not match community standards, where there are shops, groups and even night-clubs that cater to people who enjoy BDSM as part of their sex life.[118]

10.69 A number of submissions were directed at the propriety of one group's views being able to trump those of others. While some questioned the propriety of media content being 'banned' because a majority determined it to be offensive (even though an individual's access would have no adverse impact on the rest of the community;[119] so, item 1(b) is clearly excluded), others advocated a community standard of public decency.[120]

10.70 Another point to arise was possible censorship—in a political sense—which is not warranted. The NSW Council for Civil Liberties warned:

> Governments should not misuse classification to focus on areas which clamorous minorities consider dangerous, but where there is no proof, or which in fact are not.[121]

10.71 Given the number of submissions that expressed concern about whether the classification criteria for RC accurately reflect current community standards, it is apt to recall that earlier in this Discussion Paper, at Proposal 9–5, the ALRC proposed that a comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, and with a broad reach across the Australian community. The ALRC proposed that such a review should be undertaken at least every five years.

---

114 For example N Suzor, *Submission CI 1233*, 15 July 2011; G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

115 The Arts Law Centre of Australia, *Submission CI 1299*, 19 July 2011.

116 For example Pirate Party Australia, *Submission CI 1588*, 15 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

117 Pirate Party Australia, *Submission CI 1588*, 15 July 2011.

118 Ibid.

119 For example New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011; N Suzor, *Submission CI 1233*, 15 July 2011.

120 For example Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011.

121 New South Wales Council for Civil Liberties, *Submission CI 2120*, 29 July 2011. Some other submissions suggested that this might already have occurred. See I Graham, *Submission CI 1244*, 17 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011.

Criticisms of item 1(c) content

10.72 A number of submissions were critical of the current breadth of item 1(c) of the Code.[122] For example, Weatherall noted that there is an 'extraordinary range of activities that are proscribed by criminal provisions in Australian law' so the content that may come within item 1(c) is 'potentially extremely broad'.[123]

10.73 Graham submitted that item 1(c) had been used to make 'highly publicly controversial RC decisions' and referred to the decisions noted above in respect of the edition of *Rabelais*, *The Peaceful Pill Handbook*, as well as a decision on a computer game entitled *Marc Ecko's Getting Up: Contents Under Pressure*—which 'provided elements of promotion of the crime of graffiti'.[124]

10.74 Some submissions were critical of item 1(c) of the Code as it relates to drug use.[125] The National Drug Research Institute, Curtin University for example called for consideration of the scope of RC from a public health perspective: 'specifically, to reconsider the rationale behind including "detailed instruction in drug use" in the definition of refused classification'.[126] It explained that almost all of the respondents in one of its studies had participated in online drug discussion for the purpose of reducing the risks of drug use and preventing harmful outcomes.[127] It observed that the most popular drug websites were not hosted in, or otherwise connected with, Australia, so were 'not currently affected by Australia's classification system' but would be likely to be refused classification under the proposed mandatory ISP-level filter.[128] It concluded:

> Blocking websites where people discuss drug use in detail will ... hamper the efforts of health, social and law enforcement officers to monitor drug users and to produce interventions that are responsive to new drug trends. ...
>
> Simply refusing classification of sites which contain 'detailed instruction in drug use' will ignore the complexity of balancing the potential negative and positive consequences of such websites. ...
>
> It would be unfortunate if well-intentioned policy changes inadvertently increased harm by decreasing access to websites that may assist in reducing harm for individuals and the whole community.[129]

10.75 Google also expressed concern about the prohibition of this content:

> When it comes to a broader class of controversial material, such as material dealing with safer drug use or material dealing with euthanasia, which is not universally recognised as illegal, Google submits that government prohibition is inappropriate.[130]

---

122 For example K Weatherall, *Submission CI 2155*, 15 July 2011; I Graham, *Submission CI 1244*, 17 July 2011; National Drug Reseach Institute, *Submission CI 1186*, 15 July 2011.

123 K Weatherall, *Submission CI 2155*, 15 July 2011.

124 I Graham, *Submission CI 1244*, 17 July 2011. See Classification Review Board, *Decision on Marc Ecko's Getting Up: Contents Under Pressure* (2006).

125 For example Google, *Submission CI 2336*, 22 July 2011; National Drug Reseach Institute, *Submission CI 1186*, 15 July 2011; M Lindfield, *Submission CI 2164*, 15 July 2011.

126 National Drug Reseach Institute, *Submission CI 1186*, 15 July 2011.

127 Ibid.

128 Ibid.

129 Ibid.

10.76 It observed that:

> in July 2008, the print edition of *The Peaceful Pill Handbook* by Dr Philip Nitschke was listed No 66 on the Amazon.com global Bestseller List. This same edition is banned in Australia. A censored version of the book was approved for publication in New Zealand in June 2008.[131]

10.77 Other submissions were also critical of the prohibition of media content relating to euthanasia.[132] However, some submissions considered that media content which promotes or provides instruction in suicide should be prohibited.[133] For example, the Hunter Institute of Mental Health submitted:

> Given the potential risks to those who are vulnerable, we believe that any material (online or otherwise) that is explicitly pro-suicide and provides information or access to means of suicide should be prohibited. While some may conceive this as a restriction of freedom of speech, it does pose a real risk to those who are vulnerable and desperate.[134]

Criticism of s 9A

10.78 While the Music Council of Australia noted the debate about a chilling effect that accompanied 'Anti-Terrorism legislation',[135] other submissions were more vocal in their criticism of s 9A of the *Classification Act*.[136] For example, the Australian Society of Authors submitted that the provision should be repealed,

> because it fails the most elementary test of censorship—certainty of application. Because no one knows precisely what it prohibits, it inescapably catches material that is beyond the ambit of censorship.[137]

Criticism of item 1(d)

10.79 As noted, a large number of submissions criticised 1(d) of the Code table relating to computer games. As SCAG ministers have recently agreed to introduce an R 18+ classification for computer games it is unnecessary to describe the criticism of item 1(d) in this chapter.

ALRC's views

10.80 The ALRC is mindful that the Australian Government's proposed mandatory ISP filtering scheme is based upon an 'RC content list' and that the Government is waiting for the outcome of the ALRC's review of the RC classification before implementing the scheme. Accordingly, the questions about RC in the Issues Paper were directed at eliciting responses about the media content that should be prohibited online. The ALRC makes no comment about the merits or otherwise of such a filter.

---

130 Google, *Submission CI 2336*, 22 July 2011.

131 Ibid.

132 For example Eros Association, *Submission CI 1856*, 20 July 2011.

133 For example Hunter Institute of Mental Health, *Submission CI 2136*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011.

134 Hunter Institute of Mental Health, *Submission CI 2136*, 15 July 2011.

135 Music Council of Australia, *Submission CI 2086*, 21 July 2011.

136 For example I Graham, *Submission CI 1244*, 17 July 2011; Australian Society of Authors, *Submission CI 1157*, 15 July 2011.

137 Australian Society of Authors, *Submission CI 1157*, 15 July 2011.

10.81 Submissions to this Inquiry expressed divergent views about the scope of RC—both offline and online. In light of this, and consistent with promoting platform neutrality,[138] any reform of the RC classification needs to consider more than just what media content should be entirely prohibited online.

10.82 As noted above, most respondents to the Issues Paper who addressed the issue considered the RC category to be too broad to be applied effectively in a convergent media environment. At the same time, very few submissions favoured the abolition of an RC category—most of those who considered the category to be too broad, as currently constituted, nonetheless were of the view that some material, particularly real depictions of actual child sexual abuse or actual sexual violence, is so contrary to both criminal law and community standards that it should be banned outright. In a convergent media environment, this necessitates the filtering of such content so that it is not accessible from personal electronic devices such as computers and mobile phones. It is no longer possible to quarantine the 'online' world from that of other media platforms.

10.83 The ALRC has responded to these interlinked issues as follows. First, the ALRC makes a proposal for certain RC content to be specifically stated in the classification decision so that it may assist the implementation of any ISP filtering. Secondly, the ALRC has commissioned a pilot study to research community standards in regard to the current higher level classification categories (MA 15+ up to and including RC).

Certain RC content to be specified in the classification decision

10.84 The ALRC proposes that the Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content may then be added to any blacklist of content that must be filtered at the ISP level.

10.85 The ALRC has proposed this sub-set of content within the current RC category as content that could be filtered at the ISP level within Australia for a number of reasons. As Dr Lyria Bennett Moses, from the Faculty of Law of the University of New South Wales, noted in respect of 'child pornography':

- this material is internationally condemned;
- the censorship is based on different goals and purposes to some other RC material, for example, it 'is rightly treated as falling outside even a broad notion of freedom of speech';
- it may warrant a different regulatory response to other RC material, for example, '[t]he community expects an active police response ... including the prosecution of those responsible for its production'; and

---

138 See Chapter 4, Principle 8.

- there are avenues for regulating access to this material that do not exist with other RC material, for example, by way of international co-operation.[139]

10.86 Finally, a number of submissions identified real depictions of actual child sexual abuse and actual sexual violence, such as rape, as content that should be entirely prohibited—both online and offline.

Proposal 10–1 The Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content could be added to any blacklist of content that must be filtered at the internet service provider level.

Researching community standards and RC content

10.87 In Chapter 2, the ALRC proposed a guiding principle for reform that communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community.[140] The ALRC is mindful that gauging community standards from the views of those who submit comments to a public consultation may not adequately represent the diversity of opinions in the community as a whole. Moreover, such views may not have been derived from consideration of actual media content in the higher level categories.

10.88 In light of this question, the ALRC has commissioned a pilot study to consider the current higher level classification categories, from MA 15+ up to and including RC, for the purpose of assessing what content may or may not be applicable in these categories. The ALRC has been developing this pilot study in collaboration with the Australian Government Attorney-General's Department and the Department of Broadband, Communications and the Digital Economy. The study is being conducted by consultants Urbis Keys Young.

10.89 The pilot study involves bringing together a representative group of members of the community to view classifiable content that causes concern to people, and to consider the weighting of elements applied in the current Code as well as other possible elements, in order to advise on classification against current and proposed classification categories. The material may be violent, offensive and confronting, and participants have been advised of the nature of the material to be shown. The representative group is being recruited through advertisements in print and online media throughout Australia, as well as through the ALRC's website.

10.90 In addition to the public participants in the pilot study, a control group has been established comprised of people with prior experience of, and/or publicly stated opinions on, the current classification guidelines. The intention is to be able to check

139 L Bennett Moses, *Submission CI 2126*, 15 July 2011.
140 See Chapter 4, Principle 2.

community views against those of people who regularly engage with debates about, or otherwise interact with, Australia's classification scheme.

10.91 The pilot study will be conducted over October–November 2011, and results will be made available to the ALRC in advance of the release of the Final Report. Findings from the pilot study may inform recommendations on the RC category, as well as providing a possible methodology for ongoing research into the classification categories.[141]

141 See Proposal 9–5.

Part 3

Administering and Enforcing the New Scheme

11. Codes and Co-regulation

Contents

Summary 189
Regulatory forms 189
  Self-regulation 190
  Quasi-regulation 190
  Co-regulation 191
  Direct government regulation 191
Factors in determining regulatory form 191
Industry codes 192
  Existing industry codes 193
  Classification and co-regulation 194
ALRC's proposals 196
  Codes and co-regulation 196
  Content of industry classification codes 197
  Approval and enforcement of codes 199

Summary

11.1 In this chapter, the ALRC proposes that the Classification of Media Content Act provide for the development and operation of industry classification codes of practice, consistent with the statutory classification obligations, categories and criteria contained in the Act. The intention is that these codes would assist in the interpretation and application of the statutory classification categories and criteria and introduce some additional flexibility to the regulatory scheme.

11.2 The chapter examines the possible processes for the development of industry classification codes, and proposes mechanisms for the approval and enforcement of codes by the new Regulator. The ALRC also proposes that where an industry classification code of practice relates to media content that must be classified or access to which must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.

Regulatory forms

11.3 The development and operation of industry classification codes involves elements of co-regulation. Co-regulation is a regulatory form that can be placed on a continuum of government oversight ranging from self-regulation, through quasi-

regulation and co-regulation, to direct government regulation.[1] Some examples of these forms are described below, with reference to aspects of the current classification system.

Self-regulation

11.4 Self-regulation is generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement.

11.5 For example, the content of advertising is subject to a self-regulatory system created by the Australian Association of National Advertisers (AANA) in 1998. The AANA established a Code of Ethics and the Advertising Standards Bureau (ASB), which incorporates an independent Advertising Standards Board to hear complaints regarding advertising content.

11.6 The 'classification' of audio material is also self-regulated, under the *Recorded Music Labelling Code of Practice*.[2] There is no legislation and individual record companies are responsible for labelling recordings under a code that outlines labelling provisions and establishes a complaints-handling mechanism.

11.7 The processes and procedures followed by video-sharing websites and other internet content providers in controlling content that they sell or distribute may also be characterised as a form of self-regulation. These processes include responding to user reporting (or 'flagging') of inappropriate content and methods to detect inappropriate content using algorithms and other technical means. For example, YouTube users click a flag button to report a video which they consider to be inappropriate and flagged videos are routed into 'smart' queues for manual review by a specialist review team before a decision is made whether or not to take the video down, or age-restrict it.[3]

Quasi-regulation

11.8 Quasi-regulation describes those arrangements where government influences businesses to comply, but which do not form part of explicit government regulation.

11.9 An example of quasi-regulation is the agreement by Telstra, Optus and Primus to filter voluntarily a list of child abuse URLs compiled and maintained by the Australian Communications and Media Authority (the ACMA). This arrangement was entered into against the background of the Australian Government's proposed system for mandatory internet service provider level filtering of URLs.[4]

11.10 Arguably, the AANA self-regulatory system for advertising might equally be characterised as quasi-regulation. This is because governments may have regulated this

---

1 See Australian Government, *Best Practice Regulation Handbook* (2010). The ALRC's usage of these terms is based on this publication.

2 Australian Music Retailers Association and Australian Recording Industry Association, *Recorded Music Labelling Code of Practice* (2003).

3 Google, *Submission CI 2336*, 22 July 2011.

4 See S Conroy (Minister for Broadband Communications and the Digital Economy), 'Outcome of Consultations on Transparency and Accountability for ISP Filtering of RC Content' (Press Release, 9 July 2010).

area if a self-regulatory regime did not exist—and may regulate here if this regime does not demonstrate its responsiveness to community expectations.[5]

Co-regulation

11.11 Co-regulation typically refers to situations where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced.

11.12 Regulation of radio and television content is co-regulatory. Industry groups have developed codes under s 123 of the *Broadcasting Services Act 1992* (Cth), in consultation with the ACMA. Most aspects of program content are governed by these codes, which include the *Commercial Television Industry Code of Practice* and the *Commercial Radio Australia Code of Practice and Guidelines*. Once implemented, the ACMA monitors these codes and deals with unresolved complaints made under them.

Direct government regulation

11.13 Direct government regulation comprises primary and subordinate legislation. It is the most commonly used form of regulation.[6] Direct government regulation applies to the classification of publications, films and computer games under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*).

Factors in determining regulatory form

11.14 The Australian Government *Best Practice Regulation Handbook* states that direct government regulation should be considered when, among other things: the problem is high-risk, of high impact or significance; the community requires the certainty provided by legal sanctions; and there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles, with no possibility of effective sanctions.[7]

11.15 On the other hand, self-regulation—or by extension, more co-regulation—may be a feasible option if: there is no strong public interest concern, in particular no major public health and safety concerns; the problem is a low-risk event, of low impact or significance; and the problem can be fixed by the market itself—for example, if there are market incentives for individuals and groups to develop and comply with self-regulatory arrangements.[8] Practical factors may also favour more self- or co-regulation if the time, effort or cost of government regulation outweighs its benefits.[9]

---

5 See, eg, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Reclaiming Public Space: Inquiry into the Regulation of Billboards and Outdoor Advertising: Final Report* (2011), viii, rec 2.

6 Australian Government, *Best Practice Regulation Handbook* (2010), 34–35.

7 Ibid, 35.

8 Ibid, 34.

9 For more detailed discussion of the optimal conditions for self- and co-regulatory arrangements, see Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010). See also Australian Public Service Commission, *Smarter Policy: Choosing Policy Instruments and Working with Others to Influence Behaviour* (2009).

11.16 In the communications and media context, the ACMA has identified ten 'optimal conditions' for co-regulatory arrangements, including 'environmental' conditions and features of the regulatory scheme. Briefly, the factors favouring co-regulation can be summarised as follows:

- a small number of market players with wide coverage of the industry;
- a competitive market with few barriers to entry;
- homogeneity of products—that is, products are essentially alike or comparable; and
- common industry interest—that is, collective will or genuine industry incentive to co-regulate.[10]

11.17 When used in the right circumstances, it is said that self-regulation and co-regulation can offer a number of advantages over direct regulation. These include:

- greater flexibility and adaptability;
- potentially lower compliance and administrative costs;
- an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly; and
- quick and low-cost complaints-handling and dispute resolution mechanisms.[11]

Industry codes

11.18 Codes underpinned by legislation are typical of co-regulation. Sometimes legislation sets out mandatory government standards, but provides that compliance with an industry code can be deemed to comply with those standards. Legislation may also provide for government-imposed arrangements in the event that industry does not meet its own arrangements.[12]

11.19 The ACMA has stated that co-regulatory mechanisms can include legislation that:

- delegates the power to industry to regulate and enforce codes;
- enforces undertakings to comply with a code;
- does not require a code but has a reserve power to make a code mandatory;
- requires industry to have a code and, in its absence, government will impose a code or standard;

---

10 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010), 10–11.

11 Ibid, 5 citing an OECD study: Centre for Regulated Industries, *Self-regulation and the Regulatory State—A Survey of Policy and Practice* (2002).

12 Australian Government, *Best Practice Regulation Handbook* (2010), 35.

- prescribes a code as a regulation but the code only applies to those who subscribe to it—prescribed voluntary codes; and
- prescribes a code as a regulation to apply to all industry members—prescribed mandatory codes.[13]

Existing industry codes

11.20 The *Broadcasting Services Act*, the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth) provide varying mechanisms for the development of industry codes concerning the regulation of media content.

11.21 These codes are discussed briefly below, with reference to their relationship to the classification requirements of the *Classification Act*.

11.22 In relation to online content, sch 7 of the *Broadcasting Services Act* states that the Australian Parliament 'intends that bodies or associations that the ACMA is satisfied represent sections of the content industry should develop codes (industry codes) that are to apply to participants in the respective sections of the industry in relation to their content activities'.[14]

11.23 Schedule 7 provides a process for registering codes when the ACMA is satisfied that:

- the body or association developing the code represents a particular section of the content industry;
- where the code deals with matters of substantial relevance to the community, the code provides appropriate community safeguards or, in other cases, deals with matters in an appropriate manner; and
- there has been adequate public and industry consultation.[15]

11.24 Compliance with an industry code is voluntary unless the ACMA directs a particular participant in the content industry to comply with the code.[16] Failure to comply with such a direction is an offence punishable by criminal, civil and administrative penalties.[17] In addition, the ACMA has a reserve power to make an industry standard if there are no industry codes or if an industry code is deficient.[18]

11.25 The content of codes dealing with classification of online material is constrained by *Classification Act* concepts. Schedule 7 of the *Broadcasting Services Act* evinces an intention that industry codes provide that content be assessed according to

---

13 Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (2010), 5.
14 *Broadcasting Services Act 1992* (Cth) sch 7 cl 80.
15 Ibid sch 7 cl 85.
16 Ibid sch 7 cl 89.
17 See Ch 14.
18 *Broadcasting Services Act 1992* (Cth) sch 7 cls 91–94.

Classification Act categories and criteria; and definitions of 'prohibited content' and 'potential prohibited content' in sch 7 reflect *Classification Act* categories.

11.26 Section 81 of sch 7 prescribes matters that must be dealt with in industry codes for commercial content providers.[19] Notably, these include the engagement of trained content assessors and ensuring that unclassified content likely to be classified MA 15+, R 18+, X 18+ or RC by the Classification Board is not released unless a trained content assessor has assessed the content.

11.27 Commercial television and subscription television codes of practice are less constrained by legislation. However, under s 123 of the *Broadcasting Services Act*, these codes of practice must (for films) apply the film classification system set out in the *Classification Act* and, in the case of commercial television broadcasting, must provide specified time-zone restrictions for M and MA 15+ films.[20]

11.28 Under the *Australian Broadcasting Corporation Act* and the *Special Broadcasting Service Act*, the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) have a duty to develop codes of practice relating to 'programming matters' and to notify those codes to the ACMA.[21]

11.29 There are, however, no statutory requirements relating to the content of the code's classification provisions. This reflects that, as compared to commercial broadcasters, the ABC and SBS are public broadcasters subject to special governance and accountability arrangements.[22] In theory, this gives the ABC and SBS flexibility to develop their own classification categories and procedures. In practice, however, the ABC Television Program Classification Standard states that it is 'adapted from' the Classification Board's Classification Guidelines;[23] and the SBS Television Classification Code states that it is 'based on' the Classification Board's Classification Guidelines.[24]

Classification and co-regulation

11.30 In the Issues Paper, the ALRC asked whether co-regulatory models under which industry itself is responsible for classifying content, and under which the government works with industry on a suitable code, would be more effective and practical than current arrangements.[25]

---

19 Other matters may also be dealt with: Ibid sch 7 cl 81(3). Such matters include complaint handling and promoting awareness of safety issues: sch 7 cl 82.

20 Ibid s 123.

21 *Australian Broadcasting Corporation Act 1983* (Cth) s 8(e)(i); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(j).

22 See, *Australian Broadcasting Corporation Act 1983* (Cth) pt II; *Special Broadcasting Service Act 1991* (Cth) pt 2.

23 Australian Broadcasting Corporation, *Editorial Policies: Television Program Classification—Associated Standard*, 1.

24 Special Broadcasting Service, *Codes of Practice 2006: 4. Television Classification Code*, [4.1].

25 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 17.

11.31 Such an approach received considerable support, particularly from industry stakeholders,[26] including those who cited the success of co-regulatory models of content regulation under the *Broadcasting Services Act*.[27] Telstra, for example, stated that it believed that 'the co-regulatory classification arrangements that are currently in operation on a range of different content distribution platforms have worked reasonably well to date and represent regulatory models worth building on in any future scheme'.[28]

11.32 In relation to television specifically, Free TV Australia referred to the 'very low level of complaint' about television content given that nearly 80,000 hours of content are broadcast each year. Free TV Australia noted that, in 2011, only 834 classification complaints were received by members, with only six upheld; and, in 2009–10, the ACMA conducted 85 investigations into commercial television broadcasters, of which only 30 related to classification matters, with only 11 of those resulting in a breach finding.[29]

11.33 Some community groups also saw benefit in co-regulatory approaches. The organisation Bravehearts stated that, while aware of some problems with industry classification, 'the television industry appears to operate successfully under a Code of Conduct and this should be used as the model with severe penalties if breached'.[30]

11.34 Other groups opposed co-regulatory approaches.[31] The Australian Family Association Victoria, for example, observed that:

> Given that the current classification scheme is regularly breached by content providers (and in particular, by publishers, distributors and retailers of restricted magazines), the situation is likely to be worse under a co-regulatory framework.[32]

11.35 Similarly, Collective Shout asked '[w]hen distributors fail to respond to call-in notices under the current regulatory scheme, why should we believe they would comply with community standards if left to regulate themselves?'[33]

---

26 Internet Industry Association, *Submission CI 2445*, 28 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; ASTRA Subscription Television Australia, *Submission CI 1223*, 15 July 2011; Free TV Australia, *Submission CI 1214*, 15 July 2011; Outdoor Media Association, *Submission CI 1195*, 15 July 2011; Australian Mobile Telecommunications Association, *Submission CI 1190*, 15 July 2011; Telstra, *Submission CI 1184*, 15 July 2011; Australian Federation Against Copyright Theft, *Submission CI 1182*, 15 July 2011; Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011; Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

27 For example, ASTRA Subscription Television Australia, *Submission CI 1223*, 15 July 2011; Free TV Australia, *Submission CI 1214*, 15 July 2011; Telstra, *Submission CI 1184*, 15 July 2011.

28 Telstra, *Submission CI 1184*, 15 July 2011.

29 Free TV Australia, *Submission CI 1214*, 15 July 2011.

30 Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

31 Collective Shout, *Submission CI 2450*, 7 August 2011; Australian Family Association Victoria, *Submission CI 2279*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011.

32 Australian Family Association Victoria, *Submission CI 2279*, 15 July 2011.

33 Collective Shout, *Submission CI 2450*, 7 August 2011.

ALRC's proposals

Codes and co-regulation

11.36 In the ALRC's view, it is not clear that optimal conditions for self- or co-regulation exist in any particular area that is currently subject to classification obligations. While in some areas there may be market incentives for content providers to classify—for example, because distributors and consumers of some products want and expect advice about content—these incentives do not exist in other areas.

11.37 Classification of media content is an area in which the community expects government to set rules in legislation. In the ALRC's view, there is a strong community expectation that government will ensure that at least some media content is reviewed according to statutory classification criteria before being made available, and that access to at least some classified media content should be restricted by law. The *Classification Act* provides a model for the classification of publications, films and computer games based on direct regulation and legislative rules.

11.38 In contrast, schs 5 and 7 of the *Broadcasting Services Act* (and the *Broadcasting Services Act* more generally, including in relation to television content) provide a co-regulatory approach. For example, the commercial broadcast and subscription television industries may develop their own methods of classifying programs that reflect community standards, subject to some legislative requirements.[34]

11.39 The ALRC's proposed new National Classification Scheme combines elements of both approaches. This is consistent with the reform principles that the classification regulatory framework should be adaptive to different technologies, platforms and services; and regulation should be kept to the minimum needed to achieve a clear public purpose.[35]

11.40 For example, the ALRC proposes retaining mandatory classification by the Classification Board of films for cinema release and computer games with content likely to be rated MA 15+ or higher. However, it is proposed that most other content, including broadcast and subscription television content, and television programs and films not for cinema release, would be subject to regimes based on industry classification of content.

11.41 The use of codes would introduce an element of co-regulation not previously present in regulating publications, films and computer games. However, because codes of practice under the new Classification of Media Content Act would have to be consistent with statutory classification obligations and criteria, these codes may be characterised as closer to direct regulation than co-regulation. Industry would only be free to develop its own rules within the constraints of the legislative requirements.

---

34 Including specified time zone-based restrictions and a prohibition on broadcasting films that 'portray material that goes beyond the previous "AO" classification criteria': *Broadcasting Services Act 1992* (Cth) s 123.

35 See Ch 4, Principles 4, 7.

11.42 In some areas, classification is a lower level concern for consumers and the effort or cost of government regulation is not justified. Recognising this, the ALRC proposes that some content no longer be subject to any classification obligations—including some publications and computer games likely to be classified lower than MA 15+.

Content of industry classification codes

11.43 In Chapter 9, the ALRC proposes that the new Classification of Media Content Act should provide for one set of statutory classification categories and criteria to be applied across media content, irrespective of the delivery platform. The statutory classification criteria are the factors to be taken into account in the classification decision-making process, including factors currently set out in the *Classification Act*, the Classification Code and Classification Guidelines.

11.44 While the statutory classification criteria would provide some guidance to classification decision makers on how different types of content should be classified and treated, codes of practice could provide more detailed guidance on interpreting and applying these classification categories and criteria in various contexts. For example, statutory classification criteria would provide that there be an R 18+ category for content with high impact violence, across all media. However, a code of practice relating to the classification of films might explain how interactivity should be taken into account in assessing film content specifically; and a code of practice relating to internet content might explain how to assess film sequences embedded in an 'e-book'.

11.45 More generally, there are a range of matters that are too detailed or media-specific to be included in statutory classification criteria. For example, the ALRC proposes that statutory obligations be placed on online content providers to restrict some online content to adults, including by using restricted access technologies. Codes of practice may be used to provide flexible guidance and industry rules on such technologies, including on matters such as the promotion and distribution of parental locks and user-based PC-filtering.

11.46 Codes of practice might also contain guidance on how classification markings should be displayed in different media. The ALRC proposes that the Classification of Media Content Act provide that a suitable classification marking should be displayed on media to the extent that this is reasonable and practicable and consistent with the statutory classification categories. Exactly what this means for marking an online computer game, or an R 18+ website, might be clarified in codes of practice.

11.47 The proposed Act would be silent on whether television programs need to be classified separately or as a series, or about time zone restrictions. Such issues could continue to be addressed in a code of practice for television.

11.48 The proposal for codes of practice would also allow participants in media content industries to develop their own arrangements in areas where statutory classification or other obligations do not apply, provided these are consistent with the proposed single set of classification categories and criteria.

11.49 For example, it is proposed that there be no statutory obligation to classify computer games likely to be classified lower than MA 15+. Participants in the computer game industry might, nevertheless, choose to develop a code of practice governing how industry participants should classify games likely to be classified below MA 15+. Classification of these games might involve, for example, the use of a self-assessment process such as a 'sophisticated questionnaire specifically designed to generate and assign a classification for computer games in the Australian market'.[36] Under the ALRC's proposals, participants in the computer game industry might also choose to use an authorised classification instrument, or have their own instrument approved by the Regulator for this purpose.[37]

11.50 Some existing self-regulatory codes may continue to operate alongside the proposed new Classification of Media Content Act. For example, the *Recorded Music Labelling Code of Practice* developed by the Australian Recording Industry Association (ARIA) and the Australian Music Retailers Association (AMRA)[38] applies a three-tiered labelling scheme (Level 1, Level 2 and Level 3)[39] to CDs and other recorded music products. The *Recorded Music Labelling Code of Practice* is adhered to by ARIA and AMRA members on a voluntary basis.[40]

11.51 Under the new Act there would be, in practice, no statutory obligation to classify music[41]—only an obligation to restrict access to R 18+ content. This obligation is consistent with the obligation under the *Recorded Music Labelling Code of Practice* to restrict access to Level 3 recorded music products. The *Recorded Music Labelling Code of Practice* would continue to operate as a self-regulatory regime.

11.52 However, ARIA and AMRA would also have the option of bringing these arrangements under the new Act as a code. Provided the new code was considered to be consistent with the classification criteria provided by the Act, it could be approved by the Regulator, giving the code a legislative basis, but otherwise leaving the operation of the music labelling scheme untouched.

11.53 The scheme of industry self-regulation applying to advertising under the AANA Code of Ethics could also continue to operate alongside the proposed new Classification of Media Content Act, and the statutory obligation to restrict access to advertising likely to be R 18+.[42] The House of Representatives Standing Committee on

---

36 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

37 See Ch 7.

38 Australian Music Retailers Association and Australian Recording Industry Association, *Recorded Music Labelling Code of Practice* (2003).

39 These categories can be seen as broadly consistent with the M, MA 15+ and R 18+ categories of the *Classification Act*.

40 ARIA and AMRA argued for the continuation of self-regulation based on the *Recorded Music Labelling Code of Practice*: The Australian Recording Industry Association Ltd and Australian Music Retailers' Association, *Submission CI 1237*, 15 July 2011.

41 Unless the content would be likely to be rated X 18+ or RC—which would be rare in the case of music.

42 The AANA, Advertising Standards Board and the Outdoor Media Association submitted that advertising should continue to be regulated under the AANA Code of Ethics regime: Australian Association of National Advertisers (AANA), *Submission CI 2285*, 22 July 2011; Outdoor Media Association, *Submission CI 1195*, 15 July 2011; Advertising Standards Bureau, *Submission CI 1144*, 15 July 2011.

Social Policy and Legal Affairs recommended that the Attorney-General's Department review advertising regulation and, 'if the self-regulatory system is found lacking', impose a 'co-regulatory system on advertising with government input into advertising codes of practice'.[43]

11.54 If the Government were to determine that advertising content should be subject to new classification obligations—for example, so that outdoor and billboard advertisements likely to be rated M or higher are not permitted—a code of practice under the Classification of Media Content Act could provide guidance on assessing advertisements using the criteria for this classification category.

Approval and enforcement of codes

11.55 In order to approve a code under sch 7 of the *Broadcasting Services Act*,[44] the ACMA must be satisfied that the body or association developing the code represents a particular section of the media content industry and that there has been adequate public and industry consultation on the code. In this context, the ALRC notes that it may sometimes be problematic to define what constitutes a particular section of the media content industry—particularly in the online environment.

11.56 The ALRC proposes that the Regulator under the new Classification of Media Content Act similarly be empowered to approve a code of practice. The code should also be required to be consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code.

11.57 As discussed above, there are a range of mechanisms by which industry codes of practice may be made enforceable. Under sch 7 of the *Broadcasting Services Act*, compliance with a code is effectively voluntary (or left to the industry to enforce), unless the ACMA directs a particular participant in the industry to comply.[45] In addition, in some circumstances, a code may be replaced with an industry standard that binds all participants in the industry.[46]

11.58 A slightly different approach is taken, for example, under the *Competition and Consumer Act 2010* (Cth), which provides that regulations may declare an industry code, or specified provisions of an industry code, to be mandatory or voluntary.[47]

11.59 The ALRC proposes that, where a code of practice relates to media content that must be classified, the Regulator should have the power to enforce compliance with the code against any participant in the relevant part of the media content industry. Compliance with a code of practice that relates to media content that is not subject to statutory classification obligations should be voluntary. The ALRC remains interested

---

43 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Reclaiming Public Space: Inquiry into the Regulation of Billboards and Outdoor Advertising: Final Report* (2011), rec 2. See also Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), rec 23.

44 *Broadcasting Services Act 1992* (Cth) sch 7 cl 85.

45 Ibid sch 7 cl 89.

46 Ibid sch 7 cl 95.

47 *Competition and Consumer Act 2010* (Cth) s 51AE.

in comments on how and when compliance with an industry classification code of practice should be enforceable.

Proposal 11–1 The new Classification of Media Content Act should provide for the development of industry classification codes of practice by sections of industry involved in the production and distribution of media content.

Proposal 11–2 Industry classification codes of practice may include provisions relating to:

(a) guidance on the application of statutory classification obligations and criteria to media content covered by the code;

(b) methods of classifying media content covered by the code, including through the engagement of accredited industry classifiers;

(c) duties and responsibilities of organisations and individuals covered by the code with respect to maintaining records and reporting of classification decisions and quality assurance;

(d) the use of classification markings;

(e) methods of restricting access to certain content;

(f) protecting children from material likely to harm or disturb them;

(g) providing consumer information in a timely and clear manner;

(h) providing a responsive and effective means of addressing community concerns, including complaints about content and compliance with the code; and

(i) reporting to the Regulator, including on the handling of complaints.

Proposal 11–3 The Regulator should be empowered to approve an industry classification code of practice if satisfied that:

(a) the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code;

(b) the body or association developing the code represents a particular section of the relevant media content industry; and

(c) there has been adequate public and industry consultation on the code.

Proposal 11–4 Where an industry classification code of practice relates to media content that must be classified or to which access must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.

12. The New Regulator

Contents

Summary 201
Existing agencies 202
  Attorney-General's Department 202
  Classification Board and Classification Review Board 202
  Department of Broadband, Communications and the Digital Economy 203
  Australian Communications and Media Authority 203
  Australian Customs and Border Protection Service 204
Functions of the new Regulator 204
  Enforcement of classification laws 205
  Complaint handling 206
  Authorising industry classifiers 208
  Classification training 208
  Codes of practice 209
  Liaison 209
  Other functions 210

Summary

12.1 This chapter discusses the ALRC's proposal for a new Regulator with primary responsibility for regulating the new National Classification Scheme. The Regulator would be responsible for a range of functions that are currently performed by the Classification Branch of the Australian Government Attorney-General's Department (Classification Branch); the Director of the Classification Board; and the Australian Communications and Media Authority (ACMA). The Regulator would also have a range of new functions necessary for the operation of the scheme.

12.2 The Regulator would be responsible for most regulatory activities related to the classification of media content—both offline and online. The Classification Board would be retained as an independent statutory body responsible for making some classification decisions, reviewing decisions, and auditing decisions made by industry classifiers.

12.3 The Regulator need not be a stand-alone agency, but might form one part of the ACMA with its broader responsibilities for the regulation of broadcasting, the internet, radio-communications and telecommunications.

Existing agencies

12.4 The operation of the existing National Classification Scheme involves a number of Commonwealth agencies, as well as state and territory law enforcement and other bodies. These agencies and their roles in regulation of the classification system are briefly described below. For this purpose, 'regulation' of the classification system is used broadly to refer to decision-making, administrative and policy functions, as well as to encouraging, monitoring and enforcing compliance with classification laws.

Attorney-General's Department

12.5 The Attorney-General's Department is responsible for dealing with 'censorship' matters[1] and the Minister for Home Affairs and Justice for administering the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). The Classification Branch is responsible for:

- providing administrative support to the Classification Board and the Classification Review Board
- assisting with the development of Classification policy and advising on legal matters related to the National Classification Scheme
- providing classification training, and
- administering the Classification Liaison Scheme.[2]

Classification Board and Classification Review Board

12.6 The Classification Board is responsible for classifying publications, films and computer games. The Classification Review Broad reviews Classification Board decisions on application. Both Boards are independent statutory bodies established under the *Classification Act*. As discussed in Chapter 7, the Director of the Classification Board also has a role in relation to authorised industry-based assessors.[3] This role includes authorising industry assessors; revoking such authorisations; and approving and providing training to assessors.[4]

12.7 Under the classification cooperative scheme, neither the Attorney-General's Department nor the Boards have power to enforce classification laws. As discussed in Chapter 14, the enforcement of classification laws is primarily the responsibility of states and territories. However, the Australian Government provides some assistance in relation to enforcement, through the operation of the Classification Liaison Scheme, which verifies compliance with classification laws and refers breaches to state and territory police or other agencies.

---

1 *Administrative Arrangements Order 2010* (Cth).

2 Australian Government Attorney-General's Department, *What Happened to the Office of Film and Literature Classification (OLFC)?* <http://www.ag.gov.au/www/cob/classification.nsf/> at 8 September 2011.

3 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 14, 14B, 17.

4 See Ibid ss 22D, 22E; *Classification (Authorised Television Series Assessor Scheme) Determination 2008* ss 4,5; *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* sch 2, [2.1].

Department of Broadband, Communications and the Digital Economy

12.8 The Australian Department of Broadband, Communications and the Digital Economy (DBCDE) is responsible for dealing with 'content policy relating to the information economy'[5] and the Minister for Broadband, Communications and the Digital Economy for administering the *Broadcasting Services Act 1992* (Cth).

Australian Communications and Media Authority

12.9 The ACMA is a statutory agency within the portfolio of the Minister for Broadband, Communications and the Digital Economy. Among its many activities relating to communications and media, the ACMA is responsible for regulation of internet content.[6]

12.10 The ACMA administers co-regulatory arrangements for online content regulation under schs 5 and 7 of the *Broadcasting Services Act*. The role and functions of the ACMA include:

- Investigation of complaints about online content;
- Encouraging the development of codes of practice for the online content service provider industries as well as registering, and monitoring compliance with such codes;
- Providing advice and information to the community about online safety issues, especially those relating to children's use of the internet and mobile phones;
- Undertaking research into internet and mobile phone usage issues and informing itself and the Minister of relevant trends;
- Liaising with relevant overseas bodies.[7]

12.11 In performing this role, the ACMA is guided by statutory objects and statements of regulatory policy set out in the *Broadcasting Services Act* including, for example, to ensure online content service providers 'respect community standards in relation to content', while not imposing 'unnecessary financial and administrative burdens' on industry.[8]

12.12 In exercising its enforcement powers, the ACMA must have regard to its enforcement guidelines, which are formulated by the ACMA under s 215 of the *Broadcasting Services Act*. In the enforcement guidelines, the ACMA recognises that co-regulatory arrangements apply to some industry sectors and states that the guidelines 'will operate in that context when those arrangements apply'.[9] For example, the guidelines set out how the ACMA will exercise its discretion to accept written

---

5 *Administrative Arrangements Order 2010* (Cth).

6 Australian Communications and Media Authority, *How regulation works* <http://www.acma.gov.au/WEB/STANDARD/pc=PUB_HOW_DIR> at 11 September 2011.

7 Australian Communications and Media Authority, *Online Regulation* <http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_90169> at 11 September 2011.

8 *Broadcasting Services Act 1992* (Cth) ss 3–4.

9 *Guidelines Relating to the ACMA's Enforcement Powers under the Broadcasting Services Act 1992 2011* (Cth) cl 6.1.

undertakings given by a person that the person will take specified action to comply with an industry code.[10]

Australian Customs and Border Protection Service

12.13 The Australian Customs and Border Protection Service (Customs) administers import and export controls on 'objectionable' material at the border. The definitions of 'objectionable material' in the *Customs (Prohibited Imports) Regulations 1956* (Cth) and *Customs (Prohibited Exports) Regulations 1958* (Cth) substantially mirror the definition of RC material in the National Classification Code.

12.14 The Attorney-General's Department provides information and assistance to Customs in relation to assessing whether material is objectionable.[11] There is also an administrative agreement between the parties that outlines their respective roles and responsibilities.[12]

12.15 The role of Customs in this area has been described as providing 'a dedicated border control that also covers material that may not be intended for commercial use'.[13] This is in contrast with classification, which is generally not done 'for the purpose of controlling what a person is able to have in his or her own home'.[14]

Functions of the new Regulator

12.16 The ALRC's proposal for a single regulator is a central element of the new National Classification Scheme, and arises as a logical consequence of regulating the classification of online, offline and broadcast television media content under the same regime. A number of submissions in response to the Issues Paper called for a single regulator for a National Classification Scheme;[15] and many submissions called generally for measures to reduce the administrative complexity of current arrangements.

12.17 The new Regulator's functions should be based upon functions that are currently performed by the Classification Branch in relation to the classification of publications, films and computer games; and the ACMA, in relation to online and mobile content and broadcast television. In addition, while the Classification Board would be retained, some of its present functions, in their new form, should be conducted by the Regulator.

12.18 These functions include the proposed equivalent of the present powers for the Director of the Classification Board to require content to be submitted for

---

10 Ibid cls 9.6, 9.7, 9.10, 9.11.

11 Australian Customs and Border Protection Service, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 25 February 2011.

12 Ibid.

13 Ibid.

14 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [5.16].

15 SBS, *Submission CI 1833*, 22 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; Bravehearts Inc, *Submission CI 1175*, 15 July 2011.

classification—the ‘call in’ power[16] and to authorise industry assessors and approve training for assessors.[17]

12.19 Combining functions currently performed by the Classification Branch, the Director of the Classification Board, and the ACMA in a single regulator will help in the creation of a simpler, more streamlined classification scheme. There are obvious administrative and financial advantages for the Australian Government in having one regulator of media content rather than several, as well as benefits for consumers and industry. It is also consistent with the principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose.[18]

12.20 The new Regulator would also have new functions necessary for the operation of the scheme. These do not currently have equivalents, including those relating to the enforcement of classification laws that are currently the responsibility of state and territory agencies.[19] The proposed functions of the new Regulator are summarised below.

Enforcement of classification laws

12.21 The ALRC proposes that the new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.[20] The Regulator should exercise these powers—just as the ACMA is currently empowered to respond to breaches of the *Broadcasting Services Act*[21]—by taking administrative action, civil action, or referring matters to the Commonwealth Director of Public Prosecutions for the prosecution of a criminal offence. The possible regime of offences and penalties that might apply under the new Act is discussed in Chapter 14.

12.22 In exercising its enforcement powers, including in relation to ensuring compliance with co-regulatory industry codes, the ACMA is guided by statutory objects and statements of regulatory policy set out in the *Broadcasting Services Act*, and by its own enforcement guidelines. These enforcement guidelines provide, for example, that ACMA will use enforcement powers in a manner that ‘involves using the minimum power or intervention necessary to achieve the desired result, consistent with the scale, risk and urgency of the breach’ and ‘is most likely to produce regulatory arrangements which are stable, predictable, and deal effectively with breaches of rules’.[22] The new Classification of Media Content Act might also provide for the issuing by the Regulator of enforcement guidelines.

---

16 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23(3), 23A(3), 24(3).
17 Ibid pt 2 div 2A.
18 See Ch 4, Principle 7.
19 See Ch 14.
20 Proposal 14–1.
21 *Guidelines Relating to the ACMA's Enforcement Powers under the Broadcasting Services Act 1992 2011* (Cth) cl 5.2.
22 Ibid, [3.3], [3.4].

Complaint handling

12.23 The Regulator should be empowered to handle and resolve complaints about the operation of the new National Classification Scheme.

12.24 The report of the Senate Legal and Constitutional Affairs References Committee review of the classification system (the Senate Committee review) suggested that 'improved complaints-handling processes must be established across the National Classification Scheme'.[23]

12.25 Under the *Broadcasting Services Act*, complaints about matters covered by an industry code must be made to the relevant content provider in the first instance. If a person does not receive a response within 60 days, or receives a response but considers it to be inadequate, a complaint about that matter can be made to the ACMA.

12.26 In the Senate Committee review, suggestions were made that complaints about online content should be able to be made directly to the ACMA. In response, the AMCA observed that requiring all complaints to be made directly to it—rather than to a content provider, such as a broadcaster, in the first instance—would not be in keeping with co-regulation under the *Broadcasting Services Act*. This co-regulation 'envisages that [broadcasting] licensees take primary responsibility for the material they broadcast'. The ACMA also expressed concern about the effect such a change would have on its workload.[24]

12.27 The ALRC considers that the starting point should be that complaints about classification matters should be dealt with by the Regulator only where they have not been handled satisfactorily by content providers or industry complaints-handling bodies. This accords with best practice in complaint handling mechanisms, where complaints are dealt with as close as possible to the point of origin, and helps to ensure that the Regulator will deal only with the complaints that are most difficult to resolve or raise systemic issues.

12.28 However, in some cases, it may be difficult for consumers to know where to complain. While the new scheme will simplify the current framework, the Regulator will co-exist with a Classification Board and industry bodies that handle complaints pursuant to industry classification codes approved by the Regulator under the Act or self-regulatory arrangements, such as those operated by the Australian Association of National Advertisers.

12.29 In this context, the Senate Committee recommended the establishment of a classification complaints 'clearinghouse', where complaints in relation to classification can be directed and that would be 'responsible for forwarding them to the appropriate body for consideration'.[25]

---

23 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), [12.70].

24 Australian Communications and Media Authority, *Responses to Questions Taken on Notice*, Senate Legal and Constitutional References Committee Hearing 27 April 2011, 13 May 2011.

25 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 29.

12.30 The ALRC agrees that a consumer 'should not be required to have a detailed knowledge of the classification system, along with the role of the various bodies involved in classification and their associated responsibilities'.[26] As an adjunct to its complaints-handling functions, the Regulator might usefully perform the sort of central coordination role suggested by the Senate Committee. This might involve, for example, running a classification 'hotline' or internet portal for the lodgement of complaints.

12.31 Another issue related to complaint handling concerns the discretion of the Regulator to decline to investigate complaints. Generally, under the *Broadcasting Services Act*, the ACMA must investigate a complaint, unless it is satisfied that a complaint is frivolous, vexatious or not made in good faith.[27] The ACMA has noted that:

> It is unusual for the ACMA to decide not to investigate a complaint on these grounds and determining whether a matter is frivolous, vexatious or not made in good faith can be resource-intensive in itself. The ACMA does not have any other discretion not to investigate a valid complaint.[28]

12.32 A similar lack of discretion applies to complaints to the ACMA under schs 5 and 7 relating to prohibited or potentially prohibited content[29]—although the ACMA may also decline to investigate a complaint if it has reason to believe that the complaint was made for the purpose of frustrating or undermining the effective administration of the schedules.[30]

12.33 The discretion of other Australian Government regulators is not similarly constrained.[31] The new Regulator should be granted appropriate discretion to determine how best to respond to complaints. Given its wide responsibilities and finite resources, it is critical that the new Regulator be able to prioritise the investigation of complaints. For example, the Regulator may choose to focus on investigating the most serious complaints about content, such as those about online child sexual abuse material, or those complaints that raise systemic issues concerning the operation of industry classification arrangements.

---

26 Ibid, [12.71].

27 *Broadcasting Services Act 1992* (Cth) s 38.

28 Australian Communications and Media Authority, *Responses to Questions Taken on Notice*, Senate Legal and Constitutional References Committee Hearing 27 April 2011, 13 May 2011.

29 *Broadcasting Services Act 1992* (Cth) sch 5, cl 26(2)(a); sch 7, cl 43(3)(a).

30 Ibid sch 5, cl 26(2)(b); sch 7, cl 43(3)(b).

31 For example, the Australian Securities and Investments Commission 'may make such investigation as it thinks expedient': *Australian Securities and Investments Commission Act 2001* (Cth) s 13; and the Ombudsman may decline to investigate a complaint where it considers that 'the complainant does not have a sufficient interest in the subject matter of the complaint' or 'an investigation, or further investigation, of the action is not warranted having regard to all the circumstances': *Ombudsman Act 1976* (Cth) s 6(1)(b)(ii)–(iii).

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

Authorising industry classifiers

12.34 The ALRC proposes that some media content should be able to be classified by authorised industry classifiers.[32] The ALRC proposes that the new Regulator have a number of important roles in relation to industry classification, including authorising industry classifiers who have completed training approved by the Regulator.

12.35 At present, the Director of the Classification Board is empowered to authorise and revoke the authorisation of industry assessors (the equivalent of industry classifiers under the new scheme).[33] The ALRC proposes that the new Regulator should undertake these functions. The Regulator should have powers necessary to maintain the integrity of industry classification decisions and to deal with misconduct or incompetence by industry classifiers.

12.36 Removing this function from the Classification Board would mean that the Board would be more able to focus on its role as a classification decision maker and avoid any conflict of interest that may be involved in the Board authorising or revoking the authorisation of other classification decision-makers.

12.37 The ALRC also proposes that the Regulator authorise industry-developed classification instruments—such as online, interactive questionnaires—as suitable for use in making classification decisions.[34]

Classification training

12.38 Under existing arrangements, the Classification Branch provides classification training to members of the Classification Board and to officers of agencies including the ACMA and Customs.[35] The ALRC proposes that, under the new scheme, the Regulator should be empowered to provide classification training to members of the Classification Board and to industry classifiers.

12.39 Consistency in training is essential for acceptance by the community of more material being classified by industry than is currently the case. The increasing role of industry classification means that it may be impractical or inappropriate for the Regulator to provide, or be a major provider of, classification training. The Regulator

32 See Ch 7.

33 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) pt 2 div 2A.

34 See Proposal 7–5.

35 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

should, therefore, also be empowered to approve classification training courses provided by others.

12.40 The ALRC understands that, if recognition for classification training were to be brought within the Australian Qualifications Framework,[36] as discussed in chapter 7, then it is likely that the Regulator would be involved in accreditation of training providers—perhaps working with relevant industry and other groups on auditing classification training programs.

Codes of practice

12.41 The ALRC proposes that the Classification of Media Content Act should provide for the development and operation of industry classification codes of practice.[37] The new Regulator would promote and facilitate industry classification of media content under codes of practice and, in relation to some codes, enforce compliance.

12.42 As discussed in Chapter 11, the Regulator would be responsible for overseeing the development of, and approving, industry codes. The new Regulator should also be empowered to approve any variations of the codes, revoke any of its approvals if required, and maintain a register of such codes of practice—similar to the role currently played by the ACMA in relation to broadcasting and internet codes of practice.

12.43 Where an industry classification code of practice relates to media content that must be classified, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.[38]

Liaison

12.44 The new Regulator should liaise with relevant Australian and overseas media content regulators and law enforcement agencies. For example, under the Classification of Media Content Act, the Regulator would have an obligation to liaise with law enforcement agencies where media content may contain child sexual abuse material, or other illegal content.[39] The ACMA currently liaises with regulatory and law enforcement bodies overseas with the aim of developing cooperative arrangements for preventing and reporting child abuse material that is online.[40]

---

36 The Australian Qualifications Framework (AQF) is the national policy for regulated qualifications in Australian education and training.

37 Proposal 11–1.

38 Proposal 11–4.

39 For example, under the *Broadcasting Services Act*, ACMA has an obligation to notify law enforcement agencies where Australian-hosted prohibited or potential prohibited content is also considered to be sufficiently serious: *Broadcasting Services Act 1992* (Cth) sch 7, s 69.

40 See Australian Communications and Media Authority, *Working Together to Fight Online Child Abuse Material* <http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_90166> at 11 September 2011.

Other functions

12.45 The new Regulator might have a number of other functions, although these might also be performed by the Department of Broadband, Communications and the Digital Economy or other department responsible for the new National Classification Scheme. These other functions include:

- providing administrative support to the Classification Board, including in relation to the recruitment and training of Board members;
- assisting with the development of classification policy and legislation, and advising on matters related to the new National Classification Scheme;
- conducting or commissioning research relevant to classification;[41] and
- educating the Australian public about the new National Classification Scheme and promoting media literacy more generally, for example, providing information on appropriate consumer tools such as content filters.

Proposal 12–1 A single agency ('the Regulator') should be responsible for the regulation of media content under the new National Classification Scheme. The Regulator's functions should include:

(a) encouraging, monitoring and enforcing compliance with classification laws;

(b) handling complaints about the classification of media content;

(c) authorising industry classifiers, providing classification training or approving classification training courses provided by others;

(d) promoting the development of industry classification codes of practice and approving and maintaining a register of such codes; and

(e) liaising with relevant Australian and overseas media content regulators and law enforcement agencies.

In addition, the Regulator's functions may include:

(f) providing administrative support to the Classification Board;

(g) assisting with the development of classification policy and legislation;

(h) conducting or commissioning research relevant to classification; and

(i) educating the public about the new National Classification Scheme and promoting media literacy.

41 See, eg, Proposal 9–5.

13. Enacting the New National Classification Scheme

Contents

Summary 211
The new Classification of Media Content Act 211
The classification cooperative scheme 212
State and territory classification powers 212
Commonwealth legislative powers 214
Referral of state powers 215
Inconsistency of Commonwealth and state laws 215
ALRC's views 216

Summary

13.1 This chapter discusses the legislative and constitutional basis for the existing Commonwealth-state cooperative scheme for the classification of publications, films and computer games (the classification cooperative scheme) and the *Broadcasting Services Act 1992* (Cth). The chapter proposes that the new Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia, supplemented by state referrals of power, if necessary.

The new Classification of Media Content Act

13.2 As discussed in Chapter 4, the ALRC proposes that a new National Classification Scheme be enacted providing consolidated and modernised laws to replace the classification cooperative scheme and the Commonwealth co-regulatory scheme for regulating online content and content provided by mobile carriers contained in schs 5 and 7 of the *Broadcasting Services Act*.

13.3 As the centrepiece of this new framework, the ALRC proposes a new Classification of Media Content Act, establishing a new classification scheme applicable to offline and online media content.

13.4 An important part of the rationale for having a new National Classification Scheme is to avoid inconsistency in the enforcement of classification laws. Chapter 14 discusses enforcement in more detail and presents an alternative framework for a National Classification Scheme, applicable if the Australian Government determines that the states and territories should retain enforcement powers.

The classification cooperative scheme

13.5 As explained in Chapter 2, the classification cooperative scheme is based on the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (the *Classification Act*) and complementary state and territory enforcement legislation and is underpinned by the Intergovernmental Agreement on Censorship (the Intergovernmental Agreement).

13.6 The *Classification Act* was enacted by the Parliament of Australia to provide for the classification of publications, films and computer games for the ACT, pursuant to its power to make laws for the government of a territory (the 'territories' power).[1] The *Classification Act* specifically provides that it is intended to form part of a Commonwealth, state and territory scheme for classification and the enforcement of classifications.[2]

13.7 The *Classification Act* itself provides that Commonwealth, state and territory ministers must agree to any amendment to the Classification Code and on classification guidelines or amendments to those guidelines.[3] The Intergovernmental Agreement, under which the scheme is established and maintained, may be amended only by unanimous agreement of the Commonwealth, states and territories.[4] A party may withdraw from the agreement by one month's notice in writing.[5]

State and territory classification powers

13.8 Some states and territories retain powers to classify or re-classify material.[6] Four jurisdictions—Queensland, South Australia, Tasmania and the Northern Territory—have legislated concurrent classification powers.[7]

13.9 For example, under the *Classification of Computer Games and Images Act 1995* (Qld), a classification officer has the power to classify computer games that have yet to be classified under the *Classification Act*.[8] Further, if a computer game is classified under the Queensland Act and is subsequently also classified by the Classification Board under the *Classification Act*, the Queensland Act provides that the Commonwealth classification decision has no effect in Queensland.[9]

---

1 *Australian Constitution* s 122.

2 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 3.

3 Ibid ss 6, 12.

4 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), cl 3(2).

5 Ibid, cl 3(3).

6 In addition, a state or territory minister is entitled to require the Commonwealth Minister to apply to the Classification Review Board for a review of a decision: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 42.

7 *Classification of Publications Act 1991* (Qld) s 9; *Classification of Films Act 1991* (Qld) s 25CA; *Classification of Computer Games and Images Act 1995* (Qld) s 5; *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 16; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 41A; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 16.

8 *Classification of Computer Games and Images Act 1995* (Qld) s 5.

9 Ibid s 4(2). No inconsistency with a law of the Commonwealth arises, in terms of s 109 of the

13.10 Three jurisdictions also reserve the power to reclassify publications, films and computer games already classified by the Classification Board.[10] For example, in South Australia, the South Australian Classification Council may make classification decisions with respect to publications, films or computer games that prevail, in South Australia, over any inconsistent decisions made under the Commonwealth *Classification Act*.[11]

13.11 While the classification criteria used by the South Australian Classification Council are identical to those applied by the Classification Board, the Council's Annual Report notes that 'there may still be a difference between the two bodies because the Council is comprised of South Australian residents and endeavours to consider the standards accepted by the South Australian community in particular'.[12]

13.12 In other jurisdictions, any divergence from a classification decision made under the classification cooperative scheme would require amendment to state or territory legislation and, arguably, breaching the Intergovernmental Agreement.[13] It has been observed that

> Such action would seem to be rather drastic for the occasional controversial classification decision. However, although State and Territory jurisdictions may find it difficult or burdensome to overturn a decision, it is still possible for State authorities to choose not to prosecute offences related to banned works.[14]

13.13 Under the classification cooperative scheme, the enforcement of classification laws is primarily the responsibility of states and territories. The *Classification Act* itself states that 'provisions dealing with the consequences of not having material classified and the enforcement of classification decisions are to be found in complementary laws of the States and Territories'.[15]

13.14 As discussed in Chapter 14, state and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. Penalties for similar offences also differ.

Constitution (discussed below), because the Classification Board decision may only have effect in Queensland through the operation of the Queensland Act itself.

10 *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 17; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 41A; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 16.

11 *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 16, 17. In 2005, the South Australian Classification Council reclassified the film, *9 Songs*, as X 18+, after it had received an R 18+ rating from the Classification Board and been cleared for national release: South Australian Classification Council, *Annual Report 2005–06*, 3. More recently, the Council reclassified a DVD version of the film, *A Serbian Film*, as RC, after it had received an R 18+ rating from the Classification Board.

12 South Australian Classification Council, *Annual Report 2008–09*, 2.

13 M Ramaraj Dunstan, 'Australia's National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions' (2009) 37 *Federal Law Review* 133, 143.

14 Ibid, 143.

15 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 3.

Commonwealth legislative powers

13.15 A threshold question concerning a National Classification Scheme centred on a new Classification of Media Content Act, is the extent to which the Parliament of Australia has legislative power to enact legislation establishing such a framework.

13.16 The Parliament of Australia may legislate for the classification of online and mobile content and broadcasting relying on s 51(v) of the *Australian Constitution* (the 'communications' power). This is one constitutional basis for schs 5 and 7 of the *Broadcasting Services Act*.

13.17 It appears that the Parliament of Australia also has power to make classification laws with respect to publications, films and computer games:

- imported into, or exported from, Australia or dealt with in the course of interstate trade—relying on s 51(i) of the *Constitution* (the 'trade and commerce' power);[16]
- uploaded to, downloaded from, sold, distributed, or advertised on the internet or sent through the post—relying on s 51(v) of the *Constitution* (the 'communications' power);
- sold, distributed, advertised or otherwise dealt with by foreign or trading corporations—relying on s 51(xx) of the *Constitution* (the 'corporations' power);[17] and
- sold, distributed, advertised or otherwise dealt within the territories—relying on s 122 of the Constitution (the 'territories' power).[18]

13.18 The external affairs power contained in s 51(xxix) of the *Constitution* might also be invoked, for example, with respect to:

- restrictions on child pornography—recognising Australia's international obligations under the United Nations *Convention on the Rights of the Child*;[19] or
- constraints on freedom of expression—recognising Australia's international obligations under the *International Covenant on Civil and Political Rights*.[20]

13.19 Despite this potential wide scope of Commonwealth legislative power, there may be gaps—some areas of activity that should be covered by the new National Classification Scheme but to which Commonwealth legislative powers may not extend.

---

16 For example, *Customs Act 1901* (Cth) s 233BAB.

17 For example, the *Broadcasting Services Act* relies on the corporations power to provide an additional constitutional basis for rules about the disclosure of cross-media relationships: *Broadcasting Services Act 1992* (Cth) s 52A.

18 This is the constitutional basis of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

19 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), art 19.

20 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), art 19.

For example, it may be problematic to apply Commonwealth classification laws to material published by individuals or unincorporated entities and sold or distributed only within one state.

Referral of state powers

13.20 While any gaps in Commonwealth legislative power may not be significant, and might be left to the states to regulate, such gaps could be covered by a referral of state powers to the Commonwealth under s 51(xxxvii) of the *Australian Constitution*.

13.21 Section 51(xxxvii) of the *Australian Constitution* gives the Parliament of Australia power to make laws with respect to matters referred to the Parliament by the Parliament of any state. The states have referred a number of matters to the Commonwealth including, for example, corporations law and counter-terrorism.[21]

13.22 To address any remaining or potential gaps, a state referral of powers may be stated to cover all matters relating to the operation of new Commonwealth classification legislation to the extent that the matter is not otherwise included in the legislative powers of the Parliament of the Australia.[22]

Inconsistency of Commonwealth and state laws

13.23 Where the power to legislate is held concurrently by the Commonwealth and the states, as it is under most of the heads of power on which a new Classification of Media Content Act would rely, questions involving inconsistency of laws may arise.

13.24 Section 109 of the *Constitution* provides that when 'a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid'.

13.25 As discussed above, a number of states have concurrent classification powers with respect to publications, films and computer games also covered by the Commonwealth *Classification Act*.[23]

13.26 Schedules 5 and 7 of the *Broadcasting Services Act* provide expressly for concurrent operation of state and territory laws. Both schedules state that it is the intention of the Parliament that the schedules are 'not to apply to the exclusion of a law of a State or Territory to the extent to which that law is capable of operating concurrently'.[24]

---

21 *Corporations Act 2001* (Cth) s 3; *Criminal Code* (Cth) s 100.3.

22 See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW) and cognate state and territory legislation; *Corporations Act 2001* (Cth) s 3.

23 The *Classification Act* provides expressly for the concurrent operation of State and Territory laws in relation to material prohibited in prescribed areas of the Northern Territory: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 100.

24 *Broadcasting Services Act 1992* (Cth) sch 5 cl 90; sch 7 cl 122.

ALRC's views

13.27 One principle for reform is that classification regulation should be focused upon content rather than means of delivery.[25] This suggests that the same rules should apply to the classification of all classifiable content—offline and online.[26] Such a model would also be consistent with the reform principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose and should be clear in its scope and application.

13.28 As discussed in Chapter 2, there are two regimes for classification of media content: under the classification cooperative scheme; and schs 5 and 7 of the *Broadcasting Services Act*. The ALRC considers that the framework for any new National Classification Scheme should unify these laws, as far as possible, and amalgamate the functions of existing regulators.

13.29 Given that the Commonwealth is responsible for regulating online content, using the legislative powers of the Parliament of Australia is the most practical way to ensure that any new framework for the classification of publications, films and computer games 'aligns with the Commonwealth's approach to regulating Internet content' under the *Broadcasting Services Act*.[27] There was considerable support expressed in submissions for the idea that the Parliament of Australia should enact new national classification laws—whether using Commonwealth legislative powers or powers referred by the states, where necessary.[28]

13.30 The potential scope of Commonwealth legislative power in this area is broad and may be sufficient to legislate nearly all aspects of a new National Classification Scheme—especially as virtually all important media content will, in the future, be available on the internet or through other electronically distributed means. The Parliament of Australia is clearly able to legislate more broadly in relation to classification of media content than it has done to date.

13.31 If there are some areas of activity that should be covered by the new National Classification Scheme, and to which Commonwealth legislative powers may not extend, a referral of power by the states would ensure that Commonwealth classification legislation is comprehensive in its coverage and not vulnerable to constitutional challenge.

---

25 See Ch 4, Principle 8.

26 This position is widely supported by stakeholders: eg, Screen Australia, *Submission CI 2284*, 15 July 2011; Internet Industry Association, *Submission CI 2445*, 28 July 2011; National Civic Council, *Submission CI 2226*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; Telstra, *Submission CI 1184*, 15 July 2011; The Communications Council, *Submission CI 1188*, 16 July 2011; Media Standards Australia Inc, *Submission CI 1104*, 15 July 2011.

27 Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

28 For example, Internet Industry Association, *Submission CI 2445*, 28 July 2011; A Hightower and Others, *Submission CI 2159*, 15 July 2011; S Ailwood and B Arnold, *Submission CI 2156*, 15 July 2011; SBS, *Submission CI 1833*, 22 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011; Free TV Australia, *Submission CI 1214*, 15 July 2011.

13.32 The Senate Legal and Constitutional Affairs References Committee reached similar conclusions in its review of the existing classification scheme in 2011. The Senate Committee recommended that the Australian Government request ‘the referral of relevant powers by states and territories to the Australian Government to enable it to legislate for a truly national classification scheme’.[29] In the event that this was not able to be negotiated before June 2012, the Senate Committee recommended that the Government ‘prepare options for the expansion of the Australian Government’s power to legislate for a new national classification scheme’.[30]

13.33 In the ALRC’s view, it seems unnecessary to seek referral of powers as a first step, because the Commonwealth’s legislative powers already may be sufficient and it is uncertain whether the states would be able to agree on a referral of power.

13.34 In constitutional terms, the new Classification of Media Content Act should be drafted to ‘cover the field’. That is, the Act should contain an express intention that it is to be exclusive within its field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*. This would mean that, for example, state legislation allowing for the classification or re-classification of media content under existing concurrent powers would be inoperative.

13.35 As discussed in Chapter 14, some state and territory enforcement legislation also contains provisions dealing with the regulation of online content, making it, for example, an offence to upload ‘objectionable material’ or ‘material unsuitable for minors’.[31] This may provide another reason for the Australian Government to ‘cover the field’ and avoid inconsistent application of offences concerning online content.

13.36 State and territory law is not excluded by schs 5 and 7 of the *Broadcasting Services Act*. As a result, the states and territories ‘are free to enact laws imposing additional classification obligations leaving open the prospect of costly and inefficient jurisdictional inconsistencies being imposed on the providers of online content in Australia’.[32] Telstra submitted that Commonwealth legislation touching on classification in this area should provide explicitly that it is intended to exclude concurrent State and Territory laws.[33]

13.37 If the Australian Government determines that the states should retain concurrent powers in some areas—for example, in relation to restrictions on the sale or display of certain material such as magazines, or in relation to uploading media content onto the internet—the new Classification of Media Content Act would need to contain provisions reserving these powers to the states.

---

29 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 10.

30 Ibid, Rec 11.

31 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 56, 57, 57A, 58.

32 Telstra, *Submission CI 1184*, 15 July 2011.

33 Ibid.

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

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

14. Enforcing Classification Laws

Contents

Summary 219
Enforcement of classification offline and online 220
Enforcement under the classification cooperative scheme 220
State and territory offences 220
State and territory law enforcement agencies 222
The Classification Liaison Service 222
Customs and Border Protection Service 223
Enforcement of online content regulation 223
Broadcasting Services Act 223
State and territory online content regulation 224
Enforcement problems 225
Classification cooperative scheme 225
Online regulation 225
ALRC's proposals 226
Enforcement under Commonwealth law 226
Alternative approach 227
Offences and penalties 228
Conducting enforcement activity 229

Summary

14.1 This chapter discusses enforcement of classification laws under the existing Commonwealth-state cooperative scheme for the classification of publications, films and computer games (the classification cooperative scheme); and schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth).

14.2 Under the classification cooperative scheme, the enforcement of classification laws is primarily the responsibility of states and territories. These arrangements contribute to problems of inconsistency in offence and penalty provisions between Australian jurisdictions and lack of compliance with classification laws. These problems and possible solutions to them are discussed in this chapter.

14.3 An important part of the rationale for having a new National Classification Scheme is to avoid inconsistency in enforcement of classification laws and associated penalties. The ALRC concludes that the Australian Government should, therefore, be responsible for the enforcement of classification laws and makes proposals for a regime of offences and penalties.

14.4 For political or pragmatic reasons, it may be considered necessary that the states and territories retain some enforcement powers. The chapter presents an alternative framework for a National Classification Scheme, applicable if the Australian Government determines that the states and territories should retain enforcement powers. In this circumstance, the ALRC proposes that a new intergovernmental agreement be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification decisions made under the new Classification of Media Content Act, but only with respect to publications, films and computer games.

Enforcement of classification offline and online

14.5 The following material describes the offences and penalties relevant to the enforcement of classification laws, including in relation to:

- offline content under the classification cooperative scheme—mainly by state and territory law enforcement agencies; and
- online content under the *Broadcasting Services Act*—mainly by the Australian Communications and Media Authority (the ACMA).

14.6 These laws include those that:

- impose obligations to classify media content according to prescribed criteria;
- impose prohibitions or restrictions on access to media content, or the sale, distribution or advertising of content; or
- provide for offences and penalties in relation to other classification laws.

Enforcement under the classification cooperative scheme

14.7 Under the classification cooperative scheme, state and territory enforcement legislation provides that the Director of the Classification Board may require publications, films or computer games to be submitted for classification.[1] Failure to comply with a notice 'calling in' a publication, film or computer game (a call in notice) is an offence under state and territory laws.

14.8 State and territory enforcement legislation also prohibits the sale, distribution and advertising of unclassified material; and restricts the sale, distribution and advertising of classified material in various ways.

State and territory offences

14.9 State and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. The main types of offence concern:

- failing to comply with call in notices;

---

1 Except in the ACT, where the offence is contained in the Commonwealth Act: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23(3), 23A(3), 24(3).

- selling, screening, distributing or advertising unclassified material; and
- failing to comply with restrictions on the sale, distribution and advertising of classified material.

Offences in relation to call in notices

14.10 All states and territories have similar offence provisions relating to failure to comply with call in notices issued by the Director of the Classification Board. For example, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) provides that the Director may call in for classification:

- publications that are submittable publications;[2]
- unclassified films that are not exempt films; and
- computer games that contain contentious material.[3]

Offences in relation to unclassified material

14.11 State and territory enforcement legislation provides for offences in relation to selling, screening, distributing or advertising unclassified material. For example, in NSW, it is an offence to:

- sell or publicly exhibit an unclassified film;
- sell or deliver a submittable publication; or
- sell or publicly demonstrate an unclassified computer game.[4]

14.12 Similar offences apply in all other state and territory jurisdictions, with minor variations in formulation.[5]

Offences in relation to classified material

14.13 State and territory enforcement legislation provides for offences in relation to selling, screening, distributing or advertising certain categories of classified material (or material that, if classified, would be classified as being in a certain category). Offences vary significantly in relation to:

- the kinds of classified material that can be sold, screened, distributed, advertised or possessed; and
- how classified material can be sold, screened, distributed or advertised.

14.14 These differences can be illustrated by reference to X 18+ films. While the sale and public exhibition of X 18+ films is prohibited in all states, the ACT and the

---

2 See Ibid s 5 definition of 'submittable publication'.
3 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46, 46A, 47.
4 Ibid ss 6, 19, 27.
5 See, eg, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 6, 15, 25, 34.

Northern Territory permit it,[6] subject to various restrictions. Similarly, while Queensland prohibits the selling, distributing or advertising of Category 1 Restricted and Category 2 Restricted publications,[7] these publications may be sold in all other states and territories.

14.15 State and territory enforcement legislation contains provisions regulating how classified material can be sold, distributed or advertised. These provisions vary, particularly in relation to where certain material may be sold and how it may be displayed.

Penalties

14.16 Penalties for similar offences differ between jurisdictions. For example, the maximum penalty for failing to comply with a call in notice is as follows:

- Queensland $2,000;
- Victoria $11,945; and
- NSW $11,000 for an individual (and $22,000 for a corporation).[8]

State and territory law enforcement agencies

14.17 In most jurisdictions, state and territory police are responsible for enforcing classification laws.[9] In the ACT, classification laws are enforced by ACT Policing (part of the Australian Federal Police (AFP)) and by the ACT Office of Regulatory Services.[10]

14.18 In Queensland, the Department of Employment, Economic Development and Innovation enforces classification laws using Office of Fair Trading inspectors. Police do not investigate or prosecute alleged classification offences, unless the complaint involves suspected child exploitation.[11]

The Classification Liaison Service

14.19 The Australian Government provides some assistance in relation to enforcement, through the operation of the Classification Liaison Scheme (CLS). The Attorney-

---

6 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ss 9, 22; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 49. However, the Commonwealth Act prohibits the possession or control of Category 1 Restricted and Category 2 Restricted publications, X 18+ films, and RC material by persons in prescribed areas of the Northern Territory: *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 101–102.

7 *Classification of Publications Act 1991* (Qld) s 12.

8 *Classification of Films Act 1991* (Qld) s 25CA(3); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 60(3), 60A(3), 61(3); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46(2), s46A(2), 47(2).

9 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

10 Ibid.

11 See, Explanatory Notes State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld).

General's Department operates the CLS—a joint Australian Government, state and territory initiative.

14.20 The primary functions of the CLS are to educate industry about legal obligations under the National Classification Scheme and to verify compliance with classification laws. In this context, CLS classification liaison officers visit premises throughout Australia checking whether classifiable material complies with classification laws and refer possible breaches of the law to police and other law enforcement agencies.[12]

Customs and Border Protection Service

14.21 As discussed in Chapter 12, the Australian Customs and Border Protection Service (Customs) identifies and confiscates 'objectionable material' at the Australian border. The definitions of 'objectionable material' in the *Customs (Prohibited Imports) Regulations 1956* (Cth) and *Customs (Prohibited Exports) Regulations 1958* (Cth) substantially mirror the definition of material classified RC under the National Classification Code.

Enforcement of online content regulation

Broadcasting Services Act

14.22 Under schs 5 and 7 of the *Broadcasting Services Act*, the ACMA investigates complaints about online content that the complainant believes to be 'prohibited content' or 'potential prohibited content'. The determination of whether online content is prohibited is made with reference to the National Classification Code and Classification Board decisions. The ACMA and content or hosting service providers may apply to the Board for classification of content.[13] The steps the ACMA may take following an investigation, including the issuing of a take-down notice, are summarised in Chapter 2.

14.23 Schedules 5 and 7 of the *Broadcasting Services Act* provide for a range of offences, punishable by criminal, civil and administrative penalties.

14.24 Schedule 5 contains criminal offences concerning contravention of 'online provider rules',[14] including contravening an industry code or industry standard.[15]

14.25 The maximum penalty for contravening an online provider rule or an ACMA direction with respect to an online provider rule is 50 penalty units ($5,500)[16] for an individual and $27,500 for a body corporate. These are continuing offences, so that a

---

12 Australian Government Attorney-General's Department, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

13 *Broadcasting Services Act 1992* (Cth) sch 7 cl 22.

14 See Ibid sch 5 cls 79, 82, 83.

15 For example, provisions of the Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008), obliging internet service providers to make Internet Industry Association Family Friendly Filters available.

16 *Broadcasting Services Act 1992* (Cth) sch 5 cls 82–83.

person who contravenes the provisions is guilty of a separate offence in respect of each day during which the contravention continues.[17]

14.26 Schedule 7 provides criminal, civil and administrative penalties for non-compliance with 'designated content/hosting service provider rules', which include the rules relating to prohibited content.[18]

14.27 It is a criminal offence to contravene a designated content/hosting service provider rule[19] or a written direction from the ACMA with respect to a contravention of such a rule.[20] The maximum penalty for these offences is 100 penalty units ($11,000) for an individual and $55,000 for a body corporate. Again, these are continuing offences.

14.28 In addition, sch 7 provides that these contraventions are 'civil penalty provisions' and a person is deemed to commit a separate contravention in respect of each day during which the contravention continues.[21] Such penalties must not exceed the maximum penalty that could have been imposed on conviction for the corresponding criminal offence.[22]

14.29 Finally, a range of administrative 'quasi-penalties'[23] apply to contraventions of designated content/hosting service provider rules. For example, where there is a contravention, the ACMA may apply to the Federal Court for an order that the person cease providing the designated content/hosting service.[24] In addition, contraventions of civil penalty provisions may have an effect on related ACMA decisions under the *Broadcasting Services Act*—for example, in relation to whether a company is a suitable licensee or a suitable applicant for a licence, such as a subscription television broadcasting licence.[25]

State and territory online content regulation

14.30 Some state and territory enforcement legislation contains provisions dealing with matters beyond the classification of publications, films and computer games and including the regulation of online content. For example, the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (Vic), among other things, makes it an offence to 'use an on-line information service to publish or transmit, or make available for transmission' objectionable material, child pornography

---

17 Ibid sch 5 cl 86.

18 Ibid sch 7 cl 53(6).

19 Ibid sch 7 cl 106.

20 Ibid sch 7 cl 108.

21 Ibid sch 7 cls 107, 108(7)–(8).

22 Ibid s 205F(4).

23 Administrative 'quasi-penalties' have been defined as those administrative actions that require the exercise of discretion that goes beyond a mechanistic application of the relevant legislation—such as licensing decisions—as opposed to true administrative penalties where monetary penalties are imposed administratively as with, for example, charges and interest payable under the *Taxation Administration Act 1953* (Cth): see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2002), [2.124], [2.146].

24 *Broadcasting Services Act 1992* (Cth) sch 7 cl 110.

25 Ibid s 98.

or 'material unsuitable for minors'—the latter category being defined by reference to classification categories.[26]

14.31 At the time the Broadcasting Services (Online Services) Bill 1999 (Cth) was introduced, it was intended that the Commonwealth would be responsible for regulating the activities of internet service providers and internet content hosts and the Attorney-General would encourage the development of uniform state and territory offence provisions, creating 'offences for the publication and transmission of proscribed material by users and content creators'. However, such a scheme did not eventuate and the regulation of internet content in the states and territories continues to 'vary drastically'.[27]

Enforcement problems

Classification cooperative scheme

14.32 Problems with the enforcement of classification laws under the classification cooperative scheme were identified in the 2011 Senate Legal and Constitutional Affairs Committee review of the National Classification Scheme. The Senate Committee examined the effectiveness of the call in notice procedure and the enforcement of classification laws by the states and territories.[28]

14.33 The report concluded that several aspects of the enforcement system require urgent attention. These included:

- the lack of enforcement of call in notices;
- the operations and resourcing of the CLS; and
- inconsistent provisions in state and territory enforcement legislation.[29]

Online regulation

14.34 As discussed in various contexts elsewhere in this Discussion Paper, enforcing classification laws in relation to online media content poses significant challenges, including:

- the quantity of online content;
- the fact the content is dynamic or mutable;
- the number of persons producing content;
- that content is produced and hosted all over the world; and
- the difficulty of determining age and of restricting content.

---

26 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 56, 57, 57A, 58.

27 C Penfold, 'Child Pornography Laws: The Luck of the Locale' (2005) 30(3) *Alternative Law Journal* 123, 125.

28 See, Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), ch 6.

29 Ibid, Recs 12, 13, 15–21.

ALRC's proposals

Enforcement under Commonwealth law

14.35 The existing classification cooperative scheme, under which the Commonwealth classifies publications, films and computer games, and the states and territories enact complementary enforcement legislation, has resulted in substantial variations in state and territory enforcement provisions. This situation can be seen as inconsistent with the whole idea of a 'national scheme' for classification.

14.36 There are also inconsistencies in the regulation of classification rules between the classification cooperative scheme and schs 5 and 7 of the *Broadcasting Services Act*. For example, content rated X 18+ is prohibited content under the *Broadcasting Services Act*, but may be sold as a DVD or magazine in some Australian jurisdictions. Dr Gregor Urbas and Tristan Kelly noted that, with media convergence and increasing use of the internet, 'this inconsistency may be out of step with community standards'.[30]

14.37 Many stakeholders emphasised the importance of consistency in the enforcement of classification laws,[31] including in relation to international standards.[32] Lack of consistency was identified as causing a number of problems, including higher compliance costs for media content publishers and distributors.[33]

14.38 Some stakeholders—including some state or territory governments—may consider it an advantage for states and territories to be able to implement their own enforcement arrangements. However, arguably, in 'today's digital media landscape, the concept of state boundaries is no longer applicable'.[34] As the report of the Senate Legal and Constitutional Affairs Committee Inquiry observed, the fact that state and territory law enforcement agencies are responsible for law enforcement regarding classification matters is a 'particularly disjointed and fractured arrangement of the so-called "cooperative scheme"'.[35]

14.39 The ALRC considers that the new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law. The Act

---

30 G Urbas and T Kelly, *Submission CI 1151*, 15 July 2011.

31 Internet Industry Association, *Submission CI 2445*, 28 July 2011; Australian Independent Record Labels Association, *Submission CI 2058*, 15 July 2011; Australian Christian Lobby, *Submission CI 2024*, 21 July 2011; Communications Law Centre, *Submission CI 1230*, 15 July 2011; Telstra, *Submission CI 1184*, 15 July 2011; Australian Federation Against Copyright Theft, *Submission CI 1182*, 15 July 2011; Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011; Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001; Interactive Games and Entertainment Association, *Submission CI 1101*, 14 July 2011.

32 Internet Industry Association, *Submission CI 2445*, 28 July 2011; Australian Mobile Telecommunications Association, *Submission CI 1190*, 15 July 2011.

33 Internet Industry Association, *Submission CI 2445*, 28 July 2011; Australian Home Entertainment Distribution Association, *Submission CI 1152*, 15 July 2011. Other stakeholders were less concerned about inconsistency than the prospect of consistency on an inadequate basis: Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; Civil Liberties Australia, *Submission CI 1143*, 15 July 2011; Family Council of Victoria Inc, *Submission CI 1139*, 14 July 2001.

34 SBS, *Submission CI 1833*, 22 July 2011.

35 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 175.

should require media content providers to have certain content classified—whether by the new Classification Board or by authorised industry classifiers—and provide offences and penalties for failure to do so in accordance with the requirements of the legislation and approved industry codes of practice. It would be preferable if the Classification of Media Content Act also provided for restrictions on access to content, or on the sale, screening, distribution or advertising of content.

Alternative approach

14.40 Under the ALRC's proposals, existing inconsistencies in state and territory legislation concerning restrictions on the sale, distribution or advertising of classifiable publications, films and computer games would have to be resolved in the new Classification of Media Content Act—for example, in relation to the sale and distribution of X 18+ films and DVDs.

14.41 For this, and other, reasons—including the cost of enforcing classification laws—the Australian Government may be unwilling to enact new laws with regard to the enforcement of classification laws. In that case, the Classification of Media Content Act may have to contain provisions recognising that enforcement will be a matter for the states and territories.

14.42 However, without further agreement between the Commonwealth, states and territories, this would be likely to result in a new National Classification Scheme with similar inconsistencies in enforcement provisions to those that exist at present.

14.43 The ALRC proposes that, therefore, if the Australian Government determines that the states and territories should retain powers in relation to the enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact consistent legislation providing for the enforcement of classification laws with respect to publications, films and computer games.

14.44 Commonwealth, state and territory ministers should agree on the best approach to classification-related offences and penalties and to apply, or enact, uniform provisions. Two main approaches are possible in this regard.

14.45 First, agreement might be reached on adopting enforcement provisions as part of a complementary 'applied' law scheme for enforcement of classification laws. Under such a scheme, provisions would be enacted by one jurisdiction (most likely the Commonwealth), and then applied by other jurisdictions.[36] Alternatively, the states and territories might enact mirror legislation—that is, one jurisdiction enacts a law that is then enacted in similar terms by the other jurisdictions.[37]

---

36 A recent example of such a scheme is the Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth).

37 The uniform Evidence Acts are an example of mirror legislation, although the original Acts have diverged somewhat over time.

14.46 In this context, the existing classification cooperative scheme has been criticised,[38] because the *Classification Act* provides that Commonwealth, state and territory ministers must agree to any amendment to the Classification Code and on classification guidelines or amendments to those guidelines;[39] and the Intergovernmental Agreement under which the scheme is established and maintained may be amended only by unanimous agreement.[40]

14.47 The need for unanimity has been criticised[41] and it has been suggested that any new intergovernmental agreement should provide only that amendments require the support of the Australian Government and six other parties, including the ACT.[42]

Offences and penalties

14.48 If, as is proposed, the new Classification of Media Content Act provides for the enforcement of classification laws under Commonwealth law, an appropriate regime of offences and penalties should be incorporated in the Act, in accordance with best practice guidance.

14.49 Best practice guidance in the Commonwealth law context includes the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. This provides information about, among other things, provisions of the *Criminal Code* (Cth) and *Crimes Act 1914* (Cth) that have a bearing on the way that offences and related provisions should be framed; other legal and policy considerations that are relevant to how offence, civil penalty and enforcement provisions are framed; and suggested precedents for various types of offence, civil penalty and enforcement provisions.[43]

14.50 One starting point for framing new offence and penalty provisions would be likely to be those set out in sch 7 of the *Broadcasting Services Act*—after taking into account any changes to the *Broadcasting Services Act* that may result from the conclusions of the Convergence Review.[44]

14.51 The sch 7 offence and penalty regime, with significant adaptation, could be extended to apply to publications, films and computer games. This might mean that, for example, the sale of unclassified or RC content would be punishable under the new Classification of Media Content Act by criminal and civil penalties; and the broadcasting of unclassified television programs would be punishable by criminal, civil and administrative penalties (such as licence removal for repeated breaches). It may

---

38 I Graham, *Submission CI 1244*, 17 July 2011; MLCS Management, *Submission CI 1241*, 16 July 2011.

39 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 6, 12.

40 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), cl 3(2).

41 I Graham, *Submission CI 1244*, 17 July 2011. Also *Confidential Submission CI 1185*, 15 July 2011 (agreement of 6 of 9 jurisdictions should be required). MLCS Management stated that the existing Intergovernmental Agreement 'creates logistical and practical difficulties in dealing with classification issues' and the need to gain unanimous agreement on significant issues hampers change: MLCS Management, *Submission CI 1241*, 16 July 2011.

42 I Graham, *Submission CI 1244*, 17 July 2011.

43 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007).

44 See Ch 1.

also be appropriate, in relation to some offences involving publications, films and computer games, to provide for confiscation of unclassified products as a penalty.

14.52 Existing state and territory provisions are also starting points for the framing of new offences and penalties. Some states, for example, operate infringement notice schemes for minor breaches of classification laws. Under an infringement notice scheme, a non-judicial officer is empowered to give a notice alleging the offence to a suspected offender providing that the suspected offender may pay a specified penalty to avoid prosecution.[45] For example, in South Australia, offences under the *Classification (Publications, Films and Computer Games) Act 1995* (SA) are subject to 'expiation fees', set at around 5% of the maximum fine.[46] Failure to comply with a call in notice, for instance, is punishable by a maximum fine of $5,000 and may be subject to an expiation fee of $315.[47]

14.53 This approach might be adopted for some minor offences in the new Classification of Media Content Act (or harmonised state and territory enforcement legislation). The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states that an infringement notice scheme 'may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective'.[48]

Conducting enforcement activity

14.54 If the new Classification of Media Content Act provides for enforcement of classification laws, questions arise about which agencies will be responsible for law enforcement activity.

14.55 This is relatively straightforward in the case of online content. Enforcement mechanisms, similar to those exercised by the ACMA under the *Broadcasting Services Act*, would be exercised by the new Regulator.[49] Depending on how the new Regulator is staffed and resourced, the ALRC would expect it also to have a role in investigating and enforcing classification laws in relation to publications, films and computer games, including through the issuing of infringement notices.

14.56 The Regulator would initiate criminal prosecutions through the Office of the Commonwealth Director of Public Prosecutions (CDPP) and bring any civil or administrative actions, such as obtaining cessation of service orders. The CDPP is responsible for the majority of prosecutions under Commonwealth criminal law—although some regulators such as the Australian Taxation Office, the Australian

---

45 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

46 In SA, expiation fees generally must not be more than 25% of the maximum fine prescribed for the offence: *Expiation of Offences Act 1996* (SA) s 5(3).

47 *Classification (Publications, Films and Computer Games) Act 1995* (SA).

48 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

49 The ACMA has guidelines relating to its enforcement powers under the *Broadcasting Services Act*. These set out the matters that it takes into account in making enforcement decisions: *Guidelines Relating to the ACMA's Enforcement Powers under the Broadcasting Services Act 1992* (2011) (Cth).

Securities and Investments Commission and the Australian Competition and Consumer Commission, have power to prosecute some offences. The Regulator might be empowered to prosecute certain more minor offences and could, for example, issue infringement notices, if such a scheme were instituted.

14.57 The AFP might undertake the investigation of serious criminal offences, for example, providing content that would be classified RC over the internet on a commercial basis. It is questionable, however, whether the AFP would choose to place any higher priority on enforcement activity in relation to more minor offences, such as the prohibited sale or display of R 18+ or X 18+ magazines or DVDs, than state and territory police currently do.

14.58 There is no reason why state and territory law enforcement agencies could not also be involved in the enforcement of Commonwealth classification-related offences. Under existing legislation, state and territory police may perform functions related to the enforcement of Commonwealth legislation. These include powers of arrest, executing search warrants and confiscating property.[50] State and territory authorities may also institute proceedings for any Commonwealth offence in state and territory courts.[51] The willingness of state and territory law enforcement agencies to become involved in classification-related enforcement may become an issue that needs to be resolved through inter-governmental discussions, including about the funding of enforcement activities.

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

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

Proposal 14–3 The new Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with:

(a) restrictions on the sale, screening, distribution and advertising of classified material;

(b) statutory obligations to classify media content;

(c) statutory obligations to restrict access to media content;

---

50 See, for example, *Crimes Act 1914* (Cth) pt 1AA, div 4 (powers of arrest) and pt IE (forfeiture of child pornography material).

51 Ibid s 13. However, the CDPP retains the power to take over the proceedings: Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [3.11].

(d) an industry-based classification code; and

(e) directions of the Regulator.

Proposal 14–4 Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the *Broadcasting Services Act 1992* (Cth).

Proposal 14–5 The Australian Government should consider whether the Classification of Media Content Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.

Appendix 1. Agencies, Organisations and Individuals Consulted

Name	*Location*
Mark Armstrong, Executive Director, Network Insight	Sydney
Australian and New Zealand Communication Association, roundtable participants on Media Classification special session: Kath Albury; Elizabeth Burns Coleman; Brett Hutchins; Clare Lloyd; Jason Potts; Elinor Rennie	Hamilton, New Zealand
Australian Research Council Centre of Excellence for Creative Industries and Innovation, Policy Convergence Panel, with Terry Cutler (Cutler & Co), Professor Stuart Cunningham (QUT), Malcolm Long (Convergence Review), and Richard Eccles, Deputy Secretary, Arts and Sport, Department of the Prime Minister and Cabinet	Brisbane
Robyn Ayres, Executive Director, and Jo Teng, Solicitor, Arts Law Centre of Australia	Sydney
Barbara Biggins, President, Young Media Australia, and Professor Elizabeth Handsley, President, Australian Council on Children and the Media	Adelaide
Glen Boreham, Malcolm Long and Louise McElvogue, Convergence Review Committee	Sydney
Lisa Brown, Policy Manager, Australian Mobile Telecommunications Association	Sydney
Petra Buchanan, Chief Executive Officer, and Simon Curtis, Policy and Regulatory Affairs Manager, Australian Subscription Television and Radio Association	Sydney
Associate Professor Jane Burns, Chief Executive Officer, Co-operative Research Centre for Young People, Technology and Wellbeing, and Dr. Judith Slocombe, Chief Executive Officer, The Allannah and Madeline Foundation	Sydney

Name	***Location***
Simon Bush, Chief Executive Officer, Australian Home Entertainment Distributors Association	Canberra
Classification Enforcement Forum: 31 participants from all Australian states and territories, as well as Classification Branch, Attorney-General's Department, Classification Liaison Service, Australian Communications and Media Authority, Australian Customs and Border Protection, and Australian Federal Police	Sydney
Matt Minogue, First Assistant Secretary, Civil Law Division, Chris Collett, Acting Assistant Secretary, Classification Branch, Jane Fitzgerald, Assistant Secretary, and Wendy Banfield, Principal Legal Officer, Attorney-General's Department	Sydney
Simon Cordina, Assistant Secretary, Cyber-Safety and Trade, Tim Edwards, Director, Online Content, and Steph Mellor, Assistant Director, Online Content, Department of Broadband, Communications and the Digital Economy	Canberra
Ron Curry, Chief Executive Officer, and Joshua Cavalleri, Tress Cox Lawyers, Policy Adviser, Interactive Games and Entertainment Association	Sydney
Dr Terry Cutler, Executive Director, Cutler & Co.	Melbourne
John Dickie, John Dickie Communications	Sydney
Patrick Fair, Partner, Baker & McKenzie (representing Internet Industry Association)	Sydney
Iarla Flynn, and Ishtar Vij, Public Policy and Government Affairs, Google Australia and New Zealand	Sydney
Julie Flynn, Chief Executive Officer, Free TV Australia; Holly Brimble, Director of Legal and Broadcasting Policy, Free TV Australia; Nick O'Donnell, Legal Counsel, Regulatory & Business Affairs, Seven Network; Scott Briggs, Director, Corporate & Regulatory Affairs, Nine Entertainment Co; Annabelle Herd, Head of Broadcast Policy, Network Ten.	Sydney
Professor Lelia Green, Edith Cowan University, WA	Brisbane

Name	***Location***
Peter Leonard, Partner, Gilbert + Tobin Lawyers	Sydney
Fr Richard Leonard, Director, Australian Catholic Office for Film & Broadcasting, Australian Catholic Bishops' Conference	Sydney
Professor Catharine Lumby and Associate Professor Kate Crawford, Journalism and Media Research Centre, University of New South Wales	Sydney
Sue McCreadie, Senior Manager, Film & Creative Industries, Department of Trade and investment, Regional Infrastructure and Services, NSW Government	Sydney
Donald McDonald AO, Director, Lesley O'Brien, Deputy Director, and Greg Scott, Senior Classifier, Classification Board	Sydney
Professor Alan McKee, Film and Television, Creative Industries Faculty, Queensland University of Technology	Brisbane
Fiona Patton, Chief Executive Officer, EROS Association; Robbie Swan, Executive Officer, EROS Association; and David Haines, Non-Executive Chairman, Mobile Active	Canberra
Joel Pearlman, Managing Director, Roadshow Films and Executive Director, Motion Picture Distributors Association of Australia; Lori Flekser, General Manager, Motion Picture Distributors Association of Australia; and Michael Selwyn, Managing Director, Paramount Pictures Australia	Sydney
Victoria Rubensohn, Chair, Classification Review Board	Sydney
Jonquil Ritter, Executive Manager Citizen and Community Branch; and Jeremy Fenton, Manager, Content Classification Section, Australian Communication and Media Authority	Sydney
Dr Andy Ruddock, Department of English, Communications and Performance Studies, Monash University	Boston, USA
Lyle Shelton, Chief of Staff, and Ben Williams, Deputy Chief of Staff, Australian Christian Lobby	Canberra

Name	***Location***
Gary Smith, General Manager of Regulatory Compliance and Self Regulation, Optus	Melbourne
Sally Stockbridge, Network Classifications Manager, Network Ten	Sydney
Dr David Sutton, Head of Corporate Strategy & Governance, and Michael Brealey, Head of Strategy & Governance, Australian Broadcasting Corporation	Sydney
Tim Seirlis, Classification Training Officer, Attorney-General's Department	Sydney
Stephen Towers, Dean of Studies, Queensland University of Technology	Brisbane
Tim Watts, Regulatory Manager, Regulatory Affairs, Strategy & Corporate Services, and Kate Jones, Supervising Counsel, Telstra	Melbourne
Marcus Westbury, Director of ISEA 2013 (International Symposium on Electronic Art)	Beijing, China
Lyria Bennett Moses, Senior Lecturer, Faculty of Law, University of New South Wales	Sydney

Appendix 2. Platform Neutrality and the Question of Media Effects

1. In developing its proposals for this Discussion Paper, the ALRC proposes that, to the maximum degree possible, policies and regulations applying to the National Classification Scheme should apply the principle of platform neutrality. In the context of media convergence, it is argued that attempts to apply different levels of regulation to media based upon assumptions about their perceived impact has proven to be unsustainable over time, and to have generated significant distortions in the overall classification framework.

2. The lengthy debate about whether to introduce an R 18+ classification for computer games, and the distortions and anomalies that emerged in the Australian games market arising from the absence of such a classification—meaning that a range of broadly comparable games were either classified as MA 15+ and hence available to children, or refused classification altogether—has drawn attention to the risks arising from classification criteria that have been based upon assumptions about whether one form of media has more impact than another.

3. The ALRC has instead identified age-based classifications—drawing upon available literature on stages of child development—as providing a more useful and effective framework for a National Classification Scheme than platform-based distinctions.

4. The literature on whether particular media content has effects on those who consume it is voluminous. The relationship between media violence and violence in society is perhaps the most researched topic in media and communications, with studies dating back as far as the 1930s. Research into the relationship between television and violence has been particularly prominent since the mid-1950s, after the United States (US) Congressional hearings of 1952 and 1955.[1]

5. Research has often been triggered by particular events, such as the turmoil in the US in the late 1960s, the Columbine school shootings in the US in 1989, or—in the Australian context—the aftermath of the killing of 35 people at Port Arthur, Tasmania, by Martin Bryant in 1996. More recently, both the Oslo shootings and the London riots acted as prompts for debate about the influence of violent video games and social media respectively.

6. An excellent overview of debates as they relate to the influence of media on violent behaviour can be found in a 2008 special issue of *American Behavioural*

1 J Murray, 'Media Violence: The Effects are Both Real and Strong' (2008) 51 *American Behavioural Scientist* 1212, 1213.

Scientist. Those who argue that the effects of sustained exposure to violent media on children are significant, generally point to three classes of effects:

- Aggression: Viewing televised violence can lead to increases in aggressive behaviour and/or changes in attitudes and values favo[u]ring the use of aggression to solve conflicts.
- Desensitization: Extensive violence viewing may lead to decreased sensitivity to violence and a greater willingness to tolerate increasing levels of violence in society.
- Fear: Extensive exposure to television violence may produce the mean world syndrome effect, in which viewers overestimate their risk of victimisation.[2]

7. Similar observations have been made by the Australian Psychological Society Ltd, which observed that '[e]xposure to violent television can and does influence children's feelings, attitudes and behaviour', and that 'prolonged exposure to television violence is one of a number of factors which lead to children being more likely to display aggressive behaviour in both the short-term and the long-term'.[3] Among those submissions who commented on this issue, Family Voice Australia referred to studies concerning violent video games and their impact on children, and the Australian Council for Children and the Media also provided references to relevant studies.[4]

8. There has also been considerable questioning of claims about strong media effects on individual behaviour. In an overview of 50 years of research on media violence, Barrie Gunter points to six factors that qualify strong claims being made about the impact of media violence that draw upon empirical research.[5]

9. First, whether the studies took place in an experimental setting or were based upon 'real world' data. It has been noted that three-quarters of studies undertaken have been by psychologists, and about half of these have been laboratory-type experiments.[6] These are open to criticism that they do not replicate 'real world' media consumption practices, and that participants go into such experiments with a pre-conceived idea of what researchers are expecting to find.

10. Secondly, the use of experimental methods that seek to uncover cause-effect relationships can neglect the degree to which, if media violence does impact upon behaviour, the relationship is more likely to be longer-term and cumulative rather than short-term and immediate. There is considerably less longitudinal data available on these questions as compared to experimental studies, and the meta-analytic studies

---

2 Ibid, 1222.

3 Australian Psychological Society, *The Effects of Violent Media on Children* (2000) <http://www.psychology.org.au/Assets/Files/effects_of_violent_media_on_children.pdf> at 23September 2011. See also Council on Communications and the Media, 'Media Violence' (2009) 124 *Pediatrics* 1495.

4 Australian Council on Children and the Media, *Submission CI 1236*, 15 July 2011; FamilyVoice Australia, *Submission CI 85*, 3 July 2011.

5 B Gunter, 'Media Violence: Is There a Case for Causality?' (2008) 51 *American Behavioural Scientist* 1061.

6 G Comstock, 'A Sociological Perspective on Television Violence and Aggression' (2008) 51 *American Behavioural Scientist* 1184, 1204.

(those that draw together the findings of multiple studies) find only weak correlations at best.

11. Thirdly, in so far as there has been a link established, it has generally been associated with those of lower socio-economic status backgrounds, or particular racial minorities. As researchers such as George Comstock observe, such groups also 'consist of individuals who already face considerable challenges in coping with everyday life' including a greater likelihood of conflict with authority and the law.[7] Given that the relationships are multi-causal, this leaves open the question as to whether the media-centric focus of effects research occurs at the expense of considering other relevant socio-cultural and socio-economic factors.

12. Fourthly, the research literature is dominated by studies looking at the potentially harmful effects of various forms of media exposure, with few studies considering neutral or even positive consequences of exposure. For instance, if media consumers are clear about the difference between media violence and real violence, then the portrayal of violence can be an entirely legitimate form of storytelling—and one with a very long history—particularly if it also conveys a message that aggressive or anti-social behaviour can have negative consequences for its perpetrators.

13. Fifthly, the question of whether media consumers in general, and children in particular, differentiate between media violence and real violence can be neglected in experimental studies. Stuart Cunningham has made the point, in relation to work undertaken by the Australian Broadcasting Tribunal on media violence in the early 1990s, that those surveyed were more likely to be disturbed by violent scenes witnessed on television news broadcasts than by fictionalised portrayals of violence in feature films or television dramas.[8]

14. The sixth and final point: the risk of assuming that the link between media violence and social violence has been proven is that 'an oversimplified position ... can lead to political misrepresentation of media effects, with unreasonable requests for tighter controls over media content, scheduling, and transmissions'.[9]

15. The argument presented here is not that there are no effects of media on individual behaviour. Gunter concludes that 'certain forms of media violence can exert certain kinds of effects on some consumers some of the time',[10] and Andy Ruddock from Monash University has identified particular contexts where particular media consumers actively use media to achieve certain kinds of effects.[11] It is, rather, to note that there are many and varied results from these studies, and evidence has not become clearer over time. This would suggest intrinsic difficulties in basing media classification recommendations around claims of media effects. This conclusion is

---

7 Ibid, 1206.

8 S Cunningham, 'TV Violence: The Challenge of Public Policy for Cultural Studies' (1992) 6 *Cultural Studies* 79, 91.

9 B Gunter, 'Media Violence: Is There a Case for Causality?' (2008) 51 *American Behavioural Scientist* 1061, 1112.

10 Ibid, 1113.

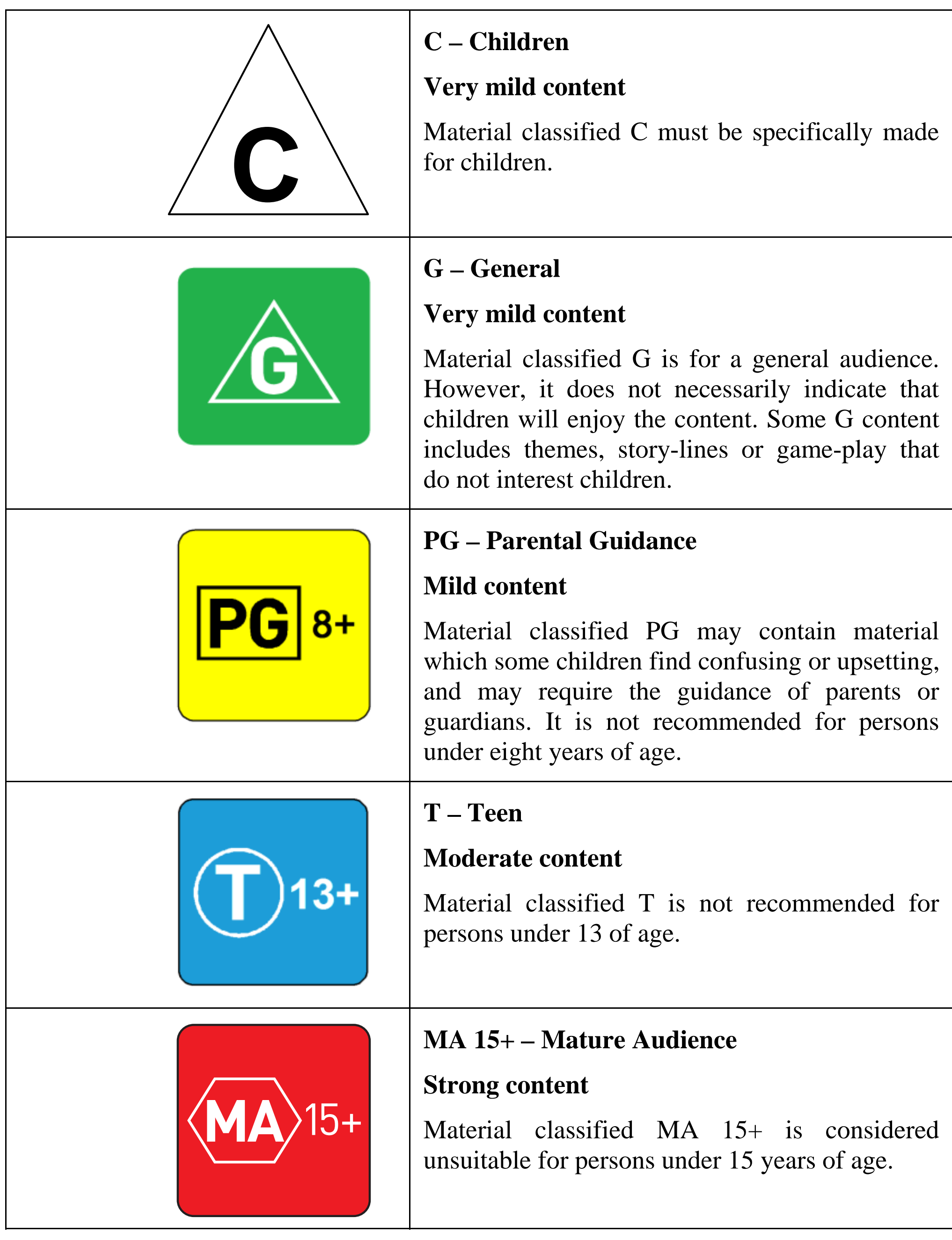
11 A Ruddock, *Youth Media* (2012, forthcoming).

similar to that reached by the Australian Government Attorney-General's Department in its literature review on the impact of playing violent video games (VVGs) on aggression:

> Significant harmful effects from VVGs have not been persuasively proven or disproven. There is some consensus that VVGs may be harmful to certain populations, such as people with aggressive and psychotic personality traits. Overall, most studies have consistently shown a small statistical effect of VVG exposure on aggressive behaviour, but there are problems with these findings that reduce their policy relevance. Overall ... research into the effects of VVGs on aggression is contested and inconclusive. [12]

12 Australian Government Attorney-General's Department, *Literature Review on the Impact of Playing Violent Video Games on Aggression* (2010) 42.

Appendix 3. Proposed Classification Markings



Marking	Description
C	**C – Children** **Very mild content** Material classified C must be specifically made for children.
G	**G – General** **Very mild content** Material classified G is for a general audience. However, it does not necessarily indicate that children will enjoy the content. Some G content includes themes, story-lines or game-play that do not interest children.
PG 8+	**PG – Parental Guidance** **Mild content** Material classified PG may contain material which some children find confusing or upsetting, and may require the guidance of parents or guardians. It is not recommended for persons under eight years of age.
T 13+	**T – Teen** **Moderate content** Material classified T is not recommended for persons under 13 of age.
MA 15+	**MA 15+ – Mature Audience** **Strong content** Material classified MA 15+ is considered unsuitable for persons under 15 years of age.

	R 18+ – Restricted **High level content** This content is legally restricted to adults. Some material classified R18+ may be offensive to sections of the adult community.
	X 18+ – Restricted This classification is a special and legally restricted category which contains only sexually explicit material. That is, material which contains real depictions of actual sexual intercourse and other sexual activity between consenting adults.

Appendix 4. What Must be Classified and by Whom and What Must be Restricted?

Must be classified	Who classifies	Proposals
Feature-length films produced on a commercial basis and for cinema release	Classification Board	6–1 and 7–1
Feature-length films and television programs produced on a commercial basis, but not for cinema release—eg, films and programs on DVD or the internet or broadcast on television	Classification Board or an authorised industry classifier	6–1 and 7–2
Computer games produced on a commercial basis and likely to be MA 15+ or higher	Classification Board	6–2 and 7–1
All media content that may be RC	Classification Board	6–5 and 7–1
All media content likely to be X 18+, including magazines, films and websites	Industry classifiers, or only the Board?	6–4 and Question 7–1

May be classified	Who classifies	Proposals
All media content eg, lower-level computer games	Classification Board, an industry classifier, or a person using an authorised instrument	6–8, 7–2 and 7–3

Access must be restricted to adults	Proposals
Media content classified R 18+ or X 18+	8–2
All other media content *likely* to be R 18+, including content that is not required to be classified	8–1