Classification (Publications, Films and Computer Games) Amendment (Online Games) Bill 2011

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Law and Bills Digest Section

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Classification (Publications, Films and Computer Games) Amendment (Online Games) Bill 2011

Date introduced: 12 October 2011
House: House of Representatives
Portfolio: Justice
Commencement: Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Classification (Publications, Films and Computer Games) Amendment (Online Games) Bill 2011 (the Bill) is to introduce a two year exemption from classification for computer games which are only available online and on mobile devices.

Background

Regulation of mobile phone and online games—The National Classification Scheme

Mobile phone and online games are regulated as ‘computer games’ under the National Classification Scheme (NCS). The NCS is a cooperative arrangement between the Commonwealth, states and territories established by the Classification (Publications, Films and Computer Games) Act 1995 (Cth) (Classification Act). The Classification Act provides that the Classification Board classifies films (including videos and DVDs), computer games and certain publications. As part of the classification scheme, each state and territory has enacted classification enforcement legislation that complements the Commonwealth Classification Act. State and territory classification legislation prescribes penalties for classification offences and provides for enforcement of classification decisions in the particular jurisdictions.

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The National Classification Code\(^1\) contains descriptions about the products which would fall within the classification types. For example, the Code sets out the level of depiction of sex and violence and other issues which would cause a film to be classified as G, PG, M et cetera. The criteria for classification are also contained in the Guidelines for the Classification of Films and Computer Games\(^2\) and the Guidelines for the Classification of Publications.\(^3\)

Classification decisions are made by the Classification Board and, on appeal, reviewed by the Classification Review Board. Section 11 of the Classification Act sets out some broad principles the Boards are to consider in classification. These include:

- adults should be able to read, hear and see what they want
- minors should be protected from material likely to harm or disturb them
- everyone should be protected from exposure to unsolicited material that they find offensive and
- 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.\(^4\)

Regulation of mobile phone and online games—Broadcasting Services Act 1992\(^5\)

Apart from the NCS, regulation of online computer games also falls under the legislative framework for online content regulation in Australia set out in the Broadcasting Services Act 1992.\(^6\)

Broadly, the scheme places constraints on the types of online content that can be hosted or provided by internet service providers and content service providers. This is expressed in terms of

6. Online content regulation was introduced in the Broadcasting Services Amendment (Online Services) Act 1999.

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‘prohibited content’ (or ‘potentially prohibited content’). Generally, ‘prohibited content’ is content that has been classified by the Classification Board as X 18+ or Refused Classification (RC) and, in some cases, content classified R 18+ or MA 15+ where the content is not subject to a ‘restricted access system’. Under the Broadcasting Services Act, the Australian Communications and Media Authority (ACMA) investigates complaints about online content that the complainant believes to be ‘prohibited content’ or ‘potentially prohibited content’ with reference to the National Classification Code. The Classification Board will classify online content on receipt of an application for classification.

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 scheme.

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. There are financial penalties for failing to comply with a notice. Where Australian-hosted prohibited or potentially prohibited content is also considered to be sufficiently serious, the ACMA must notify law enforcement agencies.

**Basis of policy commitment**

Consumers now have access to an increasing number and range of computer games on a variety of platforms including on mobile devices and other network services. The Explanatory Memorandum argues that the NCS was not established to cater for the classification of these types of computer games. The rationale for this Bill is therefore explained as:

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7. Content is ‘potentially 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.
8. This description of categories is taken from: Australian Law Reform Commission, *Classification–content regulation and convergent media*, op. cit., paragraph 2.20. 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. For further information the reader is referred to the Australian Law Reform Commission, *National classification scheme review*, Discussion paper No. 77.
10. Ibid., paragraph 2.23.
11. See footnote 8.

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Presently, the significant majority of these games are not classified prior to being made available to the public in breach of offences contained in State and Territory enforcement legislation. The Classification Board in its present form could not sustain the administrative burden that would be imposed on it if all mobile phone and online games were submitted for classification. This would also impose a very significant financial burden on industry. Industry has expressed concern about this regulatory uncertainty and asked Government to clarify the present legal requirements for the classification of mobile phone and online games.\textsuperscript{14}

The Government further justifies the Bill on the basis that other existing protections will remain. For example the exemption of online and mobile phone games from classification will not apply to games that are likely to contain ‘refused classification’ material\textsuperscript{15} and other regulatory protections, such as those in the Broadcasting Services Act, will remain in place.\textsuperscript{16}

Recent inquiries and developments relating to classification

The Bill needs to be seen in the context of recent inquiries and other legislative developments relating to classification.

**Australian Law Reform Commission Report: Classification—Content Regulation and Convergent Media**

On 24 March 2011, the then Attorney-General, Robert McClelland asked the Australian Law Reform Commission to inquire into and report on the framework for the classification of media content in Australia. Developments in technology, media convergence and the global availability of media content informed the review.

The final report, *Classification—Content Regulation and Convergent Media*\textsuperscript{17}, tabled in Parliament on 1 March 2012, came to the broad conclusion that:

> Australia needs a new classification scheme that applies consistent rules to media content on all platforms—in cinemas, on television, on DVDs and on the internet. [...] But the scheme also

\textsuperscript{14} Ibid.

\textsuperscript{15} The National Classification Code provides that certain types of publications, films and computer games must be refused classification. Materials which are classed as ‘Refused Classification’ are described as containing material that offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should not be classified. It is effectively banned since under state and territory laws it is prohibited to sell, distribute or publicly exhibit materials which have been refused classification.

\textsuperscript{16} These are described above at pp. 3–4.

\textsuperscript{17} Australian Law Reform Commission, *Classification—content regulation and convergent media*, op. cit.

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needs to be flexible, so it can adapt to new technologies and the challenges of media convergence.”

Among its recommendations was a key proposal to create a new NCS to regulate the classification of media content, based on a new Act to be called the Classification of Media Content Act.

Specifically in relation to the classification of computer games, the ALRC made the following recommendations:

**Recommendation 6–2** The Classification of Media Content Act should provide that computer games that are:

- likely to be classified MA 15+ or higher
- likely to have a significant Australian audience and
- made and distributed on a commercial basis

should be classified before content providers sell, screen, provide online, or otherwise distribute them to the Australian public.

The Act should provide for platform-neutral definitions of ‘computer game’ and illustrative examples.

**Recommendation 9–1** The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: G, PG, M, MA 15+, R 18+, X 18+ and Prohibited [to replace the Refused Classification category]. Each item of media content classified under the National Classification Scheme should be assigned one of these statutory classification categories.

The Government is yet to respond to this Report.

**Proposed introduction of R 18+ for computer games**

Following introduction of the Bill under consideration in this Digest, the Government has more recently introduced another Bill related to the classification of computer games.

At present, the classification categories for computer games are: G (General); PG (Parental Guidance); M (Mature); MA 15+ (Mature Accompanied); and RC (Refused Classification). The effect of this being that computer games that exceed the MA 15+ classification fall into the Refused

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Classification category. In other words, there is no current classification category for computer games that are suitable only for adults.

The Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 (the R 18+ Computer Games Bill) would create an R 18+ Restricted category for computer games and would align the classification of computer games with the current R 18+ (Restricted) film classification category.

The R 18+ Computer Games Bill passed the House of Representatives on 19 March 2012 and is currently before the Senate.

Committee consideration

On 3 November 2011, the Senate referred the provisions of this Bill to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for inquiry and report by 14 March 2012. Details of the inquiry are at:


The Committee report was tabled on 9 February 2012 and stated that the Committee recommends that the Senate pass the Bill. In the Committee’s view the Bill is a reasonable and sensible interim solution until longer-term reforms for the classification of mobile device and online games are introduced. In reaching this view, the Committee agrees with the concerns raised by industry and the Director of the Classification Board, as noted by the Minister in his second reading speech, that the legal requirements and obligations for the classification of games played online and on mobile devices need to be clarified.20

Finally, the Committee recognises that the measures in the Bill are only interim measures, and that long-term reforms for the classification of mobile device and online games will be informed by the ALRC’s review of the NCS. The Committee believes that a two-year period is sufficient time for any reforms arising from the ALRC review to be considered and implemented.21

Policy position of non-government parties/independents

The Bill has bipartisan support in the Parliament. It passed the House of Representatives on 2 November 2011 and is currently before the Senate.

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21. Ibid.

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Position of major interest groups

Support for the Bill

The Committee inquiry into the Bill received six submissions. Of those, the Australian Mobile Telecommunications Association (AMTA) and Mr Bruce Arnold expressed support for the Bill.

AMTA stated:

AMTA supports the Bill as an interim measure...AMTA believes that [the Bill] reflects current industry practices which are working well. The Bill will provide industry and consumers with the necessary classification of legal and regulatory requirements.

Mr Arnold commended the Bill as a 'forward-looking and positive interim response to the challenges posed by adoption of digital technologies in an increasingly globalised environment'.

Opposition to the Bill

Submissions to the Committee inquiry from FamilyVoice Australia and the Australian Council on Children and the Media (ACCM) opposed the Bill.

FamilyVoice Australia argued that, in its view, the scope of the proposed exemption from classification for mobile device and online games is 'very broad indeed'. FamilyVoice Australia described the Bill as a 'major loosening' of classification standards for computer games available only online or on a mobile device. FamilyVoice Australia contended that '[i]n effect, this would allow such games to be readily accessible to children without any age verification being required'.

ACCM expressed concern at the proposals in the Bill to deregulate the classification of content, arguing that it is 'very difficult politically to re-regulate anything that has been deregulated', and that the practical difficulties associated with enforcing classification rules against online games is not sufficient reason to give up the rules entirely. The submission argues further and with some validity: the system [of classification of content] plays an important role in raising the community’s consciousness of the power of media experiences, and in guiding parents and others in selecting appropriate material for children and young people.

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23. Ibid., paragraph 2.2.
24. Ibid., paragraph 2.3.
25. Ibid., paragraph 2.6.
26. Ibid., paragraph 2.7.
There is sufficient evidence of media content having an influence on children’s thoughts, attitudes and behaviour to justify a comprehensive classification system. The evidence can never be conclusive, but in this as in many fields involving the healthy development of children, a precautionary approach is justified.

Our understanding is that the Bill is being proposed because of the practical difficulties associated with enforcing classification rules against online games.

From a child development perspective, such difficulties are not sufficient reason to give up on the rules entirely. No law is 100% effective, but laws remain nevertheless an important tool for reducing risks, encouraging appropriate behaviour and educating the community. 27

Arguably, parents do face a difficult task of guiding children’s exposure to all sorts of electronic information including computer games, and it would seem the Bill’s approach will not alleviate these difficulties.

Financial implications

The Explanatory Memorandum states that the amendments in the Bill have no financial impact on Government revenue. 28

Key provisions

Schedule 1—Amendments

There are two key provisions, at items 4 and 6 of Schedule 1 of the Bill. Item 4 inserts a new definition of ‘exempt computer game’ and item 6, a new definition of ‘exempt online game’ into the Classification Act. The amendments have the effect of removing the requirements for mobile phone and online games to be classified by broadening the definition of games not requiring classification.

‘Computer game’

The definition of ‘computer game’ in the Classification Act currently includes online games and mobile games. The definition will not be affected by this Bill. ‘Computer game’ is defined in section 5A of the Classification Act as:


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• a computer program and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game (subsection 5A(1))
• a computer program, data associated with a computer program or a computer program and any associated data that is capable of generating new elements or additional levels into a game (the 'original game') that is a computer game under subsection 5A(1), and is contained in a device separate from that containing the original game, is also a computer game (subsection 5A(2)) and
• a computer game does not include an advertisement for a publication, film or computer game (subsection 5A(3)).

‘Exempt computer games’

Currently, a computer game is an 'exempt computer game' if it 'forms part of, or is included in computer software for business, accounting, professional, scientific, or educational purposes' (subsection 5B(2) of the Classification Act). The new definition of ‘exempt computer game’ inserted by item 4 of Schedule 1 of the Bill is comprised of the types of 'exempt computer games' under current subsection 5B(2) and also include ‘exempt online games’. The definition of ‘exempt online games’ is inserted by item 6 of Schedule 1 of the Bill (described below).

New subsection 5B(2) of the Classification Act also confirms that applications to the Classification Board for classification of exempt computer games are not required, although they may be made.29

‘Exempt online games’

Item 6 of Schedule 1 of the Bill inserts proposed section 5C into the Classification Act to define ‘exempt online games’, which is a subset of ‘exempt computer games’.

Proposed subsection 5C(1) sets out two categories of computer games which are exempt online games:

• a computer game that is only available by means of a content service30 and can only be played on a mobile device31 onto which it has been installed (proposed paragraph 5C(1)(a)) and
• a computer game that is only available by means of a content service32, and can only be played while the player is using an internet carriage service33 (proposed paragraph 5C(1)(b)).

29. Under the Classification Act, any person may submit a computer game to the Classification Board for classification upon payment of a prescribed fee.
30. Within the meaning of Schedule 7 of the Broadcasting Services Act.
31. A mobile device means a device that is designed to run a mobile operating system (item 3 of Schedule 1 of the Bill).
32. Within the meaning of Schedule 7 of the Broadcasting Services Act.
33. Within the meaning of Schedule 5 of the Broadcasting Services Act.
**Proposed subsection 5C(2)** provides exceptions to these definitions of exempt online games. Of some significance, a computer game that contains material likely to cause the game to be ‘refused classification’ is unable to be exempt from classification.

A computer game that is classified is not an exempt online game (**proposed subsection 5C(3)**). The Explanatory Memorandum explains that exempt online games may be submitted for application or called-in for classification by the Director of the Classification Board. This section confirms that once these computer games are classified, they are no longer considered exempt online games.\(^{34}\)

Division 6 of Part 2 of the Classification Act sets out the process of application for, and grant of, certificates for unclassified films or computer games as exempt films or computer games. In applying for a certificate, applications must include, among other things, particulars of any material that could cause the film or game to be classified 'M' or a higher classification.

**Proposed subsection 5C(4)** applies Division 6 of Part 2 of the Classification Act to applications for, and grants of certificates for computer games as exempt online games, as if the references to the 'M or a higher classification' are instead references to refused classification.

**Proposed subsection 5C(5)** provides a two-year sunset clause for the exemption from classification for online games. The subsection provides that, at the end of the period of two years starting on the commencement of section 5C, a computer game is not an exempt online game.

**Concluding comments**

The Bill has bipartisan support in the Parliament. It is seen as a sensible interim solution to address the problem of an impractical and redundant classification regime unable to cope with the huge increase in volume and variety of online games.

Although there are concerned advocates who argue that de-regulation is likely to make adult material more accessible to children, the practical impact of the Bill may in fact not be that great, as it seeks to confirm what apparently is current practice of not classifying online and mobile phone games. Furthermore, as the Government argues, the framework for online content regulation under the Broadcasting Services Act will continue to provide some regulation of access to online games.

In terms of the ALRC report discussed above, the Government is still to respond. However it is of interest that a key recommendation in the report is that computer games available on all platforms, likely to be classified MA 15+ or higher; likely to have a significant Australian audience; and made and distributed on a commercial basis, should be classified. The Bill seems to move in quite a

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\(^{34}\) Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (Online Games) Bill 2011, p. 7. For example, this could occur where a person submits a computer game to the Classification Board for classification upon payment of a prescribed fee, or it could occur where the ACMA refers material to the Board for classification (see Explanatory Memorandum, p. 1).

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contrary direction, rather than making any preliminary move to implement this recommendation. The Government emphasises that the Bill is only an interim solution until the ALRC recommendations can be considered and a more comprehensive classification scheme developed. One of the six submissions to the inquiry into the Bill (ACCM) raised the concern that regulating an area which has been deregulated is a difficult task.35

A final comment relates to this Bill and its relationship to the R 18+ Computer Games Bill also before the Parliament. One question might be why the Bills were not combined, as their content and timing are closely connected. When the Bills are considered together they raise a question about the category ‘refused classification’. The Explanatory Memorandum to this Bill notes that the exemption from classification will not apply to computer games that are likely to contain ‘refused classification’ material and that existing protections against this category of material contained in Commonwealth, state and territory legislation will continue to apply. Currently ‘refused classification’ in relation to computer games is any computer games above the rating of MA+. However with the proposed introduction of a new classification of R 18+ for computer games, the number of computer games that fall into the category of ‘refused classification’ will be much smaller. This does give more weight to FamilyVoice Australia’s concern that the exemption from classification is ‘very broad indeed’.36

35. Australian Council on Children and the Media, op. cit., p. 3.

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