Australian Government
Australian Law Reform Commission

Classification—Content Regulation and Convergent Media

FINAL REPORT

ALRC Report 118

February 2012

This Final Report reflects the law as at 29 February 2012.

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

Postal Address
GPO Box 3708
Sydney NSW 2001

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

E-mail: info@alrc.gov.au
Website: www.alrc.gov.au

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.

ISBN: 978-0-9871777-3-5
Commission Reference: ALRC Report 118, 2012

Australian Government

Australian Law Reform Commission

The Hon Nicola Roxon MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

28 February 2012

Dear Attorney-General

Review of Censorship and Classification

On 24 March 2011, the Australian Law Reform Commission received Terms of Reference to undertake a review of Censorship and Classification.

On 17 November 2011, the Commission's reporting date was extended from 31 January 2012 to 28 February 2012.

On behalf of the Members of the Commission involved in this Inquiry—and in accordance with the *Australian Law Reform Commission Act 1996*—I am pleased to present you with the Final Report on this reference, *Classification—Content Regulation and Convergent Media* (ALRC Report 118, 2012).

Yours sincerely,

Professor Rosalind Croucher
President

Professor Terry Flew
Commissioner in Charge

Contents

Terms of Reference 5
Participants 7
Recommendations 11
Executive Summary 21

Part 1—Introduction 31

1. Introduction to the Inquiry 33
Introduction 33
Related inquiries 34
Scope of the Inquiry 36
The law reform process 38
Economic impact 40
Report outline 41

2. The Current Classification Scheme 47
Summary 47
From censorship to classification 47
Classification cooperative scheme 49
Broadcasting Services Act 50
Assessing the current scheme 53
The need for fundamental reform 59

3. Media Convergence and the Transformed Media Environment 63
Summary 63
Media convergence and the transformed media environment 64
Media convergence and 'broken concepts' in legislation 74

4. Guiding Principles for Reform 77
Summary 77
Context for the Reform Principles 78
Guiding Principles 80
Platform Neutrality and the Question of Media Effects 96

5. The New National Classification Scheme 101
Summary 101
The Classification of Media Content Act 102
Responses to the Discussion Paper 104
Content and content providers 106

Obligations for online content 109
The new Act and online content providers 113
The ABC and SBS 120

Part 2—A New Classification Scheme 123

6. Films, Television Programs and Computer Games 125
Summary 125
Determining what content should be classified 126
Films, television programs and computer games 130
Exemptions 141
Voluntary classification 143
Classify notices 144

7. Classification Decision Makers 147
Summary 147
Who currently classifies content? 148
Determining who should classify content 150
Content to be classified by the Classification Board 153
Industry classification 159
Checks and safeguards 170
Classification decisions database 178

8. Markings, Modifications, Time Zones and Advertising 181
Summary 181
Markings 182
Modifications 186
Packaging media content 190
New consumer advice 192
Television time-zone restrictions 193
Advertisements for films, television programs and computer games 197
Public display of media content 200

9. Classification Categories and Criteria 203
Summary 203
Classification categories 204
Consumer advice 213
Classification criteria 217
Research 226

10. Restricting Access to Adult Content 229
Summary 229
Restricting access to adult content 230
Should all adult content be classified? 238
Reasonable steps to restrict access 243
Removing mandatory restrictions on MA 15+ content 254
Young people and cyber-safety 256

11. The Scope of Prohibited Content **259**
Summary 259
Overview of the RC category 260
The current scope of RC content 262
Renaming the RC category 268
Reforming the scope of Prohibited content 269
Pilot study into community attitudes to higher-level media content 279

12. Prohibiting Content **283**
Summary 283
The obligation 284
Classifying before enforcement 287
Prohibitions offline 289
Prohibitions online 290
International cooperation 298

Part 3—Administering and Enforcing the New Scheme **301**

13. Codes and Co-regulation **303**
Summary 303
Regulatory forms 304
Factors in determining regulatory form 305
Existing industry codes 306
Codes and co-regulation 308
Industry codes and the new scheme 310

14. The Regulator **321**
Summary 321
Existing agencies 322
The Regulator 325
Functions of the Regulator 331

15. Enacting the New Scheme **341**
Summary 341
The Classification of Media Content Act 341
The classification cooperative scheme 342
Commonwealth legislative powers 344
Enacting the new Act 345
Inconsistency of Commonwealth and state laws 349
Consultation with states and territories 351

16. Enforcing Classification Laws **353**
Summary 353
Enforcement of classification laws offline and online 354
Enforcement under the classification cooperative scheme 354
Enforcement under the *Broadcasting Services Act* 357
State and territory online content regulation 359
Enforcement problems 359
Enforcement under Commonwealth law 360

Appendix 1. Agencies, Organisations and Individuals Consulted 371
Appendix 2. Key Obligations Under the New Scheme 379
Appendix 3. International Comparison of Classification and Content Regulation 381
Appendix 4. Glossary of Key Terms 395

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.

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, Acting Principal Legal Officer

Jared Boorer, Senior Legal Officer

Justine Clarke, Senior Legal Officer

Michele Reddy, Senior Policy Officer

Kathryn Nielson, Legal Officer

Librarian

Carolyn Kearney

Web Manager

Marie-Claire Muir

Interns

Nina Abbey

Adam Arnold

Katie Batty

Robert Chiarella

Catherine Farrell

Brooke Greenwood

Sean Lau

Lauren Loz

Scott McIntosh, Harvard University

Lucinda O'Dwyer

David Rowe

Jennifer Ruiz, University of Maryland

Jacqueline Serkowski

Riki Sutherland

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, Young and Well Co-operative Research Centre

Simon Bush, Chief Executive Officer, 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, Chief Executive Officer, 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, Chief Executive Officer, 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 and Community Branch, Australian Communications and Media Authority

Tim Watts, Regulatory Manager, Regulatory Affairs, Strategy and Corporate Services, Telstra

Expert Readers

Peter Coroneos, Consultant, former Chief Executive of Internet Industry Association

Nick Gouliaditis, Senior Lawyer, Australian Government Solicitor

Recommendations

5. The New National Classification Scheme

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

Recommendation 5–2 The National Classification Scheme should be based on a new Act, the 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; and

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

Recommendation 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 National Classification Scheme.

Recommendation 5–4 The Classification of Media Content Act should provide that obligations to classify or restrict access to content apply to persons or organisations who sell, screen, provide online, or otherwise distribute content to the public ('content providers').

Recommendation 5–5 The Classification of Media Content Act should provide that a 'content provider' includes non-commercial and commercial content providers. However, obligations to classify or restrict access to content would not generally apply to persons uploading content online other than on a commercial basis.

Recommendation 5–6 The Classification of Media Content Act should provide that a 'content provider' includes online content providers and content platforms that control how online content is uploaded, generated or displayed; but excludes other internet intermediaries, including application service providers, host providers and internet access providers.

Recommendation 5–7 The Classification of Media Content Act should provide that obligations in relation to Prohibited content apply to content providers and internet intermediaries, including application service providers, host providers and internet access providers.

Recommendation 5–8 The Classification of Media Content Act should provide content providers and internet intermediaries—including application service providers, host providers and internet access providers—with protection from civil proceedings in respect of anything done in compliance with the Act or industry codes approved by the Regulator.

Recommendation 5–9 The Classification of Media Content Act should provide that obligations to classify or restrict access to online content apply to any content with an appropriate Australian link. This may include content:

(a) hosted in Australia;

(b) controlled by an Australian content provider; or

(c) directed to an Australian audience.

6. Films, Television Programs and Computer Games

Recommendation 6–1 The Classification of Media Content Act should provide that feature films and television programs that are:

(a) likely to have a significant Australian audience, and

(b) 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 'feature film' and 'television program' and illustrative examples. Examples of television programs may include situation comedies, documentaries, children's programs, drama and factual content.

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

(a) likely to be classified MA 15+ or higher; and

(b) likely to have a significant Australian audience; and

(c) 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 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. 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. Providers of this content should not be exempt from obligations to take reasonable steps to restrict access to adult content.

Recommendation 6–4 The Classification of Media Content Act should enable the Regulator to approve industry codes that provide for the voluntary classification and marking of content that is not required to be classified. The Regulator should encourage the development of such codes for:

(a) computer games likely to be classified below MA 15+;

(b) magazines likely to be classified R 18+ or X 18+; and

(c) music with a strong impact.

Recommendation 6–5 The Classification of Media Content Act should enable the Regulator to issue a 'classify notice' to a content provider who provides unclassified content that the Act mandates must be classified. Such notices may relate to a specific piece of content, or for a category or class of content.

7. Classification Decision Makers

Recommendation 7–1 The Classification of Media Content Act should enable the Regulator to determine, of the content that must be classified, what content must be classified by the Classification Board. The determination should be set out in a legislative instrument.

Recommendation 7–2 The Classification of Media Content Act should provide that the Regulator, in determining the content that must be classified by the Classification Board, should have regard to matters including:

(a) the need for a classification benchmark, particularly for popular or new types of media content;

(b) the need for content to be classified by an independent decision maker;

(c) the classification of similar content in other jurisdictions;

(d) evidence of rigorous and reliable industry classification decision making;

(e) the capacity of the Classification Board to make timely classification decisions; and

(f) the cost to content providers of Classification Board decisions.

Recommendation 7–3 The Classification of Media Content Act should provide that, on commencement of the new National Classification Scheme, of the content that must be classified, the following content must be classified by the Classification Board:

(a) feature films for Australian cinema release; and

(b) computer games that are likely to be MA 15+ or higher.

Recommendation 7–4 The Classification of Media Content Act should provide that, other than media content that must be classified by the Classification Board, media content may be:

(a) classified by the Classification Board;

(b) classified by an authorised industry classifier; or

(c) deemed to be classified because it has been classified under an authorised classification system.

Recommendation 7–5 The Classification of Media Content Act should provide that industry classifiers must have completed training approved by the Regulator and be authorised by the Regulator to classify media content.

Recommendation 7–6 The Classification of Media Content Act should enable the Regulator to determine, in a legislative instrument, that certain films, television programs and computer games with a classification made under an authorised classification system, are deemed to have an equivalent Australian classification.

Recommendation 7–7 The Classification of Media Content Act should provide that in determining whether a classification system is an authorised classification system, the Regulator should have regard to matters including:

(a) the comparability of classification decision-making processes, classification categories and criteria with the Australian classification scheme;

(b) the independence and composition of decision-making bodies;

(c) the endorsement or adoption by national classification regulatory regimes;

(d) the transparency of classification decision-making processes and classification criteria;

(e) complaints and review mechanisms;

(f) public reporting of classification activities; and

(g) research and development activities.

Recommendation 7–8 The Classification of Media Content Act should enable the Regulator to develop and authorise classification decision-making instruments, such as online questionnaires.

Recommendation 7–9 The Classification of Media Content Act should provide that, in addition to classifying media content submitted for classification, the Classification Board is responsible for reviewing classification decisions, including its own, on application. Therefore the Classification Review Board would cease to operate.

Recommendation 7–10 The Classification of Media Content Act should enable the Regulator to conduct audits of industry classification decisions.

Recommendation 7–11 The Classification of Media Content Act should enable the Regulator to call in:

(a) unclassified media content for classification by the Classification Board; and

(b) deemed content or content classified by authorised industry classifiers, for review of the classification decision by the Classification Board.

The call-in power should be confined to content that must be classified or to which access must be restricted.

Recommendation 7–12 The Classification of Media Content Act should provide for civil and administrative penalties in relation to improper classification decision making. The Regulator should be enabled to:

(a) pursue civil penalty orders against content providers;

(b) issue barring notices to industry classifiers; and

(c) revoke the authorisation of industry classifiers.

8. Markings, Modifications, Time Zones and Advertising

Recommendation 8–1 The Classification of Media Content Act should provide that content providers must display a classification marking for content that must be classified and has been classified. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be accessed, and on advertising for content directed to Australian audiences.

Recommendation 8–2 The Classification of Media Content Act should provide that if classified media content is modified, so that the modified content is likely to have a different classification from the original content, the modified content becomes unclassified. The Act should not prescribe specific types of modifications that operate to declassify content.

Recommendation 8–3 The Classification of Media Content Act should provide that if classified content is changed, so that the consumer advice no longer gives accurate information about the content, then the content must be given new consumer advice, even if the content does not need to be given a different classification.

Recommendation 8–4 The Classification of Media Content Act should not mandate time-zone restrictions for broadcasting services, but these restrictions may be provided for in industry codes.

Recommendation 8–5 Advertisements for content that must be classified should continue to be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. These voluntary codes should be amended to provide that, in assessing the suitability of an advertisement for media content that must be classified, the following matters should be considered:

(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

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. Each item of media content classified under the National Classification Scheme should be assigned one of these statutory classification categories.

Recommendation 9–2 The Classification of Media Content Act should provide that classification decisions for content that must be classified, other than G content, must also be assigned consumer advice. The Classification Board should publish consumer advice guidelines as a reference for all industry classifiers.

Recommendation 9–3 The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions be made applying these criteria.

Recommendation 9–4 The Regulator's functions should include conducting or commissioning a range of research activities that consider matters such as:

(a) community standards in relation to media content;

(b) awareness of classification information;

(c) adequacy of classification categories, the classifiable elements and the impact test;

(d) content permitted in different classification categories; or

(e) alignment of classification decisions with the views of the public.

10. Restricting Access to Adult Content

Recommendation 10–1 The Classification of Media Content Act should provide that content providers should take reasonable steps to restrict access to adult content that is sold, screened, provided online or otherwise distributed to the Australian public. Adult content is:

(a) content that has been classified R 18+ or X 18+; or

(b) unclassified content that, if classified, would be likely to be classified R 18+ or X 18+.

The Classification of Media Content Act should not mandate that all adult content must be classified.

Recommendation 10–2 The Classification of Media Content Act should provide the Regulator with the power to issue 'restrict access notices' to providers of adult content. For the purpose of issuing these notices, the Regulator should be empowered to determine whether the content is adult content.

Recommendation 10–3 The Classification of Media Content Act should provide that the reasonable steps that content providers must take to restrict access to adult content may be set out in:

(a) industry codes, approved and enforced by the Regulator; and

(b) standards, issued and enforced by the Regulator.

These codes and declarations may be developed for different types of content, content providers and industries, but could include:

(a) how and where to advertise, package and display hardcopy adult content;

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

(c) how to confirm the age of persons accessing adult content online; and

(d) how to provide warnings online.

Recommendation 10–4 The Classification of Media Content Act should not require access restrictions on MA 15+ media content. Voluntary access restrictions on MA 15+ content should be developed under industry codes, for example, for cinemas and retail outlets.

11. The Scope of Prohibited Content

Recommendation 11–1 Under the Classification of Media Content Act, the 'Refused Classification' category of content should be named 'Prohibited'.

Recommendation 11–2 The Classification of Media Content Act should frame the 'Prohibited' category more narrowly than the current 'Refused Classification' category. In particular, the Australian Government should review current prohibitions in relation to:

(a) the depiction of sexual fetishes in films; and

(b) 'detailed instruction in the use of proscribed drugs'.

The Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'

12. Prohibiting Content

Recommendation 12–1 The Classification of Media Content Act should provide that content providers must not sell, screen, provide online, or otherwise distribute Prohibited content, that is:

(a) content that has been classified Prohibited; or

(b) unclassified content that, if classified, would be likely to be classified Prohibited.

Recommendation 12–2 The Classification of Media Content Act should provide that content must be classified Prohibited by the Classification Board before a person is:

(a) charged with an offence under the Act that relates to Prohibited content; and

(b) issued a notice requiring the person to stop distributing the Prohibited content, for example by taking it down from the internet.

Recommendation 12–3 The Classification of Media Content Act should enable the Regulator to notify Australian or international law enforcement agencies or bodies about Prohibited content without having the content first classified by the Classification Board.

13. Codes and Co-regulation

Recommendation 13–1 The Classification of Media Content Act should provide for the development of industry classification codes by sections of industry or persons involved in the production and distribution of media content; and for the Regulator to request that a body or association representing a particular section of industry develop a code.

Recommendation 13–2 Industry classification codes may include provisions relating to:

(a) methods of restricting access to certain content;

(b) the use of classification markings;

(c) methods of classifying media content, including by authorised industry classifiers;

(d) guidance on the application of statutory classification criteria;

(e) maintaining records, reporting classification decisions and quality assurance;

(f) protecting children from certain content;

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

(h) providing a responsive and effective means of addressing community concerns, including complaints handling; and

(i) reporting to the Regulator on the administration of the code.

Recommendation 13–3 The Classification of Media Content Act should enable the Regulator to approve an industry classification code if satisfied that:

(a) the code is consistent with statutory obligations to classify and restrict access to media content and statutory classification categories and criteria;

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

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

Recommendation 13–4 The Classification of Media Content Act should enable the Regulator to determine an industry standard if:

(a) there is no appropriate body or association representing a relevant section of industry; or

(b) a request to develop an industry code is not complied with.

Recommendation 13–5 The Classification of Media Content Act should enable the Regulator to enforce compliance with a code against any participant in the relevant section of the media content industry, where an industry classification code relates to media content that must be classified or to which access must be restricted.

14. The Regulator

Recommendation 14–1 A single agency ('the Regulator') should be responsible for regulation under the Classification of Media Content Act. 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 and providing and approving classification training;

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

(e) liaising with relevant Australian and overseas media content regulators, classification bodies and law enforcement agencies; and

(f) educating the public about the National Classification Scheme.

In addition, the Regulator's functions may include:

(g) providing administrative support to the Classification Board;

(h) maintaining a database of classification decisions;

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

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

(k) promoting media literacy and cyber-safety.

Recommendation 14–2 The Classification of Media Content Act should provide the Regulator with broad discretion whether to investigate complaints.

15. Enacting the New Scheme

Recommendation 15–1 The Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

Recommendation 15–2 The Classification of Media Content Act should express an intention that it cover the field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*.

16. Enforcing Classification Laws

Recommendation 16–1 The Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.

Recommendation 16–2 The Classification of Media Content Act should provide a flexible range of compliance and enforcement mechanisms allowing the Regulator, depending on the circumstances, to:

(a) issue notices to comply with provisions of the Act, industry codes or standards;

(b) accept enforceable undertakings;

(c) pursue civil penalty orders;

(d) refer matters for criminal prosecution; and

(e) issue infringement notices.

Recommendation 16–3 The Classification of Media Content Act should provide for the imposition of criminal, civil and administrative penalties in relation to failing to comply with:

(a) notices of the Regulator;

(b) an industry code or standard;

(c) restrictions on the sale, screening, online provision and distribution of media content;

(d) statutory obligations to restrict access to media content; and

(e) statutory obligations to classify and mark media content.

Recommendation 16–4 The Classification of Media Content Act should require the Regulator to issue enforcement guidelines outlining the factors it will take into account and the principles it will apply in exercising its enforcement powers.

Executive Summary

Contents

Background 21
- Inquiry in context 22
- Problems with the current framework 22
- The context of media convergence 23

A new National Classification Scheme 24
- Guiding principles for reform 24

Key features 24
- Platform-neutral regulation 25
- Clear scope of what must be classified 25
- A shift in regulatory focus to restricting access to adult content 26
- Co-regulation and industry classification 27
- Classification Board benchmarking and community standards 28
- An Australian Government scheme 28
- A single regulator 29

Net effect of the recommendations 30

Background

This is the first comprehensive review of censorship and classification since the ALRC report, *Censorship Procedure*, published in 1991 (ALRC Report 55). That report recommended a legislative framework that would enable the Commonwealth, states and territories to take a national approach to classification. Its recommendations formed the basis of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), and what is commonly referred to as the National Classification Scheme.

Censorship Procedure advanced classification policy in Australia by recommending a cooperative scheme between the Commonwealth, states and territories, and identified the important role to be played by an independent Classification Board and Classification Review Board. However, it was developed in a 'pre-internet' environment, when the wider implications of media convergence for content regulation generally were not yet understood.

In the context of ever greater convergence of media technologies, platforms and services, and more media being accessed from the home through high-speed broadband networks, the need for a comprehensive review of classification laws and regulations became apparent. In providing the reference for this Inquiry 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, and the needs of the community in this evolving technological environment.

The major principles that have informed media classification in Australia—such as adults being free to make their own informed media choices and children being protected from material that may cause harm—continue to be relevant and important. While a convergent media environment presents major new challenges, there continues to be a community expectation that certain media content will be accompanied by classification information based on decisions that reflect community standards.

Inquiry in context

This Inquiry was one of a number of related inquiries taking place in Australia. The Convergence Review was established through the Department of Broadband, Communications and the Digital Economy (DBCDE) in 2011 to review Australia's media and communications legislation in the context of media convergence, due to report in the first quarter of 2012.

Other significant inquiries and reviews relevant to this Inquiry included: public consultation on the introduction of an R 18+ classification for computer games; a review of measures to increase accountability and transparency for internet service provider (ISP) filtering of Refused Classification (RC) material; a Senate Committee review of Australia's classification system; inquiries into cyber-safety and outdoor advertising; the Independent Media Inquiry into newspapers and online news publications; and a proposed national cultural policy.

Problems with the current framework

A strong underlying theme of many submissions to this Inquiry was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content now available to Australians. The *Classification Act* was described as 'an analogue piece of legislation in a digital world', and there were difficulties identified in how the *Classification Act* interfaces with the *Broadcasting Services Act 1992* (Cth), which covers broadcast and online media.

Respondents drew attention to aspects of the classification and content regulation framework that are failing to meet intended goals, and that create confusion for media content industries and the wider community. Among the problems identified were:

- inadequate regulatory response to changes in technology and community expectations;
- lack of clarity about whether films and computer games distributed online must be classified;
- 'double handling' of media content, with films and television programs being classified twice for different formats (eg, 2D and 3D) and different platforms (eg, broadcast television and DVD);

- concerns that the scope of the RC category is too broad and that too much content is prohibited online, including some content that may not be prohibited in other formats, such as magazines;
- inconsistent state and territory laws concerning restrictions and prohibitions on the sale of certain media content, such as sexually explicit films and magazines;
- low compliance with classification laws in some industries, particularly the adult industry, and correspondingly low enforcement; and
- the need to clarify the responsibilities of the Classification Board and the Australian Communications and Media Authority (the ACMA) and other Australian Government agencies and departments involved with classification and media content regulation.

The context of media convergence

This Inquiry provided the opportunity to reform Australia's classification laws to meet the challenges of a convergent media environment. Developments associated with media convergence include:

- increased household and business access to high-speed broadband internet;
- the digitisation of media products and services, as seen with the rise of YouTube, Apple iTunes and other global digital media platforms;
- the convergence of media platforms and services, for both established and new media;
- the globalisation of media platforms, content and services, making nationally-based regulations more difficult to apply;
- the acceleration of innovation, characteristic of a more knowledge-based economy;
- the rise of user-created content, and a shift in the nature of media users from audiences to participants;
- greater media user empowerment, due to greater diversity of choices of media content and platforms and the increased ability to personalise media; and
- the blurring of lines between public and private media consumption, as well as the ability to apply age-based access restrictions, as more media is accessed from the home through converged media platforms.

Piecemeal regulatory responses to changes in technologies, markets and consumer behaviour have created uncertainty for both consumers and industry, and raise questions about where responsibilities lie for driving change. Current legislation is characterised by what the ACMA has described as 'broken concepts': laws built upon platform-based media regulation, that become less and less effective in a convergent media environment.

A new National Classification Scheme

Guiding principles for reform

The ALRC identified eight guiding principles for reform directed to providing an effective framework for the classification and regulation of media content in Australia. These principles underpin the 57 recommendations for reform in this Report. The ALRC considers that these principles should inform the development of a new National Classification Scheme that can more effectively meet community needs and expectations, while being more responsive to the challenges of technological change.

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

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

Key features

In this Report, the ALRC recommends a new classification scheme for a new convergent media landscape. The key features of the ALRC's model are:

- **Platform-neutral regulation**—one legislative regime establishing obligations to classify or restrict access to content across media platforms.
- **Clear scope of what must be classified**—that is feature films, television programs and certain computer games that are both made and distributed on a commercial basis and have a significant Australian audience.

- **A shift in regulatory focus to restricting access to adult content**—imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.
- **Co-regulation and industry classification**—more industry classification of content and industry development of classification codes, subject to regulatory oversight.
- **Classification Board benchmarking and community standards—**a clear role for the Classification Board in making independent classification decisions using classification categories and criteria that reflect community standards.
- **An Australian Government scheme**—replacing the current classification cooperative scheme with enforcement of classification laws under Commonwealth law.
- **A single regulator**—with primary responsibility for regulating the new scheme.

Platform-neutral regulation

A new Classification of Media Content Act should be enacted incorporating all classification obligations applying to media content, including:

- publications, films and computer games currently subject to the *Classification Act* and state and territory classification enforcement legislation;
- online and mobile content currently subject to the regulatory regime under schs 5 and 7 of the *Broadcasting Services Act*; and
- broadcast and subscription television content currently regulated under the *Broadcasting Services Act*.

Traditional distinctions based on how content is accessed or delivered are becoming less relevant. Accordingly, the three key statutory obligations recommended in this Report are 'platform-neutral'—that is, they apply to certain media content, whether the content is screened in cinemas, broadcast on television, sold in retail outlets, provided online, or otherwise distributed to the Australian public. The Report recommends platform-neutral laws for what media content must be classified, platform-neutral laws for what media content must be restricted to adults, and platform-neutral laws for what media content is prohibited.

The intention is to avoid inconsistencies manifest under the current scheme, and enable a new classification framework to be more adaptive to changes in technologies, products and services arising out of media convergence. This would also eliminate costly 'double handling' or 'double classification' of similar content on different media platforms. Further, all media content that is required to be classified would be classified according to a single set of classification categories and criteria.

Clear scope of what must be classified

The volume of media content available to Australians has grown exponentially. There are over one trillion web sites, hundreds of thousands of 'apps' available for download

to mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second). As it is impractical to expect all media content to be classified in Australia, the scope of what must be classified should be confined to feature films, television programs and higher-level computer games.

A classification obligation that applies to content must be focused on material for which Australians most need and demand classification information. Therefore, importantly, feature films, television programs and computer games should only be required to be classified if they are both made and distributed on a commercial basis and likely to have a significant Australian audience.

Laws that stipulate what media content must be classified, and who undertakes classification activities, are currently platform-based and historic. The need to classify should be based upon the nature of the content itself—including its likely audience reach—rather than being based primarily upon the platform from which it is delivered and accessed.

Obligations to classify content would not generally apply to persons uploading online content on a non-commercial basis. Internet intermediaries, including application service providers, host providers and internet access providers, would also generally be excluded from classification-related obligations other than those concerning Prohibited content.

A shift in regulatory focus to restricting access to adult content

Content providers should be required to take reasonable steps to restrict access to all adult content that is sold, screened, provided online, or otherwise distributed to the Australian public. Adult content refers to media content that has been, or if classified would be, classified R 18+ or X 18+.

This approach to adult content recognises that formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose.

The new Act should provide for essential requirements for restricting access. The various ‘reasonable steps’ that different types of content provider might be expected to take should be prescribed in industry codes and Regulator standards, approved and enforced by the Regulator.

What steps are reasonable to take to restrict access will be based upon what is appropriate for delivery platforms. Restricting access offline may be straightforward in some instances, such as the packaging of certain content in plastic, or requiring proof of age on purchase.

While the challenges are clearly greater with online content, content providers will still be expected take reasonable steps to restrict access. Some content providers may be able to issue warnings and use age-verification systems. Others may be expected to promote self-regulatory initiatives to assist consumers to manage their own access to media content, and protect children and others in their care.

Measures to restrict access to adult content are complementary to other Government and industry cyber-safety initiatives. Measures to assist parents and guardians in particular may include:

- public education about the use of parental locks and other technical means to protect children from exposure to inappropriate media content;
- digital literacy and education programs;
- use of personal computer-based dynamic content filters; and
- user reporting—or 'flagging'—of inappropriate content.

Co-regulation and industry classification

A greater role for industry in classification can allow the Government to focus on the content that generates the most concern in terms of community standards and the protection of children. The new scheme would introduce additional elements of co-regulation into the classification system.

The scheme provides for innovative and efficient classification decision-making mechanisms. Most content that must be classified under the new scheme may be classified by authorised industry classifiers, but subject to regulatory oversight and review.

The Regulator should also have the power to approve other rigorous and transparent classification decision-making systems, perhaps developed in other jurisdictions or by digital and online content distributors. Classification decisions made under an approved system could be deemed to have an equivalent Australian classification. This would facilitate the provision of Australian classification information in a media environment characterised by vast volumes of content. New classification decision-making instruments, such as comprehensive online questionnaires that incorporate Australian classification criteria, should also be developed.

The new scheme also provides for the development and operation of industry classification codes. The intention is that such industry codes will provide flexibility for different industries to comply with regulatory requirements in a manner that is suited to their particular business models and is responsive to their particular audience and consumers. Industry codes would include details on matters such as the application of classification markings, display requirements for restricted content, reasonable steps for restricting access and complaints handling.

Industry classification and the extended use of codes will assist classification regulation to be 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.

The Regulator would provide a critical 'back stop' to the scheme by providing for safeguards and oversight to ensure that the scheme is operating effectively, that industry is complying with regulatory obligations and that consumer needs and concerns are being adequately met.

Classification Board benchmarking and community standards

The Classification Board will be retained as an independent statutory body responsible for making key classification decisions and reviewing decisions. The Board, whose members are intended to be broadly representative of the Australian community, is suited to a benchmarking role and there is a high level of public confidence in the Board's decisions.

Independent decisions that reflect community standards become more important under a system that allows for more content to be classified by industry. In this context, the role of the Classification Board is particularly important. The ALRC therefore recommends that films for cinema release and computer games likely to be classified MA 15+ or above continue to be classified by the Board. It is important that independent benchmarks are established across a range of media content and classification categories.

Classification categories should be harmonised and the criteria combined so that the same categories and criteria are applied in the classification of all media content—irrespective of its form and the platform by which it is delivered or accessed. Classification criteria should also be reviewed periodically, to ensure they continue to reflect prevailing community standards. This requires comprehensive research, including a mix of quantitative and qualitative research.

One classification category that may no longer align with community standards is the 'RC' category. This category should be renamed 'Prohibited', and its scope narrowed. The Australian Government should review current prohibitions in relation to the depiction of sexual fetishes in films, and 'detailed instruction in the use of proscribed drugs'. Further, the Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'.

An Australian Government scheme

The new scheme based upon the Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme. This conclusion is dictated by the need for classification law to respond effectively to media convergence and the desirability of consistent classification laws, decision making and enforcement.

At present, 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 and low compliance with classification laws in some industries.

An important part of the rationale for replacing the existing classification scheme is to avoid such inconsistencies. The Australian Government should be responsible for the enforcement of classification laws and a regime of offences and penalties. The new Act should express an intention that it is to cover the field.

It is envisaged that consultation with the states and territories on classification matters, including enforcement, will continue to be an important element of the new National Classification Scheme.

A single regulator

A single regulator would have primary responsibility for regulating the new scheme. The Regulator would be responsible for a range of functions similar to some of those currently performed by the Classification Branch of the Australian Government Attorney-General's Department; the Director of the Classification Board; the DBCDE; and the ACMA.

The ALRC has identified advantages in having one regulator responsible for all forms of content regulation, including classification matters. These advantages are likely to increase significantly in the context of media convergence.

The Regulator's functions should include:

- encouraging, monitoring and enforcing compliance with classification laws;
- handling complaints about the classification of media content;
- authorising industry classifiers and providing and approving classification training;
- facilitating the development of industry classification codes and approving and maintaining a register of such codes;
- liaising with relevant Australian and overseas media content regulators, classification bodies and law enforcement agencies; and
- educating the public about the new National Classification Scheme and promoting media literacy more generally.

In addition, the Regulator's functions may also include:

- providing administrative support to the Classification Board;
- maintaining a database of classification decisions;
- assisting with the development of classification policy and legislation; and
- conducting or commissioning research relevant to classification.

Net effect of the recommendations

The net effect of the ALRC's recommendations in this Report would be the establishment of a new National Classification Scheme that:

- applies consistent rules to content that are sufficiently flexible to be adaptive to technological change;
- places a regulatory focus on restricting access to adult content, helping to promote cyber-safety and protect children from inappropriate content across media platforms;
- retains the Classification Board as an independent classification decision maker with an essential role in setting benchmarks;
- promotes industry co-regulation, encouraging greater industry content classification, with government regulation more directly focused on content of higher community concern;
- provides for pragmatic regulatory oversight, to meet community expectations and safeguard community standards;
- reduces the overall regulatory burden on media content industries while ensuring that content obligations are focused on what Australians most expect to be classified; and
- harmonises classification laws across Australia, for the benefit of consumers and content providers.

Part 1

Introduction

1. Introduction to the Inquiry

Contents

Introduction 33
Related inquiries 34
Scope of the Inquiry 36
The law reform process 38
Building an evidence base 38
Community consultation 38
Appointed experts 39
Economic impact 40
Report outline 41

Introduction

1.1 On 24 March 2011, the Australian Law Reform Commission (ALRC) was asked to inquire into and report on the framework for the classification of media content in Australia.

1.2 In considering the effectiveness of the National Classification Scheme, and options for reform, the ALRC was 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 was also 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 Final Report 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 2010, there have been a significant number of inquiries and reviews covering matters related to the Inquiry. In 2010, the Australian Government Attorney-General's Department (AGD) conducted a public consultation on an R 18+ classification for computer games.[1] Commonwealth, state and territory censorship ministers subsequently reached in-principle agreement on the introduction of an R 18+ classification for computer games at the July 2011 meeting of the Standing Committee of Attorneys-General (SCAG) (now the Standing Council on Law and Justice).[2] A bill to amend the *Classification* Act to establish an R 18+ classification category for computer games was introduced by the Minister for Home Affairs and the Minister for Justice, the Hon Jason Clare MP, in February 2012.

1.7 In 2010, the Department of Broadband, Communications and the Digital Economy (DBCDE) reported on a review of measures to increase accountability and transparency of the processes that would lead to certain online content being placed on the Refused Classification (RC) Content List for mandatory internet service provider (ISP) filtering.[3] Arising out of this review, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy,

---

1 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.

2 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).

3 Department of Broadband, Communications and the Digital Economy, *Outcome of Public Consultation on Measures to Increase Accountability and Transparency for Refused Classification Material* (2010).

committed the Government to completing a review of the scope of the RC category prior to introducing legislation for mandatory ISP-level filtering of RC content. This legislative change is intended to be accompanied by the suite of transparency and accountability measures, such as mechanisms for independent review of lists of blocked URLs and avenues for the review of classification decisions.

1.8 In June 2011, the Senate Legal and Constitutional Affairs References Committee released its report, *Review of the National Classification Scheme: Achieving the Right Balance*.[4] 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.

1.9 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*.[5] 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.

1.10 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*.[6] The Committee, chaired by Graham Perrett MP, made 19 recommendations relating to:

- the effectiveness of industry self-regulation by the Advertising Standards Board;
- codes of practice for outdoor advertising;
- complaints procedures for advertising content; and
- research into prevailing community standards.

---

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

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

6 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).

1.11 While the *Reclaiming Public Space* report raised issues about the effectiveness of advertising industry self-regulation, it nonetheless 'rejected the classification system as an inappropriate system for regulating outdoor advertising'.[7]

1.12 Importantly, and in parallel with the ALRC's Inquiry, the Convergence Review is being undertaken through the DBCDE, and is due to release its final report in the first quarter of 2012. The Convergence Review Committee, an independent committee chaired by Glen Boreham, was given the task of reviewing 'the operation of media and communications legislation in Australia and to assess its effectiveness in achieving appropriate policy objectives for the convergent era'.[8] The Convergence Review incorporates a statutory review of the operation of sch 7 of the *Broadcasting Services Act*.[9]

1.13 The Convergence Review Committee released a series of five discussion papers for public comment, including a paper dealing with community standards, in September 2011, and in December 2011 released an Interim Report.[10]

1.14 In September 2011, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, announced an Independent Media Inquiry, chaired by the Hon Ray Finkelstein QC, to examine the pressures facing newspapers, online publications and their newsrooms, the operation of the Australian Press Council, as well as related issues pertaining to the ability of news media to operate according to regulations and codes of practice, and in the public interest. This inquiry will report to the Government by 28 February 2012.[11]

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*.[12] While a National Classification Scheme does not directly promote cultural creativity and innovation, it may have implications for the availability of culturally diverse media content, development of new technologies and the growth of creative industries, so recommendations need to be developed with an awareness of possible cultural policy implications.

Scope of the Inquiry

1.16 This Inquiry had a potentially very broad scope, as it necessarily referred not only to a diverse and growing array of forms of media content, but also to the complex question of community standards and how they evolve over time. At the same time, the

---

7 Ibid, 36.

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

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

10 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011).

11 Department of Broadband, Communications and the Digital Economy, *Independent Media Inquiry* <www.dbcde.gov.au/digital_economy/independent_media_inquiry> at 23 January 2012.

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

ALRC was required under its Terms of Reference to complete its deliberations within a year. The scope of the inquiry therefore needed to be clearly defined.

1.17 The Terms of Reference required 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.

1.18 The Terms of Reference also required the ALRC to consider classification as it relates to online and mobile content. The regulation of media content is provided for under 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*.

1.19 In this Report, the ALRC also considered the place of television content in a new National Classification Scheme. Broadcast media is currently classified by industry, subject to co-regulatory arrangements and codes of practice established by industry bodies and approved by, or notified to, the ACMA.[13] In preparing this Report, the ALRC has been aware of the significance of television content in the lives of Australians, and the important role played by television networks in providing information about classification.

1.20 Media convergence has particularly important implications for the regulatory treatment of television. Services such as Internet Protocol television (IP TV), online 'catch-up' services, and delivery of TV content through tablet devices and mobile phones, mean that platform-based distinctions between broadcasting and the internet are also becoming harder to sustain.

1.21 In this Report, the ALRC uses the phrase 'National Classification Scheme' broadly to refer to the existing classification cooperative scheme for publications, films and computer games, together with classification-related laws applying to online and mobile content and television under the *Broadcasting Services Act*. This Report also refers to the '*new* National Classification Scheme', or 'the new scheme'. This is the scheme recommended in this Report, to be based on a new Act, the Classification of Media Content Act.

1.22 The ALRC has also discussed other media content in relation to possible classification obligations. This included areas where there are industry self-regulatory models currently in place, such as music and advertising, as well as areas where the relevance of classification principles has been more contested, such as art works, books and eBooks, and user-created content provided on a non-commercial basis.

---

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

The law reform process

Building an evidence base

1.23 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.[14] Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), 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.[15]

1.24 The process for each law reform project may differ according to the scope of inquiry, the range of key stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference—and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within a particular framework, outlined on the ALRC's website.[16]

Community consultation

1.25 The Terms of Reference for this Inquiry directed the ALRC to consult with 'relevant stakeholders, including the community and industry, through widespread public consultation'. Other stakeholders listed included the Commonwealth AGD, the DBCDE, the ACMA, the Classification Board and Classification Review Board as well as the States and Territories.

1.26 After an initial period of research and consultation, an Issues Paper was released in May 2011,[17] to raise the issues surrounding the inquiry and suggest principles which could guide proposals for reform, as well as to educate the community about the range of issues under consideration, and invite feedback in the form of submissions. The ALRC received over 2,300 submissions in response. The public submissions and an analysis using qualitative data analysis software can be viewed on the ALRC website.

1.27 The ALRC released its Discussion Paper in September 2011.[18] The Discussion Paper provided a more detailed account of the ALRC's proposals for reform, arising

---

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

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

16 Australian Law Reform Commission, *Law Reform Process* <www.alrc.gov.au/law-reform-process> at 30 November 2011.

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

18 Ibid.

out of consultations and submissions undertaken and received. The ALRC received 77 submissions in response. The public submissions can be viewed on the ALRC website.

1.28 The ALRC also undertook 63 consultations with relevant companies and industry associations, government agencies, community stakeholders, academic experts and other interested individuals, in the period from May 2011–January 2012, in Sydney, Canberra, Melbourne, Brisbane and Adelaide. In addition, there were meetings with visiting delegations from Singapore and Malaysia. A full list of consultations is provided in Appendix 1.

1.29 Internet communication tools—including an e-newsletter, blog, and online forums—were used to provide information and obtain comment. The ALRC also made use of a Facebook page and Twitter feed to provide information on relevant media reports, as well as to provide a further avenue for community engagement.

1.30 The ALRC acknowledges the contributions of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions. It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries and the ALRC records its deep appreciation for this contribution.

1.31 In this Inquiry, the ALRC also commissioned Urbis Pty Ltd to undertake a pilot study into community attitudes towards higher-level media content (content classified MA15+ and above, including RC) across films, publications, DVDs and computer games. The ALRC gratefully acknowledges the support provided by the Classification Branch of the AGD in facilitating this study.

Appointed experts

1.32 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 and the appointment of part-time Commissioners. 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 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. The Advisory Committee for this Inquiry had 17 members, listed at the front of this Report, and met in Sydney on 25 August and 15 December 2011.

1.33 In this Inquiry the ALRC was able to call upon the expertise and experience of its two standing part-time Commissioners, both judges of the Federal Court: the Hon Justice Susan Kenny and the Hon Justice Berna Collier. The ALRC was also assisted by Peter Coroneos and Nick Gouliaditis as expert readers who commented upon specific aspects of this Report.

Economic impact

1.34 Under s 24(2)(b) of its Act, the ALRC is required to have regard to the impact of its recommendations on 'persons and businesses who would be affected by the recommendations (including the economic effect, for example)'.

1.35 The economic impact of the new National Classification Scheme may be understood at three levels:

- likely impact on regulated industries;
- likely impact on government revenue and expenditure;
- likely overall impact on the Australian economy.

1.36 The likely economic impact on currently regulated media content industries is expected to be positive. Based upon the framework outlined in the Australian Government *Best Practice Regulation Handbook*,[19] the following can be identified as likely positive impacts for industry:

- reduced mandatory requirements to submit content to the Classification Board and pay classification fees;
- greater industry capacity to flexibly manage classification costs; and
- fewer legal restrictions on the distribution of content.

1.37 In addition, the greater use of co-regulatory arrangements and industry-based classification of media content is likely to reduce the time and administrative costs or 'paper burden' on businesses.

1.38 It may be that some media content providers will choose to have in-house classifiers, while others will continue to have their content classified by the Classification Board. All industry classifiers will be required to be authorised by the Regulator, and industry participants will therefore need to consider training costs and economies of scale in determining who classifies their content. However, the possible use of authorised classification instruments and authorised classification systems would also be expected to reduce the unit cost of classification decisions.

1.39 A greater role for industry codes and co-regulation will allow government agencies more time to focus their efforts on the classification and restriction of media content where there are potentially greater community concerns

1.40 To deliver an effective classification scheme, the Regulator's activities identified in this Report, including compliance and enforcement of classification laws under a co-regulatory regime, will need to be adequately funded. This is currently budget-funded through appropriations to various government agencies and departments involved in classification and media content regulation, including the AGD, the Australian Customs and Border Protection Service, DBCDE and the ACMA.

---

19 Australian Government, *Best Practice Regulation Handbook* (2010).

1.41 At the same time, a greater role for industry classification under the new National Classification Scheme will mean that government may receive less in classification fees. Decision-making by the Classification Board is currently fully cost-recovered through fees charged to applicants for classification. If only a narrow segment of industry is required to submit content to the Classification Board and pay fees set at a level to fully recover classification costs, it may be more equitable under a new scheme to recover from industry only part of the costs of making classification decisions.

1.42 Under the new scheme, it is also possible that more of the work of the Classification Board will involve classifying online media content submitted by the Regulator, in response to complaints or for the purpose of taking enforcement action. Many of these content providers are located outside of Australia and the content itself may not be legal to distribute in Australia. The cost of this work will usually not be recovered through fees charged to the content provider.

1.43 There may, therefore, be a need for more government funding of the Classification Board's ongoing classification activities. It is arguable that a public interest case could be made for increased budget funding of classification decision-making. As argued in Chapter 7, it is in the public interest to have an independent body that sets benchmarks for classification decisions. It may also be in the public interest to require the Board to classify content before enforcement action is taken, particularly with respect to Prohibited content.

1.44 The likely overall economic impact of adopting the ALRC's recommendations is hard to project. At a general level, it can be expected that a reduction in direct government regulation of media content classification, and greater application of industry codes and co-regulatory frameworks, will enhance dynamic efficiencies as part of what Deloitte Access Economics refer to as 'a policy framework that supports investment and innovation in the internet economy'.[20]

Report outline

1.45 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 recommendations of this Report.

1.46 Chapter 2 describes the historical background to current classification laws, and the framework of the current National Classification Scheme, including the classification cooperative scheme for publications, films and computer games, and classification laws as applied to broadcasting, online and mobile content under the *Broadcasting Services Act*. The roles of the AGD, 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

20 Deloitte Access Economics, *The Connected Continent: How the Internet Is Transforming the Australian Economy* (2011), 46.

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 classification scheme.

1.47 Chapter 3 outlines factors in the media environment that necessitate reform of classification law and the development of a new scheme. It identifies the range of trends that 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. The chapter also draws attention to recent work undertaken by the ACMA on 'broken concepts' in existing broadcasting and telecommunications legislation, and their relevance to media classification.

1.48 Chapter 4 identifies eight guiding principles for reform directed to providing an effective framework for the classification of media content in Australia, and the context in which the guiding principles relate to law reform and media policy. It is proposed that these principles inform the development of a new classification scheme that can best meet community needs and expectations, while being more effective in its application and responsive to the challenges of technological change and media convergence.

1.49 Chapter 5 presents the ALRC's central recommendations to establish a new scheme regulating the classification of media content, through the enactment of a new Classification of Media Content Act. Under the Act, a single agency would be responsible for regulating the classification of media content and other classification-related laws. The new Act will impose obligations to classify and restrict access to some content. Chapter 5 also explains the obligations of content providers under the new Act, including online content providers.

1.50 Chapter 6 outlines what content should be required to be classified under the new scheme. It is recommended that the question of whether something must be classified should no longer turn upon the platform on which the content is accessed, but rather on whether the content is made and distributed on a commercial basis and has a significant Australian audience.

1.51 The ALRC recommends that the following content should be required to be classified before it is sold, screened, provided online or otherwise distributed to the Australian public: feature films; television programs; and computer games likely to be classified MA 15+ or higher. However, this content should only be required to be classified if it is both made and distributed on a commercial basis, and likely to have a significant Australian audience. The classification of most other media content—for example, books, magazines, websites, music and computer games likely to be G, PG and M—should become or remain voluntary, but industry bodies should develop codes of practice that promote classification of some of this other content.

1.52 Chapter 7 outlines who should be responsible for making classification decisions and mechanisms for appropriate review and regulatory oversight of classification

activities. The ALRC recommends that the Classification Board should continue to have sole responsibility for classifying certain media content, including films for Australian cinema release and computer games likely to be MA 15+ or higher. The remaining media content that must be classified, including feature films not for cinema release and television programs, may be classified by authorised industry classifiers.

1.53 The chapter also discusses how the classification scheme may respond more flexibly to the evolving media content environment, recommending that the Regulator have powers to: determine the media content that must be classified by the Board; and determine that certain media content that has been classified under an authorised classification system may be 'deemed' to have an equivalent Australian classification. The ALRC also recommends the introduction of authorised classification instruments, such as online questionnaires that reflect Australian classification criteria.

1.54 Chapter 8 deals with laws that attach to content that must be classified—laws which prescribe how such content should be marked, packaged and advertised, and when and where this content may be screened. The ALRC recommends that the new Act should provide that, for content that must be classified, content providers must generally display a classification marking, but that the detail concerning precisely when and how such markings should appear should be provided for in industry codes approved by the Regulator. The chapter also discusses when classified content is changed in such as way that it should be reclassified, or given new consumer advice, proposing a more flexible modifications policy. The ALRC also considers the phasing out of time-zone restrictions imposed on commercial broadcasting services, in the context of the digital switchover and as parental locks become used more widely.

1.55 Chapter 9 discusses classification categories and criteria for making classification decisions. The ALRC recommends that the existing classification categories should be harmonised and classification criteria combined, in order to ensure that the same categories and criteria are applied to the classification of all media content. The objective of these changes is that all classifiers use the same classification tools to make decisions, so that consumers can be assured of receiving clear and consistent classification information that has the same meaning no matter what the media content or the platform from which it is accessed.

1.56 The ALRC recommends the following statutory classification categories for uniform application across all media content: G, PG, M, MA 15+, R 18+, X 18+ and Prohibited. This recommendation involves several changes, including: the abolition of the publications-specific classifications, 'Unrestricted', 'Category 1 Restricted' and 'Category 2 Restricted'; the abolition of the MAV 15+ and AV classifications used by some television broadcasters; and renaming of the RC category as 'Prohibited'.

1.57 Chapter 10 discusses 'adult content' (media content that has been, or is likely to be, classified R 18+ or X 18+) and how content providers will be expected to take reasonable steps to restrict access to the adult content they distribute to the Australian public. The R 18+ and X 18+ classifications are high thresholds, but when the thresholds are met, the ALRC recommends that such content should be restricted across all platforms, both online and offline. While it is acknowledged that restricting

access to this content presents difficulties online, the ALRC considers that providers of this content should have some obligation to try to warn potential viewers and help prevent minors from accessing it, irrespective of the platform used to deliver the content.

1.58 The chapter reviews various methods of restricting access, noting that some methods may only be suitable for some content providers. It is also noted that protecting minors from adult content will continue to rely to a significant degree upon parental supervision and the effective use of PC-based filters and parental locks, and promoting the use of these tools may be one important way content providers can comply with their statutory obligation to take reasonable steps to restrict access to adult content. The ALRC recommends that methods of restricting access to online and offline content should be set out in industry codes and Regulator standards, enforced by the Regulator.

1.59 Chapter 11 discusses the scope of the current RC category and the legislative framework defining RC content. Under the current framework, RC content is essentially banned, and its sale and distribution is prohibited by Commonwealth, state and territory enforcement legislation. The ALRC recommends that, under the Classification of Media Content Act, the RC category should be named 'Prohibited', to better reflect the nature of the category. The ALRC also recommends that the Classification of Media Content Act should frame the 'Prohibited' category more narrowly than the current RC category, and suggests a range of possible changes to the existing criteria, that government might consider.

1.60 Chapter 12 discusses prohibitions on the distribution of Prohibited content, including the existing mechanisms both 'offline' and 'online'. The ALRC recommends that the Classification of Media Content Act should provide that content providers must not distribute Prohibited content (whether so classified or likely to be so classified). The ALRC also recommends that content must be classified Prohibited by the Classification Board before a person can be charged with a relevant offence under the Act or issued a notice to stop distributing the content. Further, the ALRC recommends that the Act should enable the Regulator to notify Australian or international law enforcement agencies or bodies about Prohibited content without having the content first classified by the Classification Board. The chapter also discusses voluntary and mandatory internet filtering, and debates about the scope of Prohibited content online.

1.61 In Chapter 13, the ALRC recommends that the Classification of Media Content Act should provide for the development and operation of industry classification codes, consistent with statutory obligations to classify and restrict access to media content and with statutory classification categories and criteria. The chapter examines the possible processes for the development of industry classification codes, and recommends mechanisms for the approval and enforcement of codes by the new Regulator.

1.62 Chapter 14 discusses the establishment of a single Regulator with primary responsibility for regulating the new classification 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 reviewing decisions.

1.63 Chapter 15 discusses the legislative and constitutional basis for the existing classification cooperative scheme and the *Broadcasting Services Act*. The ALRC recommends that the new Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme.

1.64 Chapter 16 discusses enforcement of classification laws under the classification cooperative scheme. While the enforcement of classification laws has primarily been 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. The ALRC concludes that the Australian Government should be responsible for the enforcement of classification laws and makes recommendations for a regime of offences and penalties.

2. The Current Classification Scheme

Contents

Summary 47
From censorship to classification 47
Classification cooperative scheme 49
The Classification Board and the Classification Review Board 49
Broadcasting Services Act 50
Broadcasting industry codes and standards 50
Online content 51
Internet industry codes 52
Assessing the current scheme 53
Positive aspects of the current scheme 54
Negative aspects of the current scheme 56
The need for fundamental reform 59

Summary

2.1 This chapter describes the historical background to current classification laws, and the framework of the current National Classification Scheme, including the classification cooperative scheme for publications, films and computer games, and classification laws as applied to broadcasting, online and mobile content under the *Broadcasting Services Act 1992* (Cth). 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.

From censorship to classification

2.2 The history of censorship and classification in Australia has been marked by a general shift away from direct censorship by government authorities prior to the 1970s, towards classification of the broad range of media content.[1]

---

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).

2.3 Censorship is used here to refer to the outright banning of media content on moral or other grounds. The primary purpose of classification, by contrast, is to provide prior information to prospective consumers as to the nature of media content. In some instances, classification also entails obligations to restrict access, as with the marking of content which indicates that it is only lawfully available to adults. In other instances, classification may also entail advice as to the suitability of such content to people within particular age groups, or recommendations as to how it should be consumed, particularly by children.

2.4 A key moment in the history of classification policy in Australia was the landmark 1968 case *Crowe v Graham*, which involved the interpretation of 'obscene' and 'indecent' under the 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]

2.5 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 banning of material as the exception. Underpinning the classification framework has been the concept of the 'reasonable adult' which informs classification decision making.

2.6 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]

2.7 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]

---

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].

Classification cooperative scheme

2.8 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);
- Guidelines for the Classification of Publications 2005 (Cth); and
- Guidelines for the Classification of Films and Computer Games (Cth).

2.9 The cooperative classification scheme is underpinned by an Intergovernmental Agreement on Censorship made between the Commonwealth and all states and territories (the Intergovernmental Agreement). This agreement confirms that certain changes to the scheme, such as amendments to the National Classification Code and classification guidelines, must be considered and agreed to by Censorship Ministers.[5]

2.10 As the National Classification Scheme is overseen by Australian Government and state and territory Censorship Ministers, classification matters are dealt with by the Standing Council on Law and Justice (SCLJ).[6] The SCLJ is a national ministerial council, whose members are the Attorney-General of Australia, the state and territory Attorneys General and the New Zealand Minister of Justice; Norfolk Island has observer status at SCLJ meetings.[7] Censorship Ministers generally meet twice a year, as part of the SCLJ to discuss classification policy and legislative issues and the operation of the scheme

2.11 The Federal Attorney-General's Department provides administrative services to the Classification Board and Classification Review Board and supports the Censorship Ministers in their administration of the National Classification Scheme. The Attorney-General's Department has overall responsibility for Australian classification policy.

The Classification Board and the Classification Review Board

2.12 The Classification Board is the primary body classifying films, publications and computer games in Australia. The Classification Board may comprise up to 30 members, and currently has 12 members, including a Director and Deputy Director. The Governor-General of Australia appoints all members for either full or part-time appointments, having regard to ensuring that the Classification Board 'is broadly representative of the Australian community'.[8] Currently, members are appointed for

---

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 Previously known as the Standing Committee of Attorneys-General.

7 Australian Attorney-General's Department, *Standing Council on Law and Justice* <www.ag.gov.au/www/agd/agd.nsf/Page/CommitteesandcouncilsMinisterialcouncils_StandingCommitteeofAttorneysGeneral> at 23 January 2012.

8 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 48.

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, with classification carried out largely on a cost recovery basis.

2.13 The Classification Review Board is an independent body comprised of part-time members who review 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 Classification 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.[9]

Broadcasting Services Act

2.14 The *Broadcasting Services Act* came into force in 1993, replacing the *Broadcasting Act 1942* (Cth). The Act contains an objects section that states the goals and principles of broadcasting policy. It also contains a statement of regulatory policy, expressing a commitment to accommodating technological change and the development of new services, and 'enabling public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens' on regulated industries and services.[10]

2.15 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.

Broadcasting industry codes and standards

2.16 In developing classification standards for television programs, broadcasters are required under pt 9 of the *Broadcasting Services Act* to take account of:

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

2.17 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

9 Classification Review Board, *Annual Report 2009–10*, 62.
10 *Broadcasting Services Act 1992* (Cth) ss 3, 4.

Australian 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 13.

2.18 The *Broadcasting Services Act* also mandates time-zone restrictions for commercial television broadcasting licensees and community television broadcasting licensees.[11] These require that films classified as Mature (M) may be broadcast only between the hours of 8:30 pm on a day and 5:00 am on the following day, or between the hours of noon and 3:00 pm on any day that is a school day. It is also required that films classified as MA 15+ may be broadcast only between the hours of 9:00 pm on a day and 5:00 am on the following day. Under the codes of practice, these time-zone restrictions also apply to television programs with the same classifications. This statutory requirement does not apply to the digital multi-channels or subscription broadcasting services.

Online content

2.19 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.[12]

2.20 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. This is expressed in terms of 'prohibited content'.

2.21 Schedule 7 defines 'prohibited' or 'potentially prohibited' content.[13] 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'. 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.

2.22 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.

---

11 Ibid pt 9 s 123(3A).

12 Overviews of online content regulation in Australia can be found in 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); and K Crawford and C Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011), 53–57.

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

2.23 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.[14]

2.24 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.[15] The ACMA must issue an interim notice for Australian-hosted potential prohibited content and apply to the Classification Board for classification of the content.[16] Content hosts must undertake the action required by the notice by 6:00pm the next business day, and financial penalties apply for failing to comply with a notice.[17] Where Australian-hosted prohibited or potential prohibited content is also considered to be sufficiently serious, the ACMA must notify law enforcement agencies.

2.25 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 of the *Broadcasting Services Act*.[18] The filters are made available by ISPs 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

2.26 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.

2.27 Under sch 5, the matters that must be dealt with in industry codes for ISPs 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.[19]

2.28 Under sch 7, the matters that must be dealt with in 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

14 Ibid sch 7 cl 43.
15 Ibid sch 7 cls 47, 56, 62.
16 Ibid sch 7 cl 47(2)–(5).
17 Ibid sch 7 cl 53.
18 Ibid sch 5 cl 40.
19 Ibid sch 5 cl 60.

safety issues; and assisting parents to supervise and control children's access to online content.[20]

2.29 In accordance with schs 5 and 7, the Internet Industry Association (IIA) has developed two industry codes—the Internet and Mobile Content Code[21] and the Content Services Code.[22] 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.

2.30 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'.[23]

Assessing the current scheme

2.31 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 an 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.

2.32 In the Australian Public Service Commission's paper, *Smarter Policy: Choosing Policy Instruments and Working with Others to Influence Behaviour*, 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.

---

20 Ibid sch 7 cls 81–82.

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

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

23 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.[24]

2.33 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

2.34 Through its consultations and submissions, the ALRC found that positive aspects of the current classification scheme included:

- well understood classification categories and markings;
- high levels of public awareness and familiarity with the classification scheme;
- statutory independence of the Classification Board and the Classification Review Board; and
- promptness of the Classification Board in classifying media content.

2.35 The ALRC also found strong support for the co-regulatory arrangements that had operated in broadcast and subscription television under the *Broadcasting Services Act*.

2.36 Prior to the establishment of the cooperative scheme in 1995, the complex network of Commonwealth, state and territory laws could sometimes result in the classification of a single film involving 13 pieces of legislation across various jurisdictions.[25]

2.37 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. He proposed that because of 'the investment by Government and industry over many years to inform media consumers', the latest 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 1990s.[26]

2.38 Under the current system, the Classification Board typically makes over 7,000 decisions within prescribed time limits every year, and few of these decisions attract

---

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

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

26 J Dickie, *Submission CI 582*.

controversy.[27] Commentators have noted that distributors generally have realistic expectations about eventual classifications, particularly for films and DVDs.[28]

2.39 The public generally knows and understands the current classification system. In a 2005 survey undertaken by the Office of Film and Literature Classification, virtually all who responded were familiar with the classification system for film and DVDs, and the vast majority believed that classification symbols were useful.[29]

2.40 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.

2.41 A co-regulatory framework has now operated in broadcast and subscription television since the 1990s, and it has strong support from the industries involved. In its submission in response to the ALRC's Issues Paper, Free TV Australia observed that the level of complaints received about commercial television program classification and content were very low relative to the amount of material broadcast and the audience size, and that very few complaints led to subsequent investigations by the ACMA or evidence of breaches of the classification guidelines.

> 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.[30]

2.42 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.[31]

---

27 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.

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

29 Office of Film and Literature Classification, *Classification Study* (2005), 6, 17, 32.

30 Free TV Australia, *Submission CI 1214*.

31 ASTRA Subscription Television Australia, *Submission CI 1223*.

2.43 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 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.[32]

Negative aspects of the current scheme

2.44 Stakeholders have identified aspects of the current classification and content regulation framework that have become dysfunctional, are failing to meet intended goals, and create confusion for industry and the wider community.

2.45 Inconsistencies exist in relation to content permitted across different media platforms and content that must be classified under different regulatory frameworks. An often cited anomaly has been the treatment of computer games, as compared to films and publications, with the absence of an R 18+ classification for computer games.[33] This arose out of concerns that existed in 1994 about the possible effects of interactivity, and the underlying assumption that the primary consumers of computer games are children.

2.46 Another problem of the current scheme is the pervasive 'double handling' of media content. Feature films classified for cinematic release need to be classified again when released on DVD, because the content has been 'modified' by adding 'extras'—even if the final classification is often the same. Films are also classified again before they are broadcast on television, and classified twice if they are released in both 2D and 3D versions. Television programs that are classified when initially broadcast have to be reclassified by the Classification Board when released on DVD. This 'double-handling' is costly to media content industries, time consuming for the Classification Board, and diverts resources from other areas of potentially greater public concern.

2.47 The *Classification Act* provides that Commonwealth, state and territory ministers must unanimously agree to amendments to the National Classification Code and classification guidelines. The Intergovernmental Agreement is premised upon the understanding that 'in relation to the Code and the classification guidelines, the Commonwealth, and the Participating States are equal partners and that the policy on

---

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

33 During the course of this Inquiry, the Australian Government, state and territory censorship ministers agreed to introduce an R 18+ classification for computer games. A bill to amend the *Classification Act* to establish an R 18+ classification category for computer games was introduced by the Minister for Home Affairs and Justice, Jason Clare MP, in February 2012.

these matters is derived from agreement between all jurisdictions'.[34] Critics argue that this process is time consuming and poorly designed to deal with significant changes in technology and community expectations. For example, agreement among the Commonwealth, states and territories over the introduction of an R 18+ classification for computer games took over a decade.

2.48 While the classification cooperative scheme addressed some of the previous anomalies between 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 and not online. The states also have different regulations relating to restricted publications and the sale and the display of R 18+ films. The 'grey market' in adult publications and DVDs is estimated to be worth about $20–30 million a year.[35] The significance of this market becomes even greater as adult content migrates to the internet, and is distributed on an international basis.

2.49 There are also significant differences in enforcement and penalty 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.

2.50 The relevance of jurisdictional differences between states and territories diminishes significantly in the context of media convergence and the blurring of boundaries between physical 'hard copy' and online media, as well as the shift of entertainment media online. The Victorian Government observed that:

> Treating identical entertainment media differently based on the media platform on which it is viewed or played (ie creating different regulatory obligations for a film that is rented from the local video shop compared to a film that is downloaded and viewed on a mobile tablet device) creates confusion, inconsistencies and inefficiencies ... Because the National Classification Scheme (NCS) primarily aims to regulate media content in a commercial context, most industry bodies captured by the NCS distribute, sell or exhibit material nationally. Jurisdictional differences have the effect of creating significant compliance burdens on such industry groups that are then required to comply with eight different regulatory frameworks. Unnecessary complexity inevitably leads to higher rates of non-compliance and increases costs to business.[36]

2.51 There is evidence of considerable, and growing, non-compliance with laws concerning the distribution of incorrectly marked adult content, unclassified adult content and X 18+ classified content. In particular, there is concern about the refusal on the part of distributors to submit such content to the Board for classification or to comply with call in notices. It has also been noted that current resources have been insufficient to effectively investigate and prosecute breaches.[37]

---

34 *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), recital C.

35 Eros Association, *Submission CI 1856*.

36 Victorian Government, *Submission CI 2526*.

37 See 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).

2.52 The scope of the current RC category has been identified as a problem with the current scheme. Problems have been identified with the disparate range of material that may be RC and the extent to which current prohibitions align with community standards.

2.53 As it currently stands, RC incorporates 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 not necessarily illegal to possess—for example, 'gratuitous, exploitative or offensive depictions of sexual activity accompanied by fetishes or practices which are offensive or abhorrent'.[38] A number of submissions to this Inquiry argued that these are distinct categories of material, and should be treated differently.

2.54 The RC category also covers material that 'promotes, incites or instructs in matters of crime or violence'.[39] This means that material relating to drug use, shoplifting, graffiti or euthanasia could potentially be classified RC. While almost all submissions accepted the need for some forms of content to be banned outright (eg, material advocating murder, rape or terrorist acts), many considered the current RC category to be overly broad, too ambiguous in its application, and problematic in its application in the online environment.

2.55 It has also been argued that more content may be prohibited online than in other media formats. Under the *Broadcasting Services Act*, certain online publications are prohibited if they have been classified Category 1 Restricted or Category 2 Restricted.[40] Dr Gregor Urbas and Mr Tristan Kelly observed that,

> 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.[41]

2.56 The relationship between classification laws and the separate regulation of online content under the *Broadcasting Services Act* is problematic. For example, providing online content, without breaching the *Broadcasting Services Act*, may nevertheless breach classification enforcement legislation that, for example, prohibits the distribution of unclassified films and computer games. These enforcement provisions may apply to online content because the definitions of 'film' and 'computer game' in the *Classification Act* are broad, and not confined to content on specific media, such as DVDs or other data storage devices.[42]

2.57 The *Broadcasting Services Act* provisions regulating online content have been described as 'highly complex and confusing legislation that is almost incomprehensible'[43] and legally uncertain. Telstra pointed out that, where content is assessed under sch 7, the legislation may involve a costly 'double classification' obligation, which disadvantages Australian online content providers.

---

38 *Guidelines for the Classification of Films and Computer Games* (Cth).
39 *National Classification Code 2005* (Cth) cls 1–4.
40 *Broadcasting Services Act 1992* (Cth) sch 7, cl 20(2).
41 G Urbas and T Kelly, *Submission CI 1151*.
42 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 5, 5A.
43 I Graham, *Submission CI 1244*.

> 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 at a major competitive disadvantage to overseas based content providers who would not be subject to these obligations.[44]

2.58 Lack of clarity in responsibilities relating to the regulation of online and offline media content also manifests itself in an uncertain relationship between the ACMA as a regulator of media content online and the Classification Board as a classification decision-making body. A complaints-based approach to content online, and separate statutory requirements to classify other media content offline, generates inconsistencies of treatment across media platforms.

The need for fundamental reform

2.59 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.[45] The ALRC sought community input on the question of whether incremental 'fine tuning' of the National Classification Scheme was appropriate, or whether more fundamental reform was required.

2.60 Most stakeholders to this inquiry advised the ALRC that the National Classification Scheme requires fundamental reform in order to address the challenges of a convergent media environment. The current scheme was described as 'an analogue piece of legislation in a digital world'[46] that has failed to respond to the challenges of media convergence.

2.61 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 objective of developing a new classification framework for the modern media environment.[47]

---

44 Telstra, *Submission CI 1184*.

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

46 Australian Publishers Association, *Submission CI 1226*.

47 Telstra, *Submission CI 1184*.

2.62 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.[48]

2.63 SBS questioned the continued relevance of a 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.[49]

2.64 Google observed that there has been a shift from 'vertical media silos' and stand-alone media platforms, to what it 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.[50]

2.65 Analysis of the responses to the Issues Paper was also informed by text analysis software that demonstrated considerable support for the view that the development of a new classification framework was required for Australia, rather than continuing to modify the existing framework.[51]

2.66 In the *Convergence Review: Interim Report*, the Convergence Review Committee argued that

> Australia would benefit from a new policy framework that reflects the vitality of services provided on new and existing communications infrastructure. There should

---

48 Australian Home Entertainment Distribution Association, *Submission CI 1152*.

49 SBS, *Submission CI 1833*.

50 Google, *Submission CI 2336*.

51 See Australian Law Reform Commission, *Responses to ALRC National Classification Scheme Review Issues Paper (IP40) - Graphical Representation of Submissions* (2011) <http://www.alrc.gov.au/publications/responses-IP40> at 26 January 2012.

> be a flexible approach to regulation that can keep pace with these opportunities. Policy and regulatory levers will need to promote open access, competition and innovation. They will also need to encourage a range of voices and provide incentives and government support to ensure that Australian and local content are still widely available in a global environment.[52]

2.67 The Senate Legal and Constitutional Affairs References Committee, in its 2011 report *Review of the National Classification Scheme: Achieving the Right Balance*, argued that 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.[53]

2.68 While a convergent media environment presents major new challenges for the National Classification Scheme, there continues to be an important role for the classification of media content in Australia, and community expectations are that media content will continue to have classification markings based on well understood classification categories.

2.69 The ALRC considers 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—to continue to be relevant. However, the framework that underpins these principles is in need of reform.

2.70 In the context of media convergence, there is a need to develop a framework that focuses upon media content rather than delivery platforms, and which 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.

2.71 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 all media content classification, as well as revised regulatory arrangements.

2.72 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, while regulatory requirements are unclear in relation to other media.

---

52 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), iv.

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

2.73 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 63
Media convergence and the transformed media environment 64
- Increased access to high-speed broadband internet 66
- Digitisation of media products and services 66
- Convergence of media platforms and services 67
- Globalisation of media platforms, content and services 68
- Acceleration of innovation 69
- Rise of user-created content 70
- Greater media user empowerment 71
- Blurring of public/private and age-based distinctions 73

Media convergence and 'broken concepts' in legislation 74

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 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.

3.2 The chapter also draws attention 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.

3.3 The current classification scheme is inherently difficult to adapt to a convergent media environment, in part due to the different content regulation frameworks which results in a fragmentation of administrative oversight, and also because of the division of authority between the Commonwealth, the states and territories. Piecemeal responses to changes in technologies, markets and consumer behaviour have compounded existing ambiguities, creating uncertainty for both consumers and industry.

Media convergence and the transformed media environment

3.4 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]

3.5 The ACMA defines media convergence as 'the phenomenon where digitisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences'.[2]

3.6 The ACMA identifies a key consequence of convergence for consumers as being a substantial increase in 'the availability of media content online—from broadcasters, news organisations, social media sites, iTunes and YouTube, to name a few of the main media sources—on an increasing array of connected devices and screens. The choice of devices for accessing the internet and 3G and wireless broadband networks is also giving users flexibility in how and where they consume media'.[3]

3.7 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.[4]

---

1 T Flew, *New Media: An Introduction* (3rd ed, 2008), 22.
2 Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 7.
3 Ibid.
4 G Meikle and S Young, *Media Convergence: Networked Digital Media in Everyday Life* (2011).

3.8 While technological change is a constant feature of modern economies, the changes associated with convergence, digitisation 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.[5]

3.9 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).[6]

3.10 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.

> 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.[7]

3.11 The *Convergence Review* has also drawn attention to the extent to which convergence is having a transformational impact on media and communications industries, 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.[8]

---

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

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

7 Ibid, 199.

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

3.12 The expectation of major changes to the architecture of media regulation arising from convergence also came through strongly in responses to the Issues Paper.[9] In particular, many respondents pointed to the need for a more platform-neutral approach to media content regulation and classification that would be based upon content rather than on delivery platform. Respondents questioned assumptions that one medium has more effect on media users than another and should therefore be subject to more stringent forms of content regulation.

3.13 The concept of platform neutrality is therefore an important one in the context of media convergence. It entails a shift away from platform-specific modes of content regulation, premised upon the structural separation of industries and content into particular technological 'silos', that have been the basis of media policy in Australia and elsewhere:

> Whilst technology has eroded the traditional divisions between free-to-air (FTA) television and the internet, newspapers and websites, radio and streaming services, our policy and regulation is still based on the industry and service structures of the early 1990s.[10]

Increased access to high-speed broadband internet

3.14 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.

3.15 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.[11]

Digitisation of media products and services

3.16 Associated with rapidly increasing internet usage by consumers and business is the digitisation of all media products and services. It is estimated that 60 hours of video are uploaded every minute onto YouTube, and four billion videos are viewed every day

---

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

10 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), iv.

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

worldwide from that site alone.[12] In Australia, there are an estimated six million YouTube users, watching over 200 million videos per month. The Apple iTunes store now sells almost 10 million songs per day, making it by far the major music retailer worldwide.

3.17 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 valued at about $80 billion in 2010.[13]

Convergence of media platforms and services

3.18 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 all rank among the top 25 Australian websites in terms of site visits, and an estimated 4.35 million users per month access content from at least one of these sites.[14] For all of these media organisations, their digital content services are now very much at the heart of their news operations, and it no longer makes sense to maintain platform-specific organisational practices.

3.19 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.[15]

3.20 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;

---

12 News.com.au, *YouTube reaches 4 billion views per day: 60 hours of video uploaded per minute* <www.news.com.au/technology/youtube-reaches-4-billion-views-per-day-60-hours-of-video-uploaded-per-minute/story-e6frfro0-1226251969116#ixzz1mDE7O5XG> at 24 January 2012.

13 Deloitte Access Economics, *The Connected Continent: How the Internet Is Transforming the Australian Economy* (2011).

14 Data taken from Alexa website <http://www.alexa.com/topsites/countries/AU> at 19 July 2011. The top five online news sites were news.com.au, ninemsn.com.au, smh.com.au, abc.net.au and theage.com.au.

15 Telstra, *Submission CI 1184*.

- technological changes generate new challenges for maintaining technology-neutral or network-neutral media regulations;
- 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.[16]

3.21 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.[17]

Globalisation of media platforms, content and services

3.22 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'.

3.23 At the same time, local audiences have frequently displayed a preference for culturally relevant local media content where it is available.[18] In the Australian context, television ratings data consistently show that locally-produced programs attract the largest TV audiences.[19]

3.24 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 content distributors such as YouTube, and media platforms such as Apple iTunes and Android Market, that sit across national boundaries.

---

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

17 Ibid, 18.

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

19 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*-while programs that were topping the TV ratings included local productions such as *Winners and Losers*, *Masterchef* and *Australia's Got Talent*. 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.

3.25 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 they operated as multinational corporations. In describing the resulting internationalisation of content distribution in relation to the mobile applications ('apps') market, the ACMA observed that 'the mobile applications market functions on both a national and global scale, and this has implications for regulation in Australia ... App stores ... are all based overseas ... [and] app developers are also based in multiple international jurisdictions.'[20]

3.26 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'.[21]

3.27 This uncoupling of global internet-based media and national legal and regulatory systems has important implications for all forms of media content regulation in Australia, as is the case worldwide. As 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.[22]

Acceleration of innovation

3.28 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.[23]

3.29 In discussing the rise of the knowledge-based economy, 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. David and Foray estimate that the stock of intangible capital first exceeded that

---

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

21 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.

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

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

of tangible capital in the United States in 1973, and has continued to grow since then.

- 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.[24]

3.30 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.[25]

Rise of user-created content

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

3.32 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.[26] 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'.[27]

3.33 The rise of user-created content is associated with broader trends away from a 20th century mass communications model, characterised by large-scale distribution, media content largely produced and distributed by media professionals, and a clear distinction between media producers and consumers. The emergent 21st century framework is one of convergent social media, characterised by dramatically reduced barriers to user participation through easy-to-use Web 2.0 technologies, and the resulting blurring of the producer/consumer distinction as there is ubiquitous user-created content accessible across multiple media platforms.[28]

---

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

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

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

27 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).

28 T Flew, *The Creative Industries, Culture and Policy* (2012), 165.

3.34 The OECD identified user-created content as a 'significant disruptive force ... [that] creates both opportunities and challenges for established market participants and their strategies', further arguing that:

> 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.[29]

3.35 The OECD also referred 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 '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.[30]

3.36 This presents a new challenge for media classification policy, of how to design regulations that distinguish between content that is produced by large-scale organisations on a commercial basis, and user-created content. The Australian Competition and Consumer Commission (ACCC) has observed that any definition of media content for purposes of classification:

> would need to be carefully drafted to ensure that other types of online audiovisual content (such as user-generated, semi-professional content and short-duration clips) are not inadvertently captured by ... the new Act.[31]

3.37 The importance of distinguishing between commercial media content and user-created content for the purposes of classification was raised in a number of individual and organisational submissions in response to DP77.[32] For example, the Arts Law Centre of Australia noted the importance of making a distinction between 'films and television programs produced on a commercial basis' and 'user-generated content media created primarily for non-commercial purposes'.[33]

Greater media user empowerment

3.38 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 media. 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.

---

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

30 Ibid, 12.

31 Australian Competition and Consumer Commission, *Submission CI 2463*.

32 This issue was raised by Lin, *Submission CI 2476* and *CI 2525*; I Graham, *Submission CI 2507*; J Trevaskis, *Submission CI 2493*; and A Hightower, *Submission CI 2511*.

33 Arts Law Centre of Australia, *Submission CI 2490*.

3.39 Professor 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.[34]

3.40 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.[35] 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. Deloittes has observed that PVR penetration among television owners in the United States and United Kingdom will exceed 50% during 2012.[36]

3.41 The significance of PVRs is that they enable households to access programs of their choice that are 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 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.

3.42 This is not to say that traditional television viewing habits will disappear. Indeed, Deloitte has observed that television's 'super media' status remains strong.[37] As well as commanding the largest share of media consumption and advertising revenue, television is a significant driver of other media content creation. Television celebrities feature prominently in book sales; books by chefs who have been on television out-sell those of chefs who have not; television programs have significant flow-on effects for the children's toy market; and many of the best selling music artists had their first public exposure on TV talent contests. Moreover, they argue that:

> Despite the sale of tens of millions of television sets that offer a form of built-in search capability for television programming, the vast majority of viewing will be

---

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

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

36 Deloitte, *Technology, Media & Telecommunications Predictions 2011* (2011), 22.

37 Ibid, 20.

> delivered on a traditional 'pushed' basis ... Although today's viewers may value the ability to pull content, pushed content remains their default choice.[38]

3.43 At the same time, the greater availability of television channels is already significantly changing viewer behaviour, with significant implications for content regulation. In December 2011, the five main free-to-air television channels accounted for 54.9% of the capital city TV viewing audience, the 10 digital channels accounted for 26.5%, and the 200+ pay TV channels accessible through FOXTEL and AUSTAR for 18.6%.[39]

3.44 While the current time-zone based restrictions on TV content apply most strongly to the main free-to-air channels, it is now the case that 45% of TV viewing is not occurring on these stations.

3.45 Moreover, the figures do not include 'catch up' online services which the TV networks operate, such as ABC iView, Yahoo! 7 TV, ninemsn video, TEN Online, and SBS On Demand.

3.46 In May 2011, ABC iView had over one million visitors and 3.3 million visits to the service, amounting to an 84% increase on the figures 12 months previously.[40] Individual programs such as *Angry Boys* recorded over one million pays during 2010–11, a figure almost equal to its five-city average audience share. Time-zone based restrictions are impossible to apply to such online services.[41]

3.47 Such trends can be expected to be accelerated by the digital switchover: as of September 2011, 82% of Australian households had digital television, and it is expected that the full switchover to digital TV will be completed by the end of 2013.[42] The rollout of the National Broadband Network (NBN) will also make internet TV services (IPTV) available to a much wider range of Australian households, as well as enabling greater use of online catch-up TV services.

Blurring of public/private and age-based distinctions

3.48 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 the media which has been publicly available or distributed (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 a 1976 report into Australian broadcasting, it was 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

38 Ibid, 24.
39 G Dyer, 'Viewers turn to digital channels' <www.crikey.com.au/2011/12/08/viewers-turn-to-digital-channels/> at 8 December 2011.
40 Australian Broadcasting Corporation, *Join the Conversation, Annual Report 2010-2011*, 55.
41 Ibid, 57.
42 Digital Switchover Taskforce, *Are you ready for Digital TV?* <www.digitalready.gov.au/Home.aspx> at 23 January 2012.

> privilege carries with it an obligation to provide the public with programs which meet the standards it expects.[43]

3.49 While expectations that the media continue to meet community standards remain important, the distinctions between media distribution methods 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.

3.50 It was 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 5–8 year olds, and 96% of 12–14 year olds. In 2009, 92% of child internet users accessed the internet from home, 86% accessed it from school, and 45% from public libraries and internet cafes.[44]

3.51 It is considerably more difficult to restrict access to online content than is possible for other media platforms. While television has long operated through a time-based regulatory framework (as programs with certain types of content—violence, nudity, sexual references—cannot be shown before particular times), and cinemas and video store employees can make age assessments or request ID, of those purchasing tickets or hiring DVDs, age verification is far more *ad hoc* and difficult on the internet.

3.52 This point was made by several respondents to the ALRC's Discussion Forum in relation to the viability of Restricted Access Systems (RAS) as a means for regulating minors' access to online content. It was noted that credit/debit cards are widely available to people under the age of 18, and that any more rigorous form of age verification had the potential to raise significant privacy concerns.[45]

Media convergence and 'broken concepts' in legislation

3.53 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.[46] Insofar as these concern the *Broadcasting Services Act* and its provisions as they relate to media content regulation, they are also relevant to the ALRC's Inquiry.

---

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

44 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.

45 See ALRC Classification Discussion Forum, <www.alrc.gov.au/public-forum/classification-forum/3-restricted-access-systems#comments> at 18 November 2011.

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

3.54 The seven 'broken concepts' which the ACMA identified 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.[47]

3.55 Similar problems can be identified in the current classification scheme. It 'over-classifies' some media, such as DVDs and computer games, while other media, such as mobile apps, are not required to be classified at all. It distinguishes classification guidelines according to the form of media and this does not easily map onto new devices and types of media content.

3.56 One of the key concepts developed in this report is that of *platform neutrality*. Discussed in more detail in Chapter 4, it is based upon the premise that the primary purpose of a National Classification Scheme is the classification of content. In the context of media convergence, this points to need to minimise platform-based distinctions to the greatest degree possible, in order to maintain an adaptive regulatory framework that can be oriented towards future media developments.

47 Ibid, 7.

4. Guiding Principles for Reform

Contents

Summary 77
Context for the reform principles 78
Guiding principles 80
- Principle 1: Individual rights 80
- Principle 2: Community standards 82
- Principle 3: Protection of children 85
- Principle 4: Consumer information 86
- Principle 5: An adaptive regulatory framework 88
- Principle 6: Competition and innovation 90
- Principle 7: Clear regulatory purpose 91
- Principle 8: Focus on content 93

Platform neutrality and the question of media effects 96

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, and the context in which the guiding principles relate to law reform and media policy. It is proposed that these principles inform the development of a new National Classification Scheme that can best meet 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

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

Context for the reform principles

4.3 The eight guiding principles outlined in this chapter provide the framework for the recommendations for reform in this Final Report. 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.

4.7 In developing the guiding principles, the ALRC drew upon:

- the existing National Classification Code;
- the objectives of the *Broadcasting Services Act 1992* (Cth);
- the Terms of Reference of this Inquiry;
- key principles identified in submissions received in response to the Issues Paper and the Discussion Paper; and
- other relevant statements of principles for Australian government regulation, such as those identified in the *Best Practice Regulation Handbook*.[2]

4.8 The ALRC also noted principles for convergent media regulation being identified in other relevant inquiries, most notably the Convergence Review being conducted by an independent committee through the Department of Broadband, Communications and the Digital Economy (DBCDE). The Convergence Review Committee has observed that the current range of reviews of media and communications being conducted for the Australian government provide 'an opportunity to create a new convergent framework for content and communications which will better position Australia in a global digital economy'.[3]

4.9 The principles that the Convergence Review has identified as being central to future policy and regulatory frameworks that should apply to the converged media and communications landscape in Australia include:

- providing reduced, better-targeted regulation;
- providing a technology neutral approach that can adapt to new services, platforms and technologies;
- promoting emerging services and innovation;
- ensuring consistent content standards across platforms;
- enhancing Australian and local content;
- supporting media diversity;
- reducing compliance costs for industry;
- providing certainty for the market into the future.[4]

4.10 Public feedback on the guiding principles was also sought through the ALRC's public discussion forum. The forum was hosted on the ALRC web site from 15 August 2011 to 2 September 2011, and attracted 101 comments from 29 participants.[5] Responses to the guiding principles have been incorporated into the discussion below.

---

2 Australian Government, *Best Practice Regulation Handbook* (2010).

3 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), v.

4 Ibid.

5 See ALRC Classification Discussion Forum, <www.alrc.gov.au/public-forum/classification>, at 9 November 2011.

Guiding principles

Principle 1: Individual rights

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

4.11 The National Classification Code states that 'adults should be able to read, hear and see what they want'.[6]

4.12 The *Broadcasting Services Act* 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'.[7]

4.13 While the National Classification Code requires that this principle be understood alongside other principles in the making of classification decisions, the principle that adults should 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.[8]

4.14 Some submissions cited art 19 of the *Universal Declaration of Human Rights* and art 19 of the *International Covenant on Civil and Political Rights* (ICCPR).[9] Art 19 of the Universal Declaration of Human Rights 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.[10]

4.15 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'.[11]

4.16 The rise of the internet has further strengthened the power of individuals to exercise their rights to free speech, and the impacts of this are being seen across the globe. As a uniquely powerful medium for personal expression, the internet challenges existing regulatory regimes in a profoundly important manner.

---

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

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

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

9 *The Universal Declaration of Human Rights*, entered into force generally on 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). For citations, see The Arts Law Centre of Australia, *Submission CI 1299*; Melbourne Fringe, *Submission CI 1199*; G Urbas and T Kelly, *Submission CI 1151*.

10 *Universal Declaration of Human Rights*, 10 December 1948, (entered into force on 10 December 1948), 217A (III).

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

4.17 Dr Gregor Urbas and Mr 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'.[12]

4.18 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.[13]

4.19 The internet not only enables access to a much wider range of media content than traditional mass communications media, but empowers its users to more readily become participants in the creation and distribution of media content.

4.20 Many submissions to this Inquiry made the observation 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, recognising the two-way, interactive nature of digital communications media.

4.21 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.[14]

4.22 In responses from the public discussion forum, it was also observed that since communication is a two-way street, this principle could be further broadened to guarantee a right to publish, as well as a right to participate in media.

4.23 The ALRC is supportive in principle of this proposition, but notes that a difficulty arises in that while the High Court of Australia has implied from the Constitution a freedom of political communication this is narrower than a guaranteed freedom of communication or expression in a general sense. It is not of an equivalent status to the First Amendment to the United States Constitution, or art 10 of the *European Convention on Human Rights*.[15]

---

12 G Urbas and T Kelly, *Submission CI 1151*.

13 United Nations Special Rapporteur on Freedom of Opinion and Expression and Others, *Joint Declaration on Freedom of Expression and the Internet* (2011), referred to by Electronic Frontier Foundation, *Submission CI 1174*; Access Now, *Submission CI 1172*, 16 July 2011. See also Electronic Frontiers Australia, *Submission CI 2194*.

14 Google, *Submission CI 2336*.

15 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138, 140 per Mason CJ, at 149 per Brennan J, at 168, 169, 174 per Deane and Toohey JJ, at 211, 212, 214 per Gaudron J, at 227 per McHugh J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 94, 95.

4.24 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 be extended to recognise that adults should be able to communicate and participate in the media of their choice. This includes as producers and senders as well as the receivers of information and media content.

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

4.25 In the Australian classification system as it has evolved from the 1970s, the principle that adults may freely access information, communication and entertainment media of their choice has been tempered by other social and cultural factors.

4.26 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'.[16]

4.27 The general matters that the Classification Board are 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.

4.28 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'.[17]

4.29 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

16 *National Classification Code 2005* (Cth) cl 1(c).
17 Ibid cl 1(d).

community standards in relation to content'; and 'restrict access to certain internet content that is likely to cause offence to a reasonable adult'.[18]

4.30 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 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.[19]

4.31 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 the need 'to give voice to the community's recognition of the powerful contribution media experiences make to the shaping of individuals and society', and 'to prevent the dissemination of content that is injurious to the public good'.[20]

4.32 What constitutes offensiveness is not fixed or certain over time, and is subject to the evolving nature of community values, norms and expectations. Moreover, what may be offensive to one person may well be entertaining, humorous or informative to another.

4.33 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.[21]

4.34 On the ALRC's public discussion forum, several respondents observed the need for a regular review of community standards based on a rigorous research framework, using a methodology that can also track changes in attitudes over time. Commentators have also observed the lack of research into community attitudes to media content and the need for information that can better align classification guidelines to contemporary community standards.[22]

---

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

19 Communications Law Centre, *Submission CI 1230*.

20 Australian Council on Children and the Media, *Submission CI 1236*.

21 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.

22 R Fitzgerald, 'Let us stop pussyfooting around our censorship laws', *Weekend Australian*, 12 February 2011.

4.35 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. Free TV Australia commented that:

> Because community standards develop and change, a dynamic approach is required to encourage innovation and development in content. Gauging 'community standards' in an objective, inclusive and responsive way is difficult. It is important to recognise that different communities within Australia have different standards, and standards change over time.[23]

4.36 The challenges of diversity to any form of classification system are accentuated by media convergence, the proliferation of media content and globalisation. Chris Berg and Tim Wilson from the Institute of Public Affairs identified factors that point towards a 'radical rethink of the principles and justification for classification' as including: 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'.[24]

4.37 The relevance of more media content being accessed from the home was also raised in submissions, as the private nature of consumption of such content may render notions of 'community standards' more problematic than for publicly available media such as cinema.

4.38 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'.[25] Dr Nicolas Suzor of the Queensland University of Technology, proposed that 'in the online environment ... it is much less important to take into account community concerns about content, since content accessed online is generally searched for, not inadvertently accessed'.[26]

4.39 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.

4.40 In this respect, it is worth noting that art 19 of the ICCPR qualifies the right to freedom of expression with the observation that it 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'.[27]

---

23 Free TV Australia, *Submission CI 2452*.
24 Institute of Public Affairs, *Submission CI 1737*.
25 Civil Liberties Australia, *Submission CI 1143*.
26 N Suzor, *Submission CI 1233*.
27 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), art 19.

Principle 3: Protection of children

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

4.41 In referring the National Classification Scheme Review to the ALRC, among a range of matters, the Australian Government 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.[28]

4.42 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'.[29]

4.43 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'.[30]

4.44 The protection of children was also identified as a primary objective of the National Classification Scheme in a number of submissions in response to the Issues Paper and the Discussion Paper.[31]

4.45 For example, 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.[32]

4.46 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'.[33]

---

28 Terms of Reference. The full Terms of Reference are set out at the front of this Report, and can be accessed from the ALRC website at <www.alrc.gov.au>.

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

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

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

32 Queensland Commission for Children and Young People and Child Guardian, *Submission CI 1246*.

33 *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).

4.47 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 from 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.[34]

4.48 This principle received a large number of comments on the ALRC's public discussion blog. Respondents argued that there was a need to recognise age-based distinctions, and that the issues for small children and teenagers are quite different. Caution was also suggested in relation to pursuing harm mitigation strategies without clear insights into the potential for harm from different media content. It was also argued that classification can ultimately only provide guidance, and responsibility for what media children access ultimately lies with their parents and care givers.[35]

4.49 The question of the relative responsibilities of government and parents in relation to protecting children from potentially harmful media content also generated strong responses from a range of individual submissions that followed the ALRC's Issues Paper.[36]

4.50 The rights 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.[37]

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

4.51 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'.[38]

---

34 G Urbas and T Kelly, *Submission CI 1151*.

35 See ALRC Classification Discussion Forum, <www.alrc.gov.au/public-forum/classification/3-children-should-be-protected-material-likely-harm-or-disturb-them> at 2 September 2011.

36 Australian Law Reform Commission, *Responses to ALRC National Classification Scheme Review Issues Paper (IP40) - Graphical Representation of Submissions* (2011) <http://www.alrc.gov.au/publications/responses-IP40> at 26 January 2012.

37 Telstra, *Submission CI 1184*.

38 Terms of Reference.

4.52 The National Classification Code provides that 'everyone should be protected from exposure to unsolicited material that they find offensive'.[39] 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.[40]

4.53 Classification is essentially about providing information to the public about the material that has been classified in order to guide their entertainment choices. Members of the public should also be able to have their concerns addressed, if they believe that a classification decision was in error, or that content has been made available that is in breach of classification laws.

4.54 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.[41]

4.55 The Australian Competition and Consumer Commission (ACCC) pointed out that 'the availability of adequate information for consumers to make informed choices is an important characteristic of a competitive industry', and that 'an effective and consistent classification system is one possible tool to achieve this'.[42]

4.56 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'.[43]

4.57 The Australian Children's Commissioners and Guardians observed that 'for the classification system to meet its objectives it must be, and must be seen to be, reliable by the community'.[44]

4.58 The Senate Legal and Constitutional Affairs References Committee 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.[45]

---

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

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

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

42 Australian Competition and Consumer Commission, *Submission CI 2463*.

43 Civil Liberties Australia, *Submission CI 1143*.

44 Australian Children's Commissioners and Guardians, *Submission CI 2499*.

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

4.59 The current National Classification Scheme framework has been criticised as being confusing to the public.[46] MLCS Management observed, for example, that it is unclear to both industry and consumers what classification requirements apply 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.[47]

4.60 Clarity about content classification regulation should assist industry to better comply with classification obligations and meet consumers' expectations for classification information as well as assist consumers understanding of where to direct complaints and have their concerns addressed.

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

4.61 In referring this review to the ALRC, the Australian Government 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'.[48]

4.62 Several stakeholders argued strongly 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.

4.63 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'.[49]

4.64 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.[50]

---

46 For example, A Hightower and Others, *Submission CI 2159*; MLCS Management, *Submission CI 1241*.
47 MLCS Management, *Submission CI 1241*.
48 Terms of Reference.
49 Telstra, *Submission CI 1184*.
50 Australian Home Entertainment Distribution Association, *Submission CI 1152*.

4.65 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.[51]

4.66 Free TV Australia agreed with the principle that

> Any new classification framework must be technology-neutral, and be able to deal with new and emerging platforms and services. In particular, the advent of devices such as Connected TVs will enable viewers to transition seamlessly between broadcast and streamed content.[52]

4.67 Criticisms of the *ad hoc* and piecemeal nature of the current National Classification Scheme (NCS) are identified in Chapter 2 of this Report. The Australian Mobile Telecommunications Association (AMTA) noted the difficulties involved in extending the existing framework to the fast-changing and global mobile telecommunications environment:

> AMTA has concerns about the practicalities in extending the NCS so that it covers all content available in Australia, including online content that may often be sourced from foreign-based producers of content or be produced by internet users rather than more traditional content providers. Such an extension of the NCS would be almost impossible to administer, either by the regulatory body or by telecommunications service providers. Further, AMTA believes that the existing classification requirements that apply, for example, to film, may not be easily or appropriately translated to other platforms, such as mobiles.[53]

4.68 Such observations with the concern expressed by the Australian Communication and Media Authority (ACMA) about 'broken concepts' in existing legislation, and '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.[54]

4.69 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.

---

51 Google, *Submission CI 2336*.

52 Free TV Australia, *Submission CI 2452*.

53 Australian Mobile Telecommunications Association, *Submission CI 1190*.

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

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

4.70 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'.

4.71 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'[55] 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'.[56]

4.72 The ACCC made the point that

> Media consumption habits are evolving as new services and applications are developed that take advantage of emerging platforms. These changes give rise to a significant opportunity to achieve a much greater degree of competition in the media and communications industry than has existed in the past.[57]

4.73 At the same time, the ACCC cautioned against overly prescriptive approaches to the regulation of online content and emergent media platforms, observing that

> Any extension of the classification regime to online content should be managed carefully to ensure that emerging platforms and services are not stifled by regulatory burdens, which in turn may lead to reduced consumer choice and competition.[58]

4.74 The ALRC considers 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.

---

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

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

57 Australian Competition and Consumer Commission, *Submission CI 2463*.

58 Ibid.

4.75 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.[59]

4.76 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'.[60]

4.77 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.[61]

4.78 On the ALRC public discussion forum, the question was raised as to whether Australia should adopt classification decisions made in other countries, given that most media content is accessed from overseas.[62] As noted in Appendix 1 to this Report, New Zealand refers to classification decisions of the Australian Classification Board for certain content sold in its domestic market. The ALRC discusses this concept in Chapter 7.

Principle 7: Clear regulatory purpose

Classification regulation should be kept to the minimum needed to achieve a clear public purpose

4.79 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'.[63]

---

59 Telstra, *Submission CI 1184*.
60 Interactive Games and Entertainment Association, *Submission CI 1101*.
61 Internet Industry Association, *Submission CI 2445*.
62 ALRC Classification Discussion Forum, <www.alrc.gov.au/public-forum/classification/4-national-classification-scheme-needs-provide-consumer-information-time#comment-92> at 2 September 2011.
63 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Emerging Issues Paper* (2011), 8.

4.80 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.[64]

4.81 Concerns about the costs of compliance and the need for clarity were expressed by stakeholders.[65] 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', with low costs of compliance.[66] 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'.[67]

4.82 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.

4.83 As discussed in later chapters of this Report, the ALRC is of the view that there is considerable scope to extend co-regulatory arrangements in those areas where there is no major community contention about classification decisions, allowing government to more effectively focus time and resources on the most contentious media content.

4.84 This is a realistic and appropriate response to the almost infinite volumes of media content now available to consumers and households, and to develop more appropriate consideration of the costs and benefits associated with who classifies what.

4.85 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 across-the-board platform-based classification to be redeployed in the fast-growing area of online content that may require restricted access or be prohibited.

---

64 Australian Government, *Best Practice Regulation Handbook* (2010), 1.
65 Telstra, *Submission CI 1184*; Interactive Games and Entertainment Association, *Submission CI 1101*.
66 Interactive Games and Entertainment Association, *Submission CI 1101*.
67 Internet Industry Association, *Submission CI 2445*.

4.86 The ACCC has provided guidelines for developing effective voluntary industry codes of conduct.[68] The ACCC observed that the benefits of voluntary industry codes can include:

- that industry codes can be more flexible than government legislation and can be amended more efficiently to keep abreast of changes in industry needs, technological changes, or changing market conditions;
- that there can be greater transparency of the industry to which signatories to the code belong;
- greater stakeholder or investor confidence in the industry/business;
- ensuring industry compliance with the Act in order to significantly minimise breaches;
- that industry participants have a greater sense of ownership of the code leading to a stronger commitment to comply with the Act;
- that the code acts as a quality control within an industry; and
- that complaints handling procedures are generally more cost effective, time efficient and user friendly in resolving complaints than government bodies.[69]

4.87 Codes and co-regulatory frameworks are discussed in more detail in Chapter 11 of this Report.

4.88 In a draft version of these principles circulated for public comment, the full statement was 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.' In response to comments received on the public discussion blog, the principle has been amended, as it was argued that clarity in scope and application is implied in the shorter statement.[70]

Principle 8: Focus on content

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

4.89 Many stakeholders identified the principle of platform neutrality as being important, and suggested that the extent to which the National Classification Scheme does not operate on the basis of such a principle, is a major source of ongoing problems.

---

68 Australian Competition and Consumer Commission, *Submission CI 2463*.

69 Australian Competition and Consumer Commission, *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (2011), 3.

70 See ALRC Classification Discussion Forum, <www.alrc.gov.au/public-forum/classification/7-classification-regulation-should-be-kept-minimum-needed-achieve-clear-#comments> at 2 September 2011.

4.90 In responses to the Issues Paper, the absence of an R 18+ classification for computer games was repeatedly cited as evidence of what happens when classification guidelines are platform driven and based upon contentious assumptions about the impact of a particular medium or the nature of its consumers.[71]

4.91 The Convergence Review Committee has also emphasised the need for a platform neutral regulatory framework. In recommending the phasing out of licencing regimes as a condition for the provision of certain types of content, such as those applying under the *Broadcasting Services Act*, the Committee has stated:

> Having regard to the principle of freedom of communication, there is no compelling reason to continue to require a licence to provide a content service, particularly where no licence is required to provide an identical service on a different platform. Providers of content services may have obligations, where appropriate, without the need for licences.[72]

4.92 Telstra 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:

> 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.[73]

4.93 Assistant Professor Sarah Ailwood and Mr Bruce Arnold, of the 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'.[74]

4.94 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.[75]

4.95 The Senate Legal and Constitutional Affairs References Committee also 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,

---

71 See Responses to ALRC National Classification Scheme Review Issues Paper (IP40) – graphical representation of submissions, <www.alrc.gov.au/publications/introduction/question-3-should-technology-or-platform-used-access-content-affect-whethe> at 3 February 2012.

72 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 4.

73 Telstra, *Submission CI 1184*.

74 S Ailwood and B Arnold, *Submission CI 2156*.

75 MLCS Management, *Submission CI 1241*.

regardless of the platform used to access that content, should be a guiding principle of a reformed National Classification Scheme'.[76]

4.96 The ALRC is of the view that convergence is making media content and services increasingly independent of particular delivery technologies, and that content regulation can no longer be premised upon assumptions that it will be carried on any single platform.

4.97 The ACMA has also argued that 'regulation constructed on the premise that content could (and should) be controlled by how it is delivered is losing its force, both in logic and in practice'.[77]

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

> 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.[78]

4.99 A conspicuous case of a lack of platform neutrality in the current scheme is in the treatment of computer games at the higher end of the classification spectrum relative to 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'.[79]

4.100 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 was 'suggestive of the "censorship" perspective, emphasising ideas associated with "protection from harm" and the public good'.[80]

---

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

77 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 6.

78 L Bennett Moses, *Submission CI 2126*. 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.

79 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.

80 Ibid, 12.

4.101 In the course of the Inquiry, an agreement was reached by the Australian Government, state and territory censorship ministers at the SCAG meeting of July 2011 to introduce an R 18+ category for computer games.[81]

4.102 In February 2012, a bill was introduced by the Minister for Home Affairs and Minister for Justice, the Hon Jason Clare MP, to amend the *Classification Act* to introduce an R 18+ category for computer games, and make consequential amendments to the *Broadcasting Services Act* to recognise the introduction of such a category.[82]

4.103 The ALRC suggests that platform neutrality should be a guiding principle of any new regulations, that co-regulatory approaches should be developed to a greater degree than is currently the case, and that regulatory activity should focus on content of most concerns in relation to community standards and the protection of children.

Platform neutrality and the question of media effects

4.104 The ALRC is proposing that policies and regulations applying under the National Classification Scheme should reflect, to the maximum degree possible, the principle of platform neutrality. Classification should focus on media content rather than platforms or delivery technologies. In the context of media convergence, we have argued that attempts to apply different regulatory frameworks to media based upon their delivery platform has proven to be unsustainable over time, and has generated significant distortions in classification outcomes.

4.105 A related issue is the possible effects that different forms of media may have on the behaviour of individuals. 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, has drawn attention to the problems that can arise from assumptions about media effects.

4.106 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.[83]

4.107 Research has often been triggered by particular events, such as riots and political assassinations in the US in the 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 in 2011 acted as prompts for debate about the influence of violent video games and social media respectively.

---

81 Standing Committee of Attorneys-General, *Communiqué 21 & 22 July 2011*.

82 Explanatory Memorandum Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 (Cth).

83 J Murray, 'Media Violence: The Effects are Both Real and Strong' (2008) 51 *American Behavioural Scientist* 1212, 1213.

4.108 An overview of debates as they relate to the influence of media on behaviour can be found in a 2008 special issue of *American Behavioural 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.[84]

4.109 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'.[85] 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.[86]

4.110 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, Professor Barrie Gunter points to six factors that qualify strong claims being made about the impact of media violence that draw upon empirical research.[87]

4.111 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.[88] 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.

4.112 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

---

84 Ibid, 1222.

85 Australian Psychological Society, *Factsheet: The Effects of Violent Media on Children* (2000). See also, Council on Communications and the Media, 'Media Violence' (2009) 124(5) *Pediatrics* 1495.

86 Australian Council on Children and the Media, *Submission CI 1236*; FamilyVoice Australia, *Submission CI 85*.

87 B Gunter, 'Media Violence: Is There a Case for Causality' 51 *American Behavioural Scientist* 1061,1061.

88 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.

4.113 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.[89] 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.

4.114 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.

4.115 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. Professor 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.[90]

4.116 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'.[91]

4.117 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',[92] and Dr. Andy Ruddock from Monash University has identified particular contexts where particular media consumers actively use media to achieve certain kinds of effects.[93] It is, rather, to note that there are many and varied results from these studies, and that this evidence base has not generated clearer findings over time.

---

89 Ibid, 1206.

90 S Cunningham, 'TV Violence: The Challenge of Public Policy for Cultural Studies' (1992) 6 *Cultural Studies* 79, 91.

91 B Gunter, 'Media Violence: Is There a Case for Causality' 51 *American Behavioural Scientist* 1061, 1112.

92 Ibid, 1113.

93 A Ruddock, *Youth Media: Young People and Researching Media Influence* (2012, unpublished manuscript).

4.118 This would suggest that there are inherent difficulties in making recommendations about content classification policy and regulation based on claims of media effects on human behaviour. This conclusion is 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.[94]

4.119 The ALRC is of the view that the evidence on media effects on individual behaviour is sufficiently ambiguous that it would advise against applying different classification criteria or restrictions to different platforms on this basis. As a result, a content-based approach to classification is the approach adopted in this Report.

94 Australian Attorney-General's Department, *Literature Review on the Impact of Playing Violent Video Games on Aggression* (2010), 42.

5. The New National Classification Scheme

Contents

Summary 101
The Classification of Media Content Act 102
Responses to the Discussion Paper 104
Content and content providers 106
Obligations to classify 107
Obligations to restrict access 108
Obligations in relation to Prohibited content 109
Obligations for online content 109
The new Act and online content providers 113
Existing online content obligations 114
Obligations under the Act 115
Australian link 118
The ABC and SBS 120

Summary

5.1 This chapter presents the ALRC's central recommendations to establish a new National Classification Scheme regulating the classification of media content, through the enactment of the Classification of Media Content Act. Under the new Act, a single agency (the Regulator) would be responsible for regulating the classification of media content. The provisions of the new Act, and the functions and responsibilities of the Regulator, are discussed in more detail throughout this Report.

5.2 The Classification of Media Content Act will impose obligations to classify and restrict access to some content. The persons and organisations who would be subject to these obligations are referred to in this Report as 'content providers'. This chapter explains the obligations of content providers under the new Act, including online content providers. It makes related recommendations, including that the Act should apply to any online content with an appropriate Australian link.

5.3 Finally, the chapter notes questions about the application of the Act to content provided by the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). The special position of the ABC and SBS as national public broadcasters is not under review in the context of this Inquiry, and the ALRC does not make specific recommendations in this regard.

The Classification of Media Content Act

5.4 The ALRC recommends that a new National Classification Scheme should be established based on a new Act—the Classification of Media Content Act.

5.5 A new scheme based on the Classification of Media Content Act would replace the existing classification cooperative scheme for the classification of publications, films and computer games—based on the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*) and complementary state and territory classification enforcement legislation—and online content regulation under schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth).

5.6 In addition, bringing television content within the scheme would require it to encompass some matters currently dealt with by other parts of the *Broadcasting Services Act*—and, possibly, the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth).

5.7 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 standards for children's programs and Australian content.[1] The new scheme would govern television content only in so far as it relates to content classification. Other content matters would continue to be regulated by the Australian Communications and Media Authority (ACMA) under the *Broadcasting Services Act* and codes.[2]

5.8 The ALRC recommends that the new 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; and
- the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.

5.9 Each of these matters is discussed in more detail in the following chapters.[3] However, the new Act would be likely to draw on concepts already contained in the

---

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

2 Including those made under the *Australian Broadcasting Corporation Act 1983* (Cth) and *Special Broadcasting Service Act 1991* (Cth).

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

Classification Act (or complementary state and territory enforcement legislation) and the *Broadcasting Services Act*. For example, the Act would:

- establish a Classification Board, with functions similar 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);
- establish a mechanism for industry codes similar to those currently provided for under the *Broadcasting Services Act* (see Chapter 13);
- provide for a Regulator that would exercise a combination of powers currently exercised by the Director of the Classification Board and the ACMA (see Chapter 14);[4] 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 16).

5.10 While adapting some existing concepts, the new scheme would also constitute a significant modification and consolidation of existing regulation. In this context, the ALRC also recognises 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'.[5]

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

Recommendation 5–2 The National Classification Scheme should be based on a new Act, the 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;

4 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.

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

(d) access restrictions on adult content;

(e) the development and operation of industry classification codes; and

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

Recommendation 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 National Classification Scheme.

Responses to the Discussion Paper

5.11 The recommendations reflect affirmation by industry, government and community stakeholders that the existing classification framework is in need of reform.

5.12 As discussed in Chapter 2, stakeholders identified several significant flaws with the current classification framework, which is widely seen as resulting from its development in an *ad hoc* and reactive manner. The need for more fundamental reform was also a common theme in individual responses to the Inquiry.[6]

5.13 As observed in Chapter 3, the existing classification framework is particularly poorly equipped to respond to the challenges of media convergence. It is characterised by inconsistencies in its treatment of similar content across different media platforms, and there is a need to develop an architecture for classification of media content that can be more adaptive to unanticipated changes in media technologies, products and services. Commentators have described the existing framework as being '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'.[7]

5.14 The arguments outlined in the Discussion Paper for a new scheme were supported by many stakeholders. For example, Telstra observed that

> The scale of technological, commercial and cultural change that has occurred over the past years and the ongoing pace of change in media industries justifies taking a holistic approach to the reform of the National Classification Scheme rather than attempting further incremental reform.[8]

5.15 The Arts Law Centre of Australia stated that the ALRC's proposals for a new classification scheme, rather than seeking to amend the current one, 'recognises the

---

6 See Australian Law Reform Commission, *Responses to ALRC National Classification Scheme Review Issues Paper (IP40) - Graphical Representation of Submissions* (2011) <http://www.alrc.gov.au/publications/responses-IP40> at 26 January 2012, Responses to Question 1.

7 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.

8 Telstra, *Submission CI 2469*.

need for fundamental comprehensive reform particularly for the digital environment'.[9] Similarly, Free TV Australia supported greater harmonisation of regulatory requirements across convergent media platforms:

> Harmonisation and common classification markings across all regulated media will ensure the communication of clear and consistent information on content, regardless of the delivery method or platform … In particular, Free TV supports the development of a single set of classification criteria, underpinned by common high-level principles which can then be specialised for each industry as appropriate.[10]

5.16 The development of a new National Classification Scheme that provides a proactive response to the challenges of media convergence is consistent with the analysis of the Convergence Review Committee, as outlined in its interim report:

> Given the opportunities offered by convergence, it is timely to rethink our approach. Australia would benefit from a new policy framework that reflects the vitality of services provided on new and existing communications infrastructure.
>
> Whilst technology has eroded the traditional divisions between free-to-air (FTA) television and the internet, newspapers and websites, radio and streaming services, our policy and regulation is still based on the industry and service structures of the early 1990s.
>
> Calibrating the policy and regulatory framework for the new environment is vital. The reforms recommended by the Convergence Review will require fundamental changes to communications legislation.[11]

5.17 A small number of respondents, however, argued against the implementation of the proposed new National Classification Scheme. Some argued that the case for an ongoing role for a media classification scheme had not been made sufficiently, particularly in terms of the scope of the current Refused Classification (RC) category. For example, one respondent stated:

> This review starts with the unstated premise that censorship of what adults watch is necessary and will continue because a vocal minority claim to have a special insight on what represents 'community standards'. How can this be a valid review if the possibility that censorship is not necessary is not included in the review, and no attempt is made to determine if there is actual proof that censorship of legal adult material and video games for adults is required?[12]

5.18 The ALRC's recommendations relating to the RC category (to be renamed 'Prohibited content') are discussed in Chapters 11 and 12. However, it is worth reiterating that, since the 1970s, the Australian classification system has largely operated around a principle of classification, with censorship or the banning of content occurring only in exceptional circumstances.

---

9 Arts Law Centre of Australia, *Submission CI 2490*.

10 Free TV Australia, *Submission CI 2452*.

11 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), iv.

12 L Mancell, *Submission CI 2492*.

5.19 The 2010–11 Annual Reports of the Classification Board and the Classification Review Board record that, of the 5,579 films, publications and computer games submitted to the Classification Board in 2010–11, only 26 films not for public exhibition and two computer games were classified RC, or 0.5% of media content classified by the Board. No publications or films for public exhibition received an RC classification in 2010–11.[13]

5.20 Others argued that the proposed provisions for classification of online content, including obligations to restrict access to some content likely to be classified R 18+ or X 18+, were too onerous for non-commercial content providers, and would inappropriately impinge upon freedom of online communication. For example, Amy Hightower submitted that:

> While the current framework is outdated and ineffective, it is actually less impactful and poses fewer restrictions on 'ordinary Australians' than the scheme effectively proposed in [the Discussion Paper]. I therefore cannot support a new Classification Scheme based on the proposals in [the Discussion Paper] unless it undergoes substantial revision.[14]

5.21 Issues concerning the application of the new scheme to online content and content providers are discussed in more detail below.

Content and content providers

5.22 The Classification of Media Content Act will impose obligations:

- to classify and mark some content and not to sell, screen, provide online, or otherwise distribute content that has not been properly classified and marked (obligations to classify);
- to restrict access to R 18+ and X 18+ content (obligations to restrict access); and
- not to sell, screen, provide online, or otherwise distribute Prohibited content (obligations in relation to Prohibited content).

5.23 Any definition of content would need to be both broad and platform-neutral, and should include:

- content that is made available online;
- content that is published or distributed in 'offline' media formats such as books, magazines, computer games, films and DVDs; and
- content that is broadcast on free-to-air and subscription television.[15]

---

13 Classification Board and Classification Review Board, *Annual Reports 2010-2011* (2011), 32–35.

14 A Hightower, *Submission CI 2511*. Similar views were expressed by: I Graham, *Submission CI 2507*; J Trevaskis, *Submission CI 2493*.

15 The *Broadcasting Services Act* contains definitions of 'content' and 'content service', which might form one useful starting point, expanded to apply to books, magazines, films and DVDs, and including its exclusions for content such as SMS and emails: *Broadcasting Services Act 1992* (Cth) sch 7 cl 2.

5.24 The category of persons and organisations who would be subject to obligations in relation to particular content are referred to in this Report as 'content providers'. In general terms, a content provider is a person or organisation that sells, screens, provides online, or otherwise distributes content to the public. As discussed below, in some circumstances, non-commercial content providers will have obligations to classify or restrict access to content. However, these obligations would not apply to persons uploading content, other than on a commercial basis, to a website.

5.25 This section briefly explains to whom the ALRC intends obligations should apply, including by discussing how provisions of the Act might operate in different contexts.

5.26 The ALRC does not make recommendations on exactly how legislative provisions should be drafted to achieve these intended results. The drafting of the legislative provisions may require definitions of 'content' and 'content provider', as well as references to conduct, such as selling or distributing content that gives rise to obligations. As discussed below, the eventual legislative language may also be influenced by the Australian Government's response to the Convergence Review[16]—and parallel reform of broadcasting and telecommunications regulation more generally.

Obligations to classify

5.27 An important consideration is that obligations to classify under the new Act will only apply to content that has been made and is distributed on a commercial basis. Leaving aside online content, the main contexts in which obligations to classify will arise under the new Act concern films, computer games and television.[17]

5.28 In relation to films, the process by which a film for cinema release is made available to the public may involve a producer, a distributor and an exhibitor. The producer would generally have no obligation to classify content because it does not directly provide the content to the public. The exhibitor would have an obligation not to exhibit an unclassified film—and, therefore, an obligation to ensure the film is classified before exhibition. However, in practice, distributors are generally in the best position to apply for the classification of films because they have access to the content in advance of exhibition and deal with multiple film releases.

5.29 Therefore, the obligation to classify should be broad enough to apply to a distributor who 'sells' the film to an exhibitor knowing that the film is to be screened to the public by the exhibitor. The obligation to classify should not, however, apply to

16 For example, by using the concept of a 'content service enterprise' to help define commercial content that should be required to be classified: Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 5. The ACMA has identified current legislative definitions of 'content service' and 'content service provider' as 'broken concepts' in the convergent media environment, through which 'content is treated differently across different distribution networks and devices' and there is different regulatory treatment according to delivery platforms: Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 40, 47.

17 The specific contexts in which content may be required to be classified are discussed in more detail in Ch 6.

an entity earlier in the chain of creation and distribution—for example, a distributor who sells the film to another distributor.

5.30 Similarly, the creators of a console-based computer game would generally have no obligation to classify it. A retailer would have an obligation not to sell an unclassified game (with a likely classification of MA 15+ or higher)[18]—and therefore, an obligation to ensure the game is classified before being offered for sale. Distributors who sell games to retailers would also have an obligation to classify them.

5.31 In practice, the obligation to classify might be discharged at any point along the chain of distribution and where this is may depend on industry practices and contractual arrangements. Where more than one entity has failed to comply with an obligation to classify, the Regulator should be able take action against one or more parties.

5.32 In the case of broadcast television, the broadcaster provides the content to the public and has an obligation to classify content.

5.33 In general, where films, games or television content are provided to the public through an internet website, any obligation to classify would apply to a person or organisation that uploads content on a commercial basis, as well as the website owner.

Obligations to restrict access

5.34 As distinct from obligations to classify content, under the Classification of Media Content Act obligations to restrict access to content would extend to non-commercial or user-created content. However, the obligation is only applicable to content that is likely to be R 18+ and X 18+ content, and is limited to taking 'reasonable steps' to restrict access to such content.

5.35 The obligation to restrict access to R 18+ and X 18+ magazines and DVDs would apply to retailers, such as newsagencies, book stores and specialist adult shops. It would also apply to publishers and distributors, who may have to mark their products with warnings and perhaps package their content in opaque plastic.[19]

5.36 In relation to films for cinema release, the obligation to restrict access to content—for example, to ensure that an R 18+ film is shown only to adults—would apply only to an exhibitor, who controls entry to the cinema.

5.37 Similarly, an obligation to restrict access to a console-based computer game—for example, to ensure that an R 18+ game is sold only to adults—would apply to a retailer who sells games to the public.

18 See Ch 6.
19 See Ch 10.

5.38 The obligation to restrict access to broadcast television content would rest with the broadcaster. The ALRC does not envisage that existing restrictions on R 18+ or X 18+ content being broadcast on commercial television or subscription television services[20] would be altered under the new Act.

5.39 The obligation to restrict access to content on a website would lie primarily with the website owner, who controls how the content is made available to the public. However, an organisation or individual uploading content made and distributed on a commercial basis would also have an obligation to take reasonable steps to restrict access to R 18+ and X 18+ content.

5.40 In the case of a commercial content provider, such as a television production company or the online site of a television network, this obligation might include an obligation not to provide R 18+ and X 18+ content through a content platform that does not restrict access to adults.

Obligations in relation to Prohibited content

5.41 Under the Classification of Media Content Act, obligations in relation to Prohibited content would be broad in application and apply to all content providers, commercial and non-commercial, and to internet intermediaries such as internet access providers who do not otherwise have obligations to classify or restrict access to content.

5.42 For example, where Prohibited content is uploaded onto a website by an individual, that individual may commit an offence under the Act. The website owner would be under an obligation to take down the content when notified by the Regulator. Other internet intermediaries may have obligations to respond to notices from the Regulator with respect to the content. An internet access provider may have an obligation to filter the content, particularly where the website owner is located overseas.

Recommendation 5–4 The Classification of Media Content Act should provide that obligations to classify or restrict access to content apply to persons or organisations who sell, screen, provide online, or otherwise distribute content to the public ('content providers').

Obligations for online content

5.43 Some stakeholders expressed concern about imposing classification-related obligations in relation to non-commercial online content, and noted that the *Broadcasting Services Act* imposes obligations to assess online content only on 'commercial content service providers'.

20 *Broadcasting Services Act 1992* (Cth) sch 2 cls 7(1)(g), 10(1)(f), 10(1)(g).

5.44 Under the *Broadcasting Services Act*, a commercial content service provider is defined as a content service that '(a) is operated for profit or as part of a profit-making enterprise; and (b) is provided to the public but only on payment of a fee (whether periodical or otherwise)'.[21]

5.45 In the ALRC's view, paragraph (b) of this definition is inappropriate as a limitation on obligations to classify or restrict access to online content, because the vast bulk of content on the internet is freely available to users. Where online content is provided on a commercial basis, this is typically funded through the sale of associated advertising space.

5.46 The OECD has observed that it is increasingly difficult to maintain a strong distinction between commercial content on the one hand, and user-created content (UCC) on the other.

> Although conceptually useful it has become harder to maintain the … UCC characteristic of creators not expecting remuneration or profit and creation being outside of professional routines. UCC may have begun as a grassroots movement not focused on monetary rewards, but monetisation of UCC has been a growing trend.
>
> Established media and Internet businesses have increasingly acquired UCC platforms for commercial purposes. Some users are remunerated for their content and some become professionals after an initial phase of non-commercial activity. Some works are also created by professionals outside of their commercial activities (eg, professional video editors creating a film at home). The term UCC may thus cover content creation by those who are much more than just 'users'.[22]

5.47 At the same time, there are concerns about potential overreach, in terms of the types of online content that might become subject to classification-related obligations—for example, personal blogs and individual postings onto chat sites. One stakeholder commented that

> most entities producing content are non-commercial (eg, private individuals), who should not need a lawyer and should not need to pay the Classification Board or an industry classifier before making content available online.[23]

5.48 There are many dimensions to whether the size and degree of commerciality of an online content provider should determine whether content provided by it should be subject to content regulation.

5.49 First, there are questions of regulatory parity and competitive neutrality. If television-like services can be accessed from the new generation of 'Smart TVs' through platforms such as Google's YouTube, or through the 'catch-up TV' content platforms such as Yahoo!7, then why should YouTube or a comparable service be exempt from content regulations while 'catch-up TV' services are not? Should Channel 7 be exempt from content regulation when providing content online, but not in

---

21 Ibid sch 7 cl 2.

22 Organisation for Economic Co-operation and Development, *Participative Web: User Created Content* (2007), 18.

23 J Trevaskis, *Submission CI 2493*.

the case of broadcast content, even if it is the same program, or additional related content (such as 'behind-the-scenes' material for a reality television program)?

5.50 Secondly, there are an increasingly diverse range of environments in which online content is accessed—at home, at school, on mobile devices—and changing community expectations about its accessibility, particularly to children. In some respects, the media environment is heading towards a 'post-internet' regime of convergent media, where the distinction between 'smart devices' such as personal computers and television, is blurring and all devices are enabling greater user interactivity.

5.51 Lilian Edwards has observed that there has been a growing expectation worldwide that governments can, and should, regulate access to some online content and that personal freedoms in the shared online space are not absolute:

> By the 2000s, the cyber-libertarian tendency had retreated and it had become well established that nation states had both the right to regulate, and an interest in regulating, the Internet, and in particular, an interest in protecting children—as the Internet ceased to be the plaything of only academics, researchers and geeks, and became part of daily social and family life.[24]

5.52 Such issues are by no means unique to the classification of media content. They arise in relation to matters as diverse as copyright protection, competition law, and the provision of local content. Historically, platform-specific regulations have tended to apply more stringent regulations to some media than to others. For example, content regulations have been applied most stringently to commercial free-to-air broadcasting services. This was justified in part by provisions associated with a licence to broadcast, and in part by the perceived degree of influence of these broadcasting services.

5.53 Both licence-based requirements and the 'influence' concept have been identified by the ACMA as 'broken concepts' in a convergent media environment:

> When considered individually, each of [these] concepts retains some effectiveness within their defined boundaries. However, when considered collectively against enduring policy goals, they provide a confusing regulatory framework that is already struggling to accommodate new types of online content and services.[25]

5.54 The Convergence Review Committee proposed that a 'new content and communications regulatory policy framework' be built around the concept of a 'content service enterprise'.[26] The term is intended to be technology-neutral in its application and to capture those large media-related enterprises that would be subject to obligations relating to content standards, media diversity and Australian content.

---

24 L Edwards, 'Pornography, Censorship and the Internet' in L Edwards and C Waedle (eds), *Law and the Internet* (2009), 626.

25 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 82.

26 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 5.

5.55 In determining what would constitute a content service enterprise, the Convergence Review Committee recommends the use of 'threshold criteria relating to the scale and nature of operations involved in supplying content services'. It states that these criteria might include:

- the viewer/user/subscriber base meeting a threshold
- the service originating in Australia or being intended for Australians
- the provider having the ability to exercise control over the content
- the operating revenue or commercial scale of the enterprise meeting a threshold.[27]

5.56 In its *Digital Australians* report, the ACMA observed that Australians find the question of *who* produced the content—traditional media organisations or individuals—to be as significant a factor in shaping expectations about content regulation as the question of whether it is delivered online or through traditional media platforms. The report states that:

> Most research participants distinguished offline or traditional media, such as newspapers, television and radio, from the internet or online content, but delivery platform was not the most important distinction that they made. The more important distinction was between *types* of content.
>
> Content produced by traditional media organisations—whether for print or broadcast, and whether offline or online—was seen as professional content, produced for broad audiences.
>
> Consumers appeared to bring their expectations of regulation from traditional, familiar media to similar content accessed online. Recognition of traditional media organisations by consumers was high. Similarly, branded content online was usually expected to meet the same or comparable standards as offline content. Whether professional content was broadcast or online, most consumers expected it to meet general community standards for taste and decency. For example, print, broadcast and online stories from traditional, reputable news organisations were expected to meet the same journalistic standards for accuracy and fairness.
>
> Content produced by individuals and posted on the internet was seen as user-generated and there was very little expectation that it would adhere to any standards, apart from the need for it to be legal, and meet the terms and conditions of use of the site it was posted to.[28]

5.57 In relation to the application of regulation, the Convergence Review Committee proposed that 'obligations focus on the entity or enterprise that provides the service and the nature and scale of that service, rather than the mode of delivery', observing that the *Digital Australians* report found 'Australians expect branded online content to meet the same or comparable standards as offline content'.[29]

---

27 Ibid, 5.

28 Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 3.

29 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 5.

5.58 At the same time, in considering the application of the concept of 'Content Service Enterprises', the Convergence Review Committee took the view that 'emerging services, start-up businesses and individuals should not be captured by unnecessary requirements and obligations'. It nonetheless argued that 'all content providers will still be subject to some requirements, such as those protecting children from harmful content'.[30]

5.59 As discussed below, the ALRC shares the view that there is not a clear line between 'big media' on the one hand, and user-created content on the other, in terms of community expectations about appropriate safeguards in relation to the forms of online content that are available on an unrestricted basis. It is recognised, however, that the size and nature of the entity producing and distributing content online would be a factor to be considered in relation to obligations to classify or restrict access to content, as well as in relation to classification enforcement provisions.

5.60 If the concept of a 'content service enterprise' is adopted in future media regulation, it could help meet expectations that some classification-related obligations be applied on a basis that distinguishes content providers operating on a large-scale commercial basis from individuals and non-profit online content providers.

The new Act and online content providers

5.61 The intended application of the obligations under the Classification of Media Content Act in the online environment is complicated because providing content online involves a range of entities and activities. Some of these may need to be expressly excluded from obligations to classify or restrict access to content—essentially because they do not exercise control over media content, but are exclusively engaged with providing services which allow the content to be made available.

5.62 Existing broadcasting and telecommunications legislation uses a range of terms to describe online content and service providers of various kinds and for various purposes—as do other laws relating to media content, in areas such as copyright and defamation. The discussion below, and the associated recommendations, use the following terms:

- ***Online content provider***: provides content that it makes available online through its own website or through an intermediary, such as a content platform.
- ***Content platform***: provides third party content on the internet through its website. An example is the YouTube platform.
- ***Application service provider***: facilitates access to content by indexing, filtering, formatting, but are not themselves content platforms. An example is a search engine, such as Google Search.
- ***Host provider***: hosts websites on a computer server, connecting with the internet and providing storage capacities.

30 Ibid.

- ***Internet access provider***: provides a service that enables users to access the internet—for example, by connecting the user to the internet via a telecommunications link or otherwise making websites accessible. This includes Telstra, Optus, iiNet, Internode and other providers of internet access.[31]

5.63 These terms are not necessarily intended to be adopted as legislative language and the same entity may fall into two or more of these categories. In particular, it is common for entities to be both online content providers and content platforms. For example, the website YouTube provides both third party content and content created for YouTube itself under commercial and contractual arrangements.

Existing online content obligations

5.64 As noted above, under the *Broadcasting Services Act*, 'commercial content service providers' have classification-related obligations in relation to online content. Such providers operate a content service 'for profit or as part of a profit making enterprise', which is 'provided to the public but only on payment of a fee'.[32]

5.65 Commercial content service providers have obligations to assess online content in accordance with the Internet Industry Code of Practice. Where a commercial content service provider, 'acting reasonably', considers that content is substantially likely to be classified as prohibited content or potential prohibited content,[33] it must ensure the content has been assessed before making the content available to end users. In forming a view as to whether content needs to be assessed, a commercial content service provider may have regard, among other things, to: the intended audience of the content service; how the content service is marketed; and the aims of the content service.[34]

5.66 Schedule 7 of the *Broadcasting Services Act* states that a person does not provide a content service 'merely because the person supplies a carriage service that enables content to be delivered or accessed'.[35] That is, internet access providers—referred to in the *Broadcasting Services Act* as 'internet service providers' (ISPs)—do not provide a content service and, therefore, do not have any responsibilities to assess content.

5.67 Following the investigation of complaints by the ACMA, 'hosting services', 'live content services' and 'links services' have obligations to respond to ACMA notices under sch 7 of the *Broadcasting Services Act*.[36] In addition, under sch 5 of the *Broadcasting Services Act*, ISPs must comply with ACMA 'access-prevention notices' in relation to content hosted outside Australia.[37] In practice, this obligation is met by

---

31 The term 'internet access provider' is used rather than internet service provider (ISP) because the ordinary meaning of the latter term may be understood to include the provision of any internet service, rather than providing access in a technical 'carriage' sense.

32 *Broadcasting Services Act 1992* (Cth) sch 7 cls 2, 5.

33 As defined under the *Broadcasting Services Act*: Ibid sch 7 cls 20, 21.

34 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008) cl 8.

35 *Broadcasting Services Act 1992* (Cth) sch 7 cl 5(1).

36 Ibid sch 7 pt 3 divs 3–5.

37 Ibid sch 5 cl 40.

ISPs participating in the 'designated notification scheme', under which ISPs are notified of prohibited content and must provide 'family friendly' filters.[38] As a result, the laws in question rarely need to be activated.

Obligations under the Act

Content providers and content platforms

5.68 In the online environment, the ALRC considers that content providers and content platforms should have obligations to classify or to restrict access to content. The definition of content provider for these purposes should cover those who provide content to the public, whether or not for profit or payment of a fee.

5.69 In particular, the definition should cover free content without advertising as well as subscription-based content and advertising supported content. The existing definition of a 'commercial content service provider' is problematic as it defines the site as commercial on the basis of how it receives revenue—that is, by direct payment by users for access to content, and not by providing free content to users and financing the service by selling advertising space.

5.70 A content provider should be defined to include those who upload media content onto the internet, including professional or commercial content providers, and those uploading user-created content. However, obligations to classify or restrict access to content should not apply to persons uploading content to someone else's website, other than on a commercial basis. An internet user uploading to a blog or social networking site should have no obligations to formally classify their content. The website owner, however, would have obligations to take reasonable steps to restrict access to R 18+ or X 18+ content, and to respond to take-down notices from the Regulator.

5.71 A distinction may need to be made between content providers and content platforms. While both should have obligations, these should differ to recognise that while some content providers (and content platforms) are in a position to classify content before it is made available to the public, some content platforms should not be expected to do so.

5.72 For example, the Internet Industry Code of Practice makes special provision for content providers ('commercial content service providers') who make content available for viewing by end users 'immediately or soon after it is contributed'—including that uploaded by other end users—where the content does not predominantly consist of 'prohibited content' or 'potential prohibited content' (as defined under the *Broadcasting Services Act*); and the content service is not promoted or marketed as making such content available.[39]

---

38 Internet Industry Association, *Internet Industry Codes of Practice: Codes for Industry Co-regulation in Areas of Internet and Mobile Content* (2005) cl 19.

39 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008) cl 8.5(e).

5.73 In these circumstances, the commercial content service provider may comply with the obligation to assess content if it 'takes reasonable steps' to inform end users that are authorised to upload content as to the applicable restrictions on content and ensure that end users and others are made aware that they may report content; and act reasonably following receipt of a bona fide report to assess the particular content, or act to make it no longer available or placed behind a restricted access system.[40]

5.74 Similar provisions under the Classification of Media Content Act might ensure that content 'sharing' websites are not subject to an obligation to pre-classify content. On the other hand, for example, an internet protocol television (IPTV) station providing a finite range of 'channels' should have obligations to classify or restrict access to its content before making it available.

Other service providers

5.75 The obligations of application service providers, host providers and internet access providers should be confined to obligations in relation to Prohibited content (as defined under the new Act), including responding to notices from the Regulator where particular enforcement action is required—such as the taking down of content, where the content platform or content provider is located overseas.

5.76 While the ALRC does not make recommendations on exactly how legislative provisions should be drafted to achieve these intended results, the following observations are made.

5.77 First, given that the provision of online content involves a range of entities and activities, it is necessary to clarify which of these are excluded from some obligations. In particular, the legislation needs to minimise impinging upon the principle, discussed in Chapter 4, that Australians should be able to read, hear, see and participate in media of their choice, which includes the right of individuals 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.

5.78 Secondly, obligations that relate to internet access providers concerning content need to be minimised, to enable them to operate with an appropriate degree of legal certainty. One starting point might be a provision, such as that in sch 7 of the *Broadcasting Services Act*, which provides that a person does not provide content 'merely because the person supplies a carriage service that enables content to be delivered or accessed'.[41] However, such a definition is narrower than required because it is directed at internet access providers, and would not extend, for example, to host providers or application service providers.

5.79 Another possible starting point might be the activities of ISPs set out in the *Copyright Act 1986* (Cth), which provides a 'safe harbour' from copyright infringement liability to 'carriage service providers' conducting certain activities.[42]

---

40 Ibid cl 8.5(e)(iv).

41 *Broadcasting Services Act 1992* (Cth) sch 7 cl 5(1).

42 *Copyright Act 1986* (Cth) ss 116AC, 116AD, 116AE, 116AF.

That is, the Classification of Media Content Act might provide that an internet access provider does not become subject to classification-related obligations when simply acting as a conduit for internet activities, caching, storing or linking content on the internet.

5.80 Thirdly, it is necessary to distinguish between content platforms and host providers or similar entities that have a role in providing online content, but should not have any obligation to classify or restrict access to that content. One way to do so may be to focus on aspects of control over content.

5.81 An entity that hosts content provided by another content provider and has the right and ability to control how the content is uploaded, generated or displayed should have obligations to classify or restrict access to content. For example, an entity should have obligations when it exercises complete discretion over what kinds of content it will host, requires the hosted content to be displayed in a certain way (for example, with the content platform's brand) and arranges advertising associated with the content.

5.82 On the other hand, when an entity only hosts websites on a computer server, and imposes minimal obligations with regard to the kind of content being hosted, it could be excluded from obligations to classify or restrict access to content. Some entities, for example, 'host content that is uploaded by others, and play a minimal, if any, editorial or curatorial role in relation to the uploaded content hosted'.[43]

Recommendation 5–5 The Classification of Media Content Act should provide that a 'content provider' includes non-commercial and commercial content providers. However, obligations to classify or restrict access to content would not generally apply to persons uploading content online other than on a commercial basis.

Recommendation 5–6 The Classification of Media Content Act should provide that a 'content provider' includes online content providers and content platforms that control how online content is uploaded, generated or displayed; but excludes other internet intermediaries, including application service providers, host providers and internet access providers.

Recommendation 5–7 The Classification of Media Content Act should provide that obligations in relation to Prohibited content apply to content providers and internet intermediaries, including application service providers, host providers and internet access providers.

5.83 Under the *Broadcasting Services Act*, ISPs are provided with protection from civil proceedings in respect of anything done by them in compliance with a code registered under sch 5, a standard determined by the ACMA, or an access-prevention

43 Google, *Submission CI 2512*.

notice.[44] Hosting service providers, live content service providers and links service providers are protected from civil proceedings in respect of anything done in compliance with rules relating to prohibited content.[45]

5.84 Similar immunity should apply to content providers and internet intermediaries, including application service providers, host providers and internet access providers, in respect of anything done by them in compliance with obligations under the Classification of Media Content Act or industry codes approved by the Regulator.

Recommendation 5–8 The Classification of Media Content Act should provide content providers and internet intermediaries—including application service providers, host providers and internet access providers—with protection from civil proceedings in respect of anything done in compliance with the Act or industry codes approved by the Regulator.

Australian link

5.85 The current regime for the regulation of online content makes a distinction between content hosted outside Australia, regulated under sch 5 of the *Broadcasting Services Act*; and content hosted in Australia, regulated under sch 7.

5.86 Schedule 5 refers to internet content 'hosted outside Australia'. In contrast, under sch 7, the ACMA may only take action in relation to content services that have an 'Australian connection'. Schedule 7 provides that a content service has an Australian connection if, and only if, any of the content provided by the content service is hosted in Australia; or in the case of a live content service, the live content service is provided from Australia.[46]

5.87 An ACMA research paper published in 2011 noted that the effectiveness of the distinction between local and overseas hosted content is 'challenged by the recent industry practice of hosting content in the cloud so that its location inside or outside of Australia is not able to be determined'.[47] In this Inquiry, the ACMA also observed that

> current distribution models for online content can effectively involve identical content accessed via the same URL being hosted in multiple locations, both in Australia and overseas. Both the take-down of content and ISP blocking are likely to be necessary if the comprehensive prevention of access to this content from within Australia is desired.[48]

5.88 While Commonwealth legislation is normally to be construed as applying only to places, persons and other matters 'in and of the Commonwealth',[49] the

---

44 *Broadcasting Services Act 1992* (Cth) sch 5 cl 88.
45 Ibid sch 7 cl 111.
46 Ibid sch 7 cl 3.
47 Australian Communications and Media Authority, *Broken Concepts: The Australian Communications Legislative Landscape* (2011), 81.
48 Australian Communications and Media Authority, *Submission CI 2489*.
49 *Acts Interpretation Act 1901* (Cth) s 21(1)(b).

Commonwealth Parliament has plenary power to make laws with extra-territorial operation.[50] In practice, however, Commonwealth regulatory statutes often include a requirement for an Australian link or connection.

5.89 For example, while the *Spam Act 2003* (Cth) states that, unless the contrary intention appears, 'this Act extends to acts, omissions, matters and things outside Australia',[51] regulation is focused on commercial electronic messages that have an 'Australian link'.[52]

5.90 As discussed above, the ALRC anticipates that the Classification of Media Content Act would replace the current scheme for online content regulation under schs 5 and 7 of the *Broadcasting Services Act*. There seems no sensible rationale, in this context, to limit obligations to classify or restrict access to online content to content 'hosted in Australia'.

5.91 The Classification of Media Content Act should provide that obligations to classify or restrict access to online content apply to any content with an appropriate Australian link including, but not limited to, content hosted in Australia.

5.92 For example, where an organisation carries on business or activities in Australia involving the provision of online content to Australian consumers, it should have obligations to classify or restrict access to content it controls, even where that content happens to be hosted overseas.

5.93 No such limitation on the extra-territorial operation of the Act should apply to obligations in relation to Prohibited content. The ability of the Regulator to take action to interdict the distribution of Prohibited content depends, among other things, on co-operation with overseas regulators and law enforcement agencies and should not be constrained by territorial limitations.

Recommendation 5–9 The Classification of Media Content Act should provide that obligations to classify or restrict access to online content apply to any content with an appropriate Australian link. This may include content:

(a) hosted in Australia;

(b) controlled by an Australian content provider; or

(c) directed to an Australian audience.

50 *Statute of Westminster 1931* (UK) s 3.

51 *Spam Act 2003* (Cth) s 14.

52 *Spam Act 2003* (Cth) s 7. This section provides that, for the purposes of the Act, a commercial electronic message has an Australian link if, among other things, the message originates in Australia; is sent by an individual who is physically present in Australia or an organisation whose central management and control is in Australia; or the computer, server or device that is used to access the message is located in Australia.

The ABC and SBS

5.94 The Classification of Media Content Act is intended to cover content broadcast on free-to-air and subscription television. This raises questions about the application of the new Act to content provided by the ABC and SBS.

5.95 The ABC and SBS are national public broadcasters subject to special governance and accountability arrangements under the *Australian Broadcasting Corporation Act* and the *Special Broadcasting Service Act*.[53] The ABC and SBS are subject to obligations under the ABS and SBS statutory charters,[54] and codes of practice developed by their boards, rather than codes approved by ACMA under the *Broadcasting Services Act*.

5.96 The *Broadcasting Services Act* 'essentially applies to the ABC and SBS only in relation to complaints escalation and spectrum and technical matters'.[55] Notably, the ABC and SBS are not subject to the requirement, imposed on commercial and community television broadcasters, that codes apply the film classification system provided by the *Classification Act*.[56]

5.97 The ABC and SBS stated that a 'strong implication in the Discussion Paper is that it is the ALRC's intention that the new classification regime apply to the national broadcasters in the same way as it would apply to any other media content provider'.[57]

5.98 The ABC and SBS submitted that such an approach would run counter to established public policy and that 'the benefits of consolidating and harmonising Australia's classification laws can be achieved without adversely affecting their independence if the established regulatory approach continues to be applied'.[58] That is, the ABC and SBS should be excluded from the Classification of Media Content Act and a 'harmonised approach' achieved by requiring the ABC and SBS, in developing their own classification standards, to have regard to the standards set for other content providers.[59]

---

53 For example, the ABC and SBS are primarily accountable to their respective statutory boards, which are required to 'maintain the independence and integrity' of the corporations. The ABC and SBS are accountable to the Parliament as a whole through regular appearances at Senate estimates hearings, questions on notice and detailed reporting on a range of specified matters in their annual reports: see *Australian Broadcasting Corporation Act 1983* (Cth) ss 8(1)(b), 80; *Special Broadcasting Service Act 1991* (Cth) ss 10(1)(a), 73.

54 *Australian Broadcasting Corporation Act 1983* (Cth) s 6; *Special Broadcasting Service Act 1991* (Cth) s 10.

55 Joint Submission Australian Broadcasting Corporation and SBS, *Submission CI 2521*. Where a person has made a complaint to the ABC or SBS under a code of practice, and considers the response to be inadequate, a complaint may be made to the ACMA: *Broadcasting Services Act 1992* (Cth) s 150.

56 *Broadcasting Services Act 1992* (Cth) s 123.

57 Joint Submission Australian Broadcasting Corporation and SBS, *Submission CI 2521*.

58 Ibid.

59 Ibid.

5.99 In formulating its proposals, the ALRC did not intend to imply that changes should be made to the existing governance and accountability arrangements applying to the ABC and SBS. The special position of ABC and SBS as national public broadcasters is not under review in the context of this Inquiry, and the ALRC does not make specific recommendations in this regard.[60] For the sake of simplicity, however, the text of the Report does not generally differentiate between content provided by the ABC, SBS and other television broadcasters.

60 The interim report of the Convergence Review recommended that the charters of the ABC and SBS should be updated to 'assist the public broadcasters by confirming current operations' and to provide certainty about the 'remit of public broadcasters': Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 15.

Part 2

A New Classification Scheme

6. Films, Television Programs and Computer Games

Contents

Summary 125
Determining what content should be classified 126
Volume of content 126
Cost and regulatory burden 127
Platform neutrality 128
Community expectations 129
Films, television programs and computer games 130
Feature films 130
Television programs 131
Computer games 132
Made and distributed on a commercial basis 135
Significant Australian audience 138
Sold, screened, provided online, or otherwise distributed 140
Exemptions 141
Voluntary classification 143
Classify notices 144

Summary

6.1 This chapter considers what media content should be required to be classified under the new National Classification Scheme. The chapter starts by considering distinguishing features of content that might be used to determine whether something must be classified. The ALRC concludes that whether something must be classified should no longer turn on the platform on which the content is accessed. Rather, it is more important to ask if content is made and distributed on a commercial basis and has a significant Australian audience.

6.2 The ALRC recommends that the following content should be required to be classified before it is sold, screened, provided online or otherwise distributed to the Australian public:

- feature films;
- television programs; and
- computer games likely to be classified MA 15+ or higher.

However, this content should only be required to be classified if it is both:

- made and distributed on a commercial basis; and
- likely to have a significant Australian audience.[1]

6.3 The classification of most other media content—for example, computer games likely to be G, PG and M, books, magazines, websites and music—should become or remain voluntary. However, industry bodies should develop codes that encourage the voluntary classification of some of this other content, such as lower-level computer games and adult magazines.

Determining what content should be classified

6.4 One of the main functions of classification law is to enable the provision of advice or information to consumers to help them choose entertainment for themselves and their families. This is of particular importance to parents and guardians. Most films and computer games that are classified in Australia receive advisory classifications (G, PG and M), to which no legal access restrictions apply.[2] However, classification laws are also intended to identify higher-level content, to warn adults and protect minors.

6.5 These goals might suggest that most content should be classified. However, for reasons discussed in this chapter, this is not practically possible or cost-effective, even if industry played a greater role in classification decision making. This section outlines some of the key matters that the ALRC considered when determining what content it recommends should be required to be classified.

Volume of content

6.6 There are over one trillion websites, hundreds of thousands of 'apps' are available to download to mobile phones and other devices, and every minute over 60 hours of video content are uploaded to YouTube (one hour of content per second).[3] Submissions to this Inquiry consistently pointed to the sheer volume of content that is now available, particularly online, and the impossibility of having Australian classifiers watch and formally classify all of it. Civil Liberties Australia, for example, submitted that the 'sheer volume of content available today simply makes mandatory classification impractical'.[4] Likewise, the Arts Law Centre submitted that 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.[5]

---

1 That is, an audience with an Australian audience of a significant size.

2 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 G, PG or M.

3 YouTube, *The Official YouTube blog* <http://youtube-global.blogspot.com/2012/01/holy-nyans-60-hours-per-minute-and-4.html> at 30 January 2012.

4 Civil Liberties Australia, *Submission CI 1143*.

5 The Arts Law Centre of Australia, *Submission CI 1299*.

6.7 The volume of content is one of the key reasons the ALRC recommends, in Chapter 7, a greater role for industry classifiers in the new scheme. If industry had a greater role in classification, it may be possible to classify more content. However, if classification is to remain a rigorous process—meaning that content is watched and assessed by trained classifiers applying formal criteria—it is still not possible to have all media content classified. To do so would impose a significant regulatory burden on content providers and create laws that would be difficult to enforce. As Telstra submitted,

> 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]

6.8 An effective regulatory outcome must account for the volume of media content now available to Australians.

Cost and regulatory burden

6.9 Classification is a costly process, involving trained professionals viewing and assessing content against formal criteria. The fee for the Board to classify a 90 minute film is $730, and if the film is for public exhibition, the fee is $2,180. Even if industry classifiers can perform this work at a lower cost, there will still be a significant cost to be met by distributors, a cost which would likely be passed on to consumers. Requiring content to be classified, some submitted, would simply send the content outside Australia. John Denham, for example, submitted:

> Since Australia represents a tiny proportion of the world market, this proposal would act as a market restriction, preventing access to the Australian market for small developers, who will simply ignore the Australian market and move their operations overseas.[7]

6.10 Meeting classification costs may be particularly disadvantageous to sole traders and small-to-medium enterprises that form the backbone of an emergent digital media content sector.[8] Identical regulatory requirements, Telstra submitted, can have 'dramatically different compliance burdens'. 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.[9]

6.11 These obligations, Telstra submitted, can also 'inhibit innovation and discourage new entrants from developing new content'.[10]

---

6 Telstra, *Submission CI 1184*.

7 J Denham, *Submission CI 2464*.

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

9 Telstra, *Submission CI 1184*.

10 Ibid. See also Arts Law Centre of Australia, *Submission CI 2490*.

6.12 The cost to industry of classifying media content suggests the obligation to classify should be limited and focused. This is consistent with the principle that regulation should be kept to the minimum needed to achieve a clear public purpose.[11]

Platform neutrality

6.13 The convergence of media technologies has undermined many of the distinctions that underpin the current classification scheme, and suggests that the platform on which content is delivered should not determine whether the content should be classified.[12]

6.14 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 up to five different regulatory requirements, as it is shown in cinemas, sold or rented as a DVD, accessed through the internet, and broadcast on free-to-air or subscription television.

6.15 Some submissions observed that consumers simply do not recognise—or care about—the distinctions between platforms.[13] 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.[14]

6.16 Arguments for consistency or parity may also suggest there should be less regulation.[15] If it is prohibitively costly to regulate content delivered on 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).

6.17 The ALRC recommends that the laws concerning what must be classified in Australia should be platform neutral. That is, the obligation to classify content should be framed without reference to the media platform from which the content is accessed—for example, whether the content is broadcast, sold on DVD, screened in cinemas, or provided on mobile phones or online.

---

11 See Ch 4, Principle 7.

12 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.

13 For example, MLCS Management, *Submission CI 1241*. See also Ch 4 of this Report.

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

15 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'.

6.18 Excluding online content would quickly make classification policy irrelevant. However, if certain online content must be classified, then for practical reasons, the classification obligation must be narrowed in other ways.

European Union's Audiovisual Media Services Directive

6.19 The European Union has gone some way towards a more platform-neutral regulation of television-like content. The European Union's Audiovisual Media Services Directive (the AVMS Directive),[16] issued on 19 December 2007, extends television broadcasting regulations, including those concerning the protection of children, to audiovisual media services on the internet.[17]

6.20 The AVMS Directive applies to 'audiovisual media services'.[18] The intention of the drafters was to encompass all kinds of media content which are 'television-like', and to this end, 'audiovisual media services' are defined broadly. Article 1 of the AVMS Directive states that 'audiovisual media services' are services 'under the editorial responsibility of a media service provider' which have the principal purpose of providing programs 'to inform, entertain or educate the general public.'[19]

6.21 'Programs' are further defined as 'a set of moving images with or without sound ... whose form and content is comparable to the form and content of television broadcasting' and include 'feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama'.[20] Certain categories of audiovisual media are excluded from regulation, namely user-generated videos and private websites,[21] electronic versions of newspapers and magazines,[22] and games of chance, online games and search engines.[23]

Community expectations

6.22 Community expectation, though difficult to gauge, may also be a useful guide to what must be classified. Submissions to this inquiry suggest that the Australian community expect classification information for feature films, television programs and computer games—though perhaps because this is the content they are accustomed to seeing classified. Many Australian content providers have given their customers or viewers classification information for this content for many years.

16 European Parliament, *Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services*, Directive 2010/13/EU (2010) (AVMS Directive).
17 The AVMS Directive amends the original 1989 Television Without Frontiers Directive, which regulated television broadcasting in Europe after the development of satellite television in the 1980s.
18 European Parliament, *AVMS Directive*, art 1.
19 Ibid, art 1(a)(i).
20 Ibid, art 1(b).
21 Ibid, recital 21.
22 Ibid, recital 28.
23 Ibid, recital 22.

6.23 Although some have called for the classification of 'everything', there appears to be only a limited community expectation that books, magazines, websites, podcasts, user-generated film clips, and other online content be formally classified.[24]

Films, television programs and computer games

6.24 The ALRC recommends that the Classification of Media Content Act (the new Act) should provide that the following content, subject to some exemptions, should be required to be classified before it is sold, screened, provided online or otherwise distributed to the Australian public:

- feature films;
- television programs; and
- computer games likely to be classified MA 15+ or higher.

6.25 However, the new Act should also provide that this content is only required to be classified if it is both:

- made and distributed on a commercial basis; and
- likely to have a significant Australian audience.

6.26 This rule is platform-neutral—which means it applies to films, television programs and computer games that are broadcast and distributed online, as well as those shown in cinemas and sold on DVD and other media.

6.27 The ALRC also recommends that the new Act should define 'feature film' and 'television program' and include illustrative examples. Examples of television programs would include situation comedies, documentaries, children's programs, drama and factual content.[25]

6.28 This is the content the ALRC recommends should be required to be classified. However, as discussed below, content providers should be encouraged to voluntarily classify other media content.

Feature films

6.29 Feature films have been classified in Australia since the 1950s, and they are classified in many other countries, even where there is no legal obligation to do so. Consumers appear to demand classification information for films more than they demand it for other content such as books, magazines and websites. This may be because moving images can have a greater impact on viewers than still images and text.

---

24 See, for example, Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 3, 4.

25 Exemptions are discussed later in this chapter.

6.30 The ALRC recommends that feature films should continue to be required to be classified, if they are made and distributed on a commercial basis and likely to have a significant Australian audience.

Cinematic compositions

6.31 Existing classification laws do not limit the films that must be classified to 'feature films'. Rather, all unclassified 'films' (other than exempt films) must be classified, and film is defined broadly to include:

> a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer generated image, can be produced (together with its sound track).[26]

6.32 If these laws were applied to online content, they would apply to millions of online film clips—and perhaps even websites. The ALRC recommends that a narrower range of film be required to be classified. In defining 'feature film', drafters of the new Act may draw upon the definition of 'work' in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), which provides that a 'work' includes:

> a cinematic composition that appears to be:
>
> (i) self-contained; and
>
> (ii) produced for viewing as a discrete entity.[27]

Duration

6.33 The duration of a film may also be a useful way of targeting the films for which Australians seek classification information. The new Act should not place a classification obligation on providers of short film-like content, commonly user-generated and distributed on video-sharing websites, which cannot feasibly be classified and for which Australians do not seem to expect classification information. The ALRC proposes that the new Act should provide that only feature films of a minimum duration, perhaps one hour, must be classified.[28]

Television programs

6.34 Television programs, other than exempt programs, are now classified before they are broadcast in Australia. The ALRC recommends that they continue to be classified, but regardless of whether they are broadcast, or distributed online, on physical media such as DVD, or otherwise (and only if they are made and distributed on a commercial basis and likely to have a significant Australian audience). As noted throughout this Report, if classification obligations do not apply to certain online content—such as television content delivered through Internet Protocol television (IPTV)—then this obligation will become increasingly less effective and relevant. The

---

26 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5.

27 Ibid.

28 Though again, only if they are made and distributed on a commercial basis and likely to have a significant Australian audience.

ALRC uses the phrase 'television program' in the absence of a popularly understood, media-neutral alternative phrase.

6.35 Free TV Australia (Free TV) expressed concern that referring to television content may be unfair, even if the intent is to create a platform-neutral law:

> The 'television program' definition, combined with the platform-neutral approach, means that in practice, the only online content that will require classification is content produced by Free TV members and similar established Australian content providers. ... The result is in an unfair regulatory impost on Free TV members and other traditional television content providers. ... Jurisdictional issues will mean that Australian businesses are the only ones who can be subject to enforcement and compliance activities. ...
>
> In an online environment, Free TV members are just like any other content provider—they are not licensed, or using spectrum, and the content in question is nonlinear 'pull' content, as opposed to traditional linear broadcasting.[29]

6.36 Free TV's preferred solution to this problem is 'to remove online content from the scope of must classify and make it a voluntary classification category, with a requirement to classify high level material likely to be MA 15+ or greater'.[30]

6.37 However, in the ALRC's view, removing online content from the scope of the laws concerning what must be classified would mean that, in time, much of the content that Australians now receive classification information about, would no longer be classified. Many of the films now sold on DVD with classification information, would be sold online without classification information. This would also leave Australia with platform-specific classification laws that will quickly become obsolete.

6.38 The ALRC does not propose that established Australian content providers, such as television networks, should have a greater regulatory burden than other content providers—unless, as discussed further below, the content they provide has a significant Australian audience, and the content others provide does not.

Computer games

6.39 Australians continue to value classification information for computer games. Along with films and television programs, computer games are among the content for which distributors in many parts of the world are expected to provide classification information.

6.40 The obligation to classify and mark computer games has been clearly applied to console and PC-based games sold in Australia since the 1990s. In the ALRC's view, many computer games distributed online, or able to be played online, should also be classified. However, if online and mobile games were required to be classified, then the scope of computer games that must be classified will need to be otherwise narrowed. There are many thousands of small games, often played online or on mobile devices

---

29 Free TV Australia, *Submission CI 2519*.

30 Ibid. Free TV draws a distinction between providing content through linear, 'push' technology (traditional broadcast television), and providing content on platforms from which users deliberately choose to download the content—'pull'.

and developed by small developers or individuals, which should not be subject to a costly classification obligation.

6.41 In the *Classification Act*, 'computer game' is defined in part to mean:

> 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.[31]

6.42 This definition—and the obligation to classify computer games in state and territory classification enforcement legislation—would capture not only console games, but online games and computer game 'apps'.[32] The ALRC recommends that the obligation to classify computer games in the new Act should also be platform neutral, and apply to online and offline games. However, the obligation to classify computer games might usefully be drafted to apply only to computer game 'works', as this term is defined in the *Classification Act*—that is, to computer games 'produced for playing as a discrete entity'.[33]

6.43 The obligation to classify computer games in the new Act should also only apply to *games*. This should go without saying, but the definition of computer game in the *Classification Act* is arguably quite broad, so much so that accounting software, for example, must be explicitly exempted from the definition.[34]

Likely to be MA 15+ or higher

6.44 The need to warn consumers and protect children might suggest that it is more important for content providers to give classification information about high-level content.[35] This idea is reflected in existing laws that provide that only 'submittable publications'—which includes publications not suitable for minors, such as sexually explicit magazines—must be classified before they are sold in Australia.[36]

6.45 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 Board, John Dickie, suggested that 'there is a large amount of material—publications, instructional films, low level computer games and puzzles—which really do not have to be classified'.[37] The Interactive Games and Entertainment Association (iGEA) submitted that 'small online content products' should only require classification if they 'have the potential to be classified within a restricted category'.[38]

---

31 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5A(1).

32 Apps and other computer programs that are not 'played' or 'interactive games' would presumably not meet this definition of computer game.

33 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5.

34 Ibid s 5B(2).

35 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.

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

37 J Dickie, *Submission CI 582*.

38 Interactive Games and Entertainment Association, *Submission CI 1101*.

6.46 Rather than exempt all of these games from the classification obligation, including higher-level games, 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 one of the higher classifications should be classified.

6.47 In the Discussion Paper, the ALRC proposed that only computer games likely to be MA 15+ or higher must be classified.[39] This is a platform-neutral law, which means it would apply to online computer games, often not classified in Australia. However, it also means that most of the games that are now sold in stores in Australia would no longer be required to be classified, and would therefore only be classified if distributors chose to have them classified.

6.48 The Arts Law Centre supported the proposal, and submitted that, 'given the large number of games created and made available in Australia each year',

> it is sensible to focus the efforts of a government classifier on contentious content and require the classification of contentious content only. Such an approach removes cost and legal burden from small game developers and individuals and imposes it only where necessary, specifically for games that include contentious or adult content.[40]

6.49 Telstra also supported the ALRC's proposal, noting that

> while large numbers of mobile and tablet games and apps are now being produced by small providers, very few contain content that would be likely to pose any concern for consumers. Targeting this classification obligation on the relatively small sub-set of content that contains content that is likely to be of concern is a cost effective approach to addressing this issue.[41]

6.50 Civil Liberties Australia, however, argued that it was more important to provide classification information for lower-level games, to help parents and guardians choose content for children.[42] FamilyVoice Australia submitted that parents are 'just as concerned to know which games are suitable for children of a particular age as they are to have this information about feature films and television programs':

> Indeed given the interactive nature of computer games and their potential to influence behaviour this information is perhaps even more important for computer games than more passive forms of media.[43]

6.51 Similarly, the Board submitted that 'parents and guardians actively seek out sound, reliable and consistent classification information ... particularly when they are looking to purchase or provide to children.' The Board also stressed that it cannot be assumed that lower-level content is easy or straightforward to classify:

> G/PG material is arguably the material on which parents and caregivers place most emphasis in terms of reliable, independent, expert classification information.[44]

---

39 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–2. A game 'likely to be MA 15+ or higher' is an unclassified game that, if it were to be classified, would be likely to be classified MA 15+ or higher.

40 Arts Law Centre of Australia, *Submission CI 2490*.

41 Telstra, *Submission CI 2469*.

42 Civil Liberties Australia, *Submission CI 2466*.

43 FamilyVoice Australia, *Submission CI 2509*.

44 Classification Board, *Submission CI 2485*.

6.52 The Australian Children's Commissioners and Guardians expressed its concerns about M computer games, and submitted that the proposal 'may limit the ability of the public to make informed choices about their computer game purchases'.[45]

6.53 In the ALRC's view, only computer games likely to be classified MA 15+ or higher should be required to be classified (and, as discussed below, only if they are made and distributed on a commercial basis and likely to have a significant Australian audience). These are the games that parents and guardians arguably most need to be warned about—the games with strong or high levels of violence, coarse language and other impactful content.[46] Classifying such games is not primarily for the benefit of 15 year olds, or the parents of 15 year olds, but rather for the benefit of younger minors and their parents, who should be warned that MA 15+ and R 18+ games can have strong or high level violence, coarse language and other content, and are considered not suitable for persons under 15 and 18 respectively. Mandating that such warnings, through classification information, be provided is consistent with the ALRC's principles for reform concerning protecting children from material likely to harm or disturb them.[47]

6.54 Content providers may also choose to classify other lower-level computer games voluntarily. The iGEA expressed its support for voluntary classification for most games, submitting that its members 'understand the value of ensuring that consumers are provided with classification information regardless of whether it is a legal requirement'.[48] In the United States computer games are classified voluntarily in response to market demand; large retail outlets such as Walmart will reportedly only stock computer games that have been classified by the Entertainment Software Ratings Board. As discussed later in this chapter, industry codes might facilitate this voluntary classification of lower-level computer games in Australia.

Made and distributed on a commercial basis

6.55 The ALRC recommends that only films, television programs and computer games that are made and distributed on a commercial basis should be required to be classified before being distributed in Australia.[49] This means that usually only persons carrying on a business producing or distributing media content would be subject to the obligation to have content classified.

6.56 Classifying content comes at a considerable cost, particularly when done by an independent statutory body. Large organisations and companies, such as television networks and the major distributors of films and computer games, will often have the

45 Australian Children's Commissioners and Guardians, *Submission CI 2499*.

46 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 Board for this period. This statistic does not account for the many online games not submitted to the Board for classification.

47 See Ch 4, Principles 3 and 4.

48 Interactive Games and Entertainment Association, *Submission CI 2470*.

49 In the Discussion Paper, the ALRC proposed that certain content should only be required to be classified if it is produced on a commercial basis: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposals 6–1 and 6–2.

resources to ensure their material is classified and, under a new scheme, may also be able to employ their own classifiers for some content.[50] Smaller content providers, individuals, and producers of user-generated content, however, may not be able to bear the cost of having their content classified. Civil Liberties Australia submitted that:

> 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.[51]

6.57 However, many submissions argued that market position or reach should not have a bearing on whether content should be classified. The iGEA said that classification laws should be capable of being applied to 'all content producers, regardless of their size or market position'.[52] FamilyVoice Australia stated that there was no reason to limit the classification obligation to content produced commercially:

> This firstly ensures that material that exceeds community standards is not classified and is not able to be sold, broadcast or exhibited. Secondly, it enables access to material not suitable for children, or for children below a certain age, to be legally restricted. Thirdly, it provides a very useful advisory service that enables individuals to select what they wish to view and assists parents to monitor and control the media their children access.[53]

6.58 A number of submissions noted the difficulty of distinguishing content produced on a commercial basis from other content. The Board, for example, submitted:

> 'Commercial' could encompass a wide variety of revenue-raising business models, from traditional pay-per-view (rental/hire/purchase/download), to those that operate for a profit and charge a fee (eg subscription fees, bundled service fees) or rely on advertising revenue (where content may be free to view but carries paid advertising).[54]

6.59 Some pointed out that many YouTube clips are very popular, and amateur content providers have been known to earn a considerable income from their content. Free TV submitted:

> YouTube earns money from advertising, even though the producers of the content often receive no financial benefits. Some YouTube 'vloggers' receive financial benefits from their content, even though their material may not initially be produced on a commercial basis. Such content will often have millions of views worldwide, more than the highest rating programs on commercial free-to-air television, or even the population of Australia.[55]

6.60 In the ALRC's view, it is important to narrow the scope of the content that must be classified to content made and distributed on a commercial basis. This may be difficult to define, but again, the volume of media content that is now available dictates

---

50 In Ch 7 the ALRC recommends the introduction of authorised industry classifiers.
51 Civil Liberties Australia, *Submission CI 1143*.
52 Interactive Games and Entertainment Association, *Submission CI 1101*.
53 FamilyVoice Australia, *Submission CI 2509*; See also J Trevaskis.
54 Classification Board, *Submission CI 2485*.
55 Free TV Australia, *Submission CI 2519*. See also A Hightower, *Submission CI 2511*.

that only certain content can reasonably be expected to be classified. Without such a limitation, the obligation would apply too broadly.

6.61 Also, crucially, content is being provided by individuals and small enterprises who may often be unable to pay for their content to be classified by the Board or an authorised industry classifier. The ALRC agrees that classification information is a useful service, but it is also a costly service, and not all content providers should be expected to provide it.

6.62 There also appears to be a greater community expectation for classification information for commercial content. A 2011 report from the Australian Communications and Media Authority states that participants considered that, ideally, 'professionally produced content available online should provide guidance about what that content contains'.

> Participants believed the classification and ratings information that applied to broadcast television should also apply to on-demand television. They also considered that classification and ratings should apply to movies and games available online, given that all professionally produced mass-consumed content should be subject to community standards. Furthermore, as parents were less likely to have a comparative reference for movies and games than for television shows, it was felt to be almost more important that classification and ratings apply to these products.[56]

6.63 A large amount of content is user-generated and not made on a commercial basis, but is distributed on a platform that operates on a commercial basis—for example, a television station or a video-sharing website with advertisements. The ALRC recommends that only media content that is both made *and* distributed on a commercial basis should be required to be classified. This is the content for which Australians appear to expect classification information, and it is also the content provided by persons most likely to be able to provide the classification information.[57]

6.64 Whether content is made and distributed on a commercial basis may be drafted with reference to whether the content is made and distributed by persons 'carrying on a business', an idea reflected in some Australian statutes. The concept of 'carrying on a business' under the *Income Tax Assessment Act 1997* (Cth) allows the Australian Tax Office (ATO) to distinguish between 'hopeful amateurs' and commercial operations, and is relevant to assessable income, entitlement to an Australian Business Number, and GST registration.[58]

---

56 Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 54.

57 This limitation is not applied to the recommendations in Ch 10 concerning content that should be restricted to adults. Reasonable steps should be taken to restrict access to adult content, whether or not the content is commercial content.

58 See Australian Taxation Office, *Am I in Business?* <www.ato.gov.au/content/66884.htm> at 23 January 2012.

Significant Australian audience

6.65 The ALRC recommends that only certain content likely to have a significant Australian audience should be required to be classified—that is, an Australian audience of a significant size.

6.66 Without such a limitation, the classification obligation will apply to too much content. A platform-neutral rule that requires television programs to be classified, for example, would mean that the thousands of television shows now broadcast internationally, but perhaps available to be watched in Australia on the internet, would have to be classified. Again, the volume of media content that is now available, combined with the impracticality of having it all classified, suggests that only some content should be required to be classified. It appears appropriate to require the most popular content to be classified—that is, content that has or is likely to have a significant Australian audience.

6.67 A similar intention may be found in the AVMS Directive, which states:

> For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public.[59]

6.68 Some submissions said that audiences seeking out more 'niche' media content also need classification information. Free TV said that viewers 'have a right to expect the same acceptable community standards with respect to any material they access'.[60]

6.69 It is also difficult, some submissions noted, to predict the size and composition of an audience—especially for online content.[61] 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.[62]

6.70 Another submission stated that internet content can 'become popular or fade in popularity within days, depending on which channels it is promoted in'.[63]

6.71 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 argued that music for 'a

---

59 *AVMS Directive*, recital 21.
60 Free TV Australia, *Submission CI 1214*.
61 See, eg, Telstra, *Submission CI 1184*; Australian Council on Children and the Media, *Submission CI 1236*.
62 Telstra, *Submission CI 1184*.
63 Endless Technology Pty Ltd, *Submission CI 1786*.

small audience should not be subject to costly or resource dependent classification systems'.[64]

6.72 The ALRC maintains that a platform-neutral rule defining what content must be classified should be limited to content with a significant Australian audience, otherwise it will catch the many millions of films, games and programs now available on the internet that may be watched by only a small proportion of the Australian population—if by any Australians at all.

6.73 The legislation should define more precisely what will amount to a significant Australian audience. Determining audience size will sometimes be difficult. The popularity of some platforms may indicate whether content will have a significant audience; films broadcast on Australian television and shown in Australian cinemas, for example, will for some years no doubt continue to reach a significant Australian audience.

6.74 Some content providers may not know whether their content is likely to have a significant Australian audience, and may even be surprised if their content 'goes viral'. Such content providers may choose to classify the content anyway, or monitor the popularity of the content, or await a 'classify notice' from the Regulator. The ALRC appreciates that laws should ideally be certain in their application, but some reference to the likely size of the Australian audience may be the only reasonable way to create a platform-neutral law that will apply to relevant content on the internet, without imposing a costly classification obligation on persons, including international content providers, who do not intend to deliver content to a significant Australian audience.

6.75 In enforcing this classification obligation, the Regulator should not be required to prove that a particular piece of content had, or was likely to have, a significant Australian audience. Rather, the Regulator should be able to issue classify notices, discussed later in this chapter, in respect of content with a significant Australian audience. If a content provider then argues that their content does not have a significant Australian audience, and the Regulator changes its view, the Regulator might withdraw its classify notice. However, if the notice stands, and is not complied with, then in enforcing the obligation, that notice should be taken to be conclusive proof that the content has a significant Australian audience.

6.76 Limiting the content that must be classified to content that is likely to have a significant Australian audience may mean that some content that would currently be classified before being broadcast or sold on DVD, for example, may no longer need to be classified, because the Australian audience is likely to be very small.[65] However, if a commercial television program is expected to be watched by a large number of Australians on the internet, and another obscure commercial television program is

64 Australian Independent Record Labels Association, *Submission CI 2058*.

65 In practice, many films with smaller audiences, such as many non-English films sold on DVD in speciality retail outlets, are not classified now anyway, even though the law provides that they should be. Whether such 'niche' non-English language films should be classified under the ALRC's model may depend largely on the likely size of their Australian audience.

expected to be watched by only a few Australians when broadcast, then in the ALRC's view, it is more important for the first program to be classified than the second.

Sold, screened, provided online, or otherwise distributed

6.77 Existing laws generally provide that certain content must be classified before it is sold, hired, distributed, publicly exhibited or broadcast—rather than merely possessed or lent to friends and family. In New South Wales, for example, it is not an offence to possess an unclassified film, or to give a copy of an unclassified film to a friend, but it is an offence to 'sell or publicly exhibit' an unclassified film.[66] Publicly exhibit means exhibit 'in a public place' or 'so that it can be seen from a public place'.[67] 'Sell' is defined to mean:

> sell or exchange or let on hire, and includes offer or display for sale or exchange or hire, agree to sell, exchange or hire and cause or permit to be sold or exchanged or hired, whether by retail or wholesale.[68]

6.78 The ALRC does not favour any extension of the obligation to classify content to persons who merely possess content or who lend or show content to family and friends. The ALRC recommends that the new Act provide that only content that is sold, screened (including broadcast), provided online (and through peer-to-peer networks), or otherwise distributed will be required to be classified.

Recommendation 6–1 The Classification of Media Content Act should provide that feature films and television programs that are:

(a) likely to have a significant Australian audience, and

(b) 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 'feature film' and 'television program' and illustrative examples. Examples of television programs may include situation comedies, documentaries, children's programs, drama and factual content.

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

(a) likely to be classified MA 15+ or higher; and

(b) likely to have a significant Australian audience; and

(c) made and distributed on a commercial basis,

66 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 6.
67 Ibid s 4.
68 Ibid s 4.

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.

Exemptions

6.79 Certain content should continue to be exempt from requirements to be classified. The new Act should contain a definition of 'exempt content' drawn from the existing exemptions in the *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
- educational computer games.

6.80 Some of this content may not be caught by the ALRC's proposed definition of content that must be classified. For example, films and computer games 'for training, instruction or reference' are perhaps unlikely to have a significant Australian audience. The content may therefore not need to be explicitly exempted, but the new Act could keep these exemptions in any event, for the sake of clarity.

6.81 Although in the ALRC's model, this content would not need to be classified, it should still be restricted to adults if it is likely to be R 18+ or X 18+.[69] This safeguard should largely obviate the need to exclude higher level content from the definition of exempt content.[70] A 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.

6.82 If access restrictions on adult content are in place (see Chapter 10), then more content can be exempted from classification requirements. 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 and computer game festivals; and
- art galleries and other cultural institutions.[71]

---

69 See Ch 10.

70 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).

71 For example, National Film and Sound Archive of Australia, *Submission CI 1198*.

6.83 This should replace the formal, and reportedly cumbersome, exemption arrangement, under which film festivals and cultural institutions currently apply to the Director of the Board to have content exempted from classification requirements.[72]

6.84 The National Association for the Visual Arts (NAVA) submitted that it 'strongly supports' the exemption for content shown at festivals, art galleries and other cultural institutions. 'This is a positive move towards supporting Australia's innovative and creative practitioners and their rights to freedom of expression'.[73]

6.85 The Arts Law Centre supported the proposal in the Discussion Paper, pointing to the role played by film festivals, art galleries and other cultural institutions in 'creating a space to show unconventional and challenging content'.[74] The Arts Law Centre also said that an explicit exemption would recognise the 'already widespread self-regulation by galleries and cultural institutions notifying visitors of content so that individuals may decide for themselves and their children whether or not to view it'.[75] Similarly, the Australia Council for the Arts also submitted that in the 'vast majority of cases our galleries and cultural institutions already present films responsibly, with appropriate measures in place to inform the public about work that contains potentially offensive material'.[76]

6.86 However, NAVA also noted that 'artistic work is no longer only made available to the public within gallery spaces but is exhibited in a wider range of contexts and locations'—including on the internet. NAVA therefore recommended that 'the work of all professional artists should be exempt, regardless of the context in which it is brought to the public'.[77] The ALRC sees no need for such a blanket exemption for artists. Many popular films, computer games and television programs that Australians would expect to be classified are no doubt made by artists, and should not be exempted from classification laws on this ground. Distinguishing between artists and other content producers would also be difficult to apply in practice.

Recommendation 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. 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. Providers of this content should not be exempt from obligations to take reasonable steps to restrict access to adult content.

72 For example, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 51.
73 National Association for the Visual Arts, *Submission CI 2471*.
74 Arts Law Centre of Australia, *Submission CI 2490*.
75 Ibid.
76 Australia Council for the Arts, *Submission CI 2508*.
77 National Association for the Visual Arts, *Submission CI 2471*.

Voluntary classification

6.87 Although the ALRC proposes that only a limited range of content must be classified, content providers may choose to have other content classified to meet consumer demand for classification information. The idea of voluntary classification was popular in submissions to this inquiry. The iGEA, for example, submitted that the computer game industry is familiar with and supports voluntary classification schemes, and that it 'welcomes the opportunity to develop codes of practice to encourage computer game providers to classify and mark content in accordance with approved and agreed industry standards'.[78]

6.88 Similarly, Telstra said that media content providers have 'substantial incentives' to classify content, including 'brand preservation' and 'customer satisfaction':

> Telstra believes that many providers would avail themselves of voluntary classification processes. This would be particularly likely to occur if the costs of these voluntary classification processes can be minimised, for example through the new forms of standardised classification instruments [proposed by the ALRC].[79]

6.89 The Arts Law Centre said that 'given the incredibly huge range of content being produced both online and offline, the government must rely and work with industry to develop suitable codes and guidelines to allow self-classification and regulation'.[80]

6.90 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. Content providers will be more likely to choose to meet this consumer demand for classification information if, as is recommended in Chapter 7, this content may be classified by an authorised industry classifier or using an authorised classification instrument.

6.91 Music is another type of content for which there are calls for further classification information. FamilyVoice Australia, for example, provided examples of music with explicit, violent and degrading lyrics, and recommended that 'music with lyrics which is likely to be classified MA 15+ or higher should be required to be classified'.[81]

6.92 However, the Australia Council for the Arts suggested a cautious approach to music classification. There is an enormous volume of music, it said, and 'numerous providers of music, including online music stores, subscription streaming services, and social media'.

---

78 Interactive Games and Entertainment Association, *Submission CI 2470*.
79 Telstra, *Submission CI 2469*. See also Pirate Party Australia, *Submission CI 1588*.
80 Arts Law Centre of Australia, *Submission CI 2490*.
81 FamilyVoice Australia, *Submission CI 2509*.

> To implement the classification scheme's categories for online music in a way that provides effective advice will require cooperation that spans multiple industries, territories and international jurisdictions.[82]

6.93 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. Music with a strong impact would be music likely to be 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 Level 1, 2 and 3 markings. This would also harmonise music classification with the classification of other media in Australia.

6.94 Voluntary codes should be approved by the Regulator, to help prevent content distributors in any particular industry from using the classifications or markings inconsistently or improperly, or in a way that undermines the classification scheme. Accordingly, the ALRC recommends the new Act provide the Regulator with the power to approve voluntary codes. The ALRC also suggests that the Regulator should actively encourage the development of suitable voluntary codes.[83]

Recommendation 6–4 The Classification of Media Content Act should enable the Regulator to approve industry codes that provide for the voluntary classification and marking of content that is not required to be classified. The Regulator should encourage the development of such codes for:

(a) computer games likely to be classified below MA 15+;

(b) magazines likely to be classified R 18+ or X 18+; and

(c) music with a strong impact.

Classify notices

6.95 Where the Regulator becomes aware of unclassified content that the new Act mandates must be classified, the Regulator should have the power to issue a notice to the content provider, requiring the content provider to have the content classified. This is similar to the existing power of the Director of the Board to call in content for classification. However, the ALRC recommends that the Regulator, rather than the Director of the Board, have this power to require classification.[84] This notice also

82 Australia Council for the Arts, *Submission CI 2508*.
83 Codes and co-regulation are discussed more broadly in Ch 13.
84 The powers of the Regulator are discussed in Ch 14.

differs from a call-in notice in that a person may comply with the notice by either engaging an authorised industry classifier or the Board to classify the content.[85]

6.96 Those who routinely provide content that must be classified—for example, cinema-release film distributors and television broadcasters—should have their content classified without receiving a notice. However, if they fail to do so, the Regulator should have the power to issue a classify notice for a category of content, rather than simply one piece of content, provided the content provider can be reasonably expected to identify the content that falls within the category identified in the notice.

6.97 The Regulator should only have the power to issue these classify notices for content that must be classified, and should exercise this power having regard to its enforcement guidelines.[86] Civil, criminal and administrative penalties in relation to classification obligations are discussed in Chapter 16.

Recommendation 6–5 The Classification of Media Content Act should enable the Regulator to issue a 'classify notice' to a content provider who provides unclassified content that the Act mandates must be classified. Such notices may relate to a specific piece of content, or for a category or class of content.

85 However, there will still be a role for call in notices: see Ch 7.
86 See Ch 16.

7. Classification Decision Makers

Contents

Summary 147
Who currently classifies content? 148
Films, computer games and publications 148
Television content 150
Online content 150
Determining who should classify content 150
Volume of content 151
Efficiency, cost and administration 151
Likely classification and nature of content 152
Independent decision making 153
Content to be classified by the Classification Board 153
Regulator to determine 154
Feature films for cinema release 156
Computer games likely to be MA 15+ or higher 157
Industry classification 159
Authorisation 161
Authorised classification systems 164
Authorised classification instruments 168
Checks and safeguards 170
Complaints 171
Reviews of classification decisions 172
Audits of industry classification decisions 175
Call-in notices 176
Sanctions regime for industry classifiers 177
Classification decisions database 178

Summary

7.1 In this chapter, the ALRC recommends 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 independent Board should be retained and in addition to making classification decisions, its role should be expanded to include reviewing decisions, upon application. The Board should continue to have sole responsibility for classifying certain content including content that needs to be classified for the purpose of enforcing classification laws. On commencement of the new National Classification

Scheme, the ALRC recommends that, of the content that must be classified, the following content must be classified by the Board:

- feature films for Australian cinema release; and
- computer games likely to be MA 15+ or higher.

7.3 However, the Regulator should also be provided with the power to determine the media content that must be classified by the Board, so that this may be changed over time, in response to the evolving media content environment and community concerns.

7.4 Apart from the media content that must be classified by the Board, the ALRC recommends that all other media content may be classified by trained authorised industry classifiers, including feature films not for cinema release and television programs.

7.5 Content providers may also choose to use the Board, authorised industry classifiers or authorised classification instruments to voluntarily classify content, such as computer games likely to be classified G, PG and M, even though this content is not required to be classified.

7.6 The ALRC further recommends that the Regulator be able to determine that certain films, television programs or computer games, that have been classified under an authorised classification system are 'deemed' to have an equivalent Australian classification.

Who currently classifies content?

7.7 Responsibility for classification, content assessment and related regulatory activities is allocated across independent classification boards, government and industry, as summarised below. Content classification and media content regulation more broadly is also outlined in Chapter 2.

Films, computer games and publications

7.8 Films, computer games and certain publications are subject to direct government regulation, which involves mandatory classification by independent boards using statutory classification 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*) which is administered by the Commonwealth Attorney-General's Department (the AGD) within the portfolio responsibility of the Minister for Home Affairs and the Minister for Justice.

The Classification Board and Classification Review Board

7.9 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.[1] 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.

7.10 The Boards' classification decision-making processes are expected to reflect sound administrative law practices. The Boards are required under legislation to prepare annual reports[2] and their activities are subject to parliamentary scrutiny.

Authorised assessors

7.11 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 certain unclassified films and computer games.[3]

7.12 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 in the decision-making process at all.

7.13 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.[4]

Other government decision makers

7.14 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 AGD, who are delegated content assessment responsibilities under the *Classification Act*; the Australian Customs and Border Protection Service (Customs), which assess and intercept prohibited imports and exports at the border; the Australian Communications and Media Authority (the ACMA), which 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.

---

1 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 48, 74.
2 Ibid ss 67, 85.
3 Ibid ss 14, 14B, 17, 31.
4 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* (Cth).

7.15 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

7.16 Commercial television broadcast licensees, the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) and subscription television companies all engage classifiers to classify programs, films and, in some cases, other content such as promotions or advertising. Industry codes for programming are a legislative requirement. Each broadcaster or industry sector has its own code that, among other matters, also governs classification activities, including exemptions, classification guidelines, time-zone restrictions, marking requirements and complaint mechanisms.[5]

Online content

7.17 'Trained content assessors' are engaged by 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* (Cth) (*Broadcasting Service Act)*. The circumstances under which content must be referred for assessment and the assessment process are set out under the Internet Industry Association Internet Industry Code of Practice, approved by and registered with the ACMA.[6]

7.18 Under sch 7 of the *Broadcasting Service Act*, mobile and online content service providers may also submit media content to the Board for classification. 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 under the *Broadcasting Service Act*.

Determining who should classify content

7.19 In Chapter 6, the ALRC recommends that feature films, television programs, and computer games likely to be classified higher than MA 15+, that are both 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. While this is a narrowly defined segment of content, it is still not practical, efficient or necessary to require all of this content to be classified by one classification body.

7.20 The ALRC has applied a 'platform neutral' approach to the division of responsibility for content classification. That is, recommendations about who classifies what content do not turn on whether the content is broadcast, provided online or

---

5 Codes of practice registered with the ACMA: *Commercial Television Industry Code of Practice 2010 ABC Code of Practice 2011*; *SBS Codes of Practice 2006*; *ASTRA Codes of Practice 2007 Subscription Broadcast Television; ASTRA Codes of Practice 2007 Subscription Narrowcast Television.*

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

provided as a physical hardcopy product. For example, the ALRC is not recommending that all physical products distributed or accessible offline must be classified by the Board while content broadcast or available online may be classified by industry. Nor is the ALRC proposing that certain forms of content must be classified by the Board, because it has a greater impact than other content.

7.21 The following section outlines the key factors that were considered in determining who should have responsibility for making classification decisions under a new National Classification Scheme. The ALRC recommends a significant shift in responsibility for classification decision-making to industry, but maintains that there remains an important role for an independent classification decision-making body.

Volume of content

7.22 As discussed in Chapter 6, the volume of media content available today inevitably restricts what practically can be classified. The volume of content that must be classified may also be too large for one entity to classify efficiently.

7.23 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'.[7] The quantity of content necessitates industry involvement in classifying the content it publishes—if classification is the desirable outcome.[8] For example, one submission observed 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.[9]

7.24 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'.[10]

Efficiency, cost and administration

7.25 The AGD charges fees for Board classification decision-making 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

7 The Arts Law Centre of Australia, *Submission CI 1299*.
8 F Hudson, *Submission CI 402*.
9 D Bryar, *Submission CI 1278*.
10 Australian Home Entertainment Distribution Association, *Submission CI 1152*.

> large scale formal classification by the Classification Board would make the provision of most online content by Australian providers uneconomic.[11]

7.26 A benefit of industry classification is that it may generate cost savings and other efficiencies, such as reducing the time taken to classify products, and accounting for classification considerations in the content development and production process. This is particularly important for independent developers and small providers of niche products.

7.27 Submissions referred to the speed of classification and familiarity with content as factors that supported industry classification.[12] 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 digital content-generating industries.[13] It was also suggested that industry should classify content where there are scheduling constraints and critical deadlines for publishing particular content.[14]

7.28 Industry classification may have particular advantages in relation to media content that can be classified quickly, especially where that content is published in large volumes and its publication is subject to tight time frames. Efficiency of classification may therefore be another useful way to decide what content should be classified by industry.

Likely classification and nature of content

7.29 The features of particular content are also 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.[15]

7.30 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.[16]

7.31 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 in impact and is often controversial in nature.[17]

7.32 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

---

11 Telstra, *Submission CI 1184*.
12 C McNeill, *Submission CI 1997*.
13 E Barker, *Submission CI 1781*; Australian Mobile Telecommunications Association, *Submission CI 1190*; D Henselin, *Submission CI 809*; P Murphy, *Submission CI 255*; C Foale, *Submission CI 206*.
14 D Bryar, *Submission CI 1278*.
15 R Palmer, *Submission CI 2296*; J McKay, *Submission CI 642*; G Stille, *Submission CI 423*.
16 Australian Christian Lobby, *Submission CI 2024*.
17 Australian Home Entertainment Distribution Association, *Submission CI 1152*.

content.[18] Other submissions supported industry classification of some G content, where an industry specialises in it and the producer's intention is clear and fair.[19] It was suggested that sexually explicit content was another type of content that would be easy for industry to classify, because it is provided by a sector that 'caters only towards adults'.[20]

Independent decision making

7.33 Given the support for industry classification, the need for an independent classification body at all may be open to question. Despite the limits of the Board to classify all content that may be subject to classification requirements under the ALRC model, some submissions asserted that 'it is imperative that a government agency, rather than industry bodies, devise and apply the classifications'.[21]

7.34 Submissions variously referred to the importance of a 'separate', 'impartial' classification body, while others, such as the Australian Council on Children and the Media (ACCM), remarked that 'classification is a highly technical process, and having one central body will ensure accuracy and consistency'.[22] 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.[23]

7.35 Some 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. FamilyVoice 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'.[24]

7.36 Even if it might be pragmatic for industry to classify some media content, it is clear that a board or equivalent body, representative of the community with statutory independence from government, and financial independence from industry, remains highly valued.

Content to be classified by the Classification Board

7.37 Having regard to the factors discussed above, the ALRC recommends that industry classifiers be empowered to classify a larger range of media content. However, the ALRC has also identified a subset of content that should be classified by the Board.

---

18 Ibid.
19 Confidential, *Submission CI 2037*.
20 J Bui, *Submission CI 873*.
21 Australian Council on Children and the Media, *Submission CI 1236*.
22 Ibid.
23 J Dickie, *Submission CI 582*.
24 FamilyVoice Australia, *Submission CI 85*.

7.38 Although the ALRC recommends that a narrow range of content be subject to mandatory classification requirements—and an even smaller segment of that content must be classified by the Board—the ALRC considers that the Board should have the power to classify any media content that is submitted for classification, on receipt of a valid application.

7.39 In addition, the Board should continue to be responsible for content that is submitted for classification for the purpose of enforcing classification laws, including those concerning prohibited content. This might include applications for classification submitted by the Regulator and law enforcement authorities, such as Customs or state and territory police.

7.40 As the benchmark decision maker, the ALRC considers that all Board classification decisions should carry over to the same content whether it is later distributed on DVD, provided as a digital download or screened on television—except where content is modified.[25]

Regulator to determine

7.41 In the interests of establishing a classification scheme that is responsive to community needs and better able to adapt to technological advances and new forms of media content, the ALRC recommends that the Regulator be provided with the power to determine what content must be classified by the Board. For certainty and clarity about the content that must be classified by the Board, the determination would take the form of a legislative instrument.

7.42 This approach recognises that the content that must be classified by the Board may be subject to change, especially in a technology-driven media content environment. It is therefore prudent to accommodate this fluidity rather than 'fix' requirements for Board classification in the new Act.

Exercise of the power

7.43 The new Act should set out the matters the Regulator should have regard to in determining what content must be classified by the Board. As discussed above, there are several notable considerations that are important for informing decisions about what content should be the responsibility of the Board to classify.

7.44 The Board's greatest value, relative to industry classifiers, lies in its role in providing an independent benchmark for classification standards and 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 benchmarking role.

7.45 Benchmarked standards are far more important under a scheme that allows for more content to be classified directly by industry. As an independent body, the Board's decisions should be objective and free of self-interest—it operates in the public

25 See Ch 8 for information about modifications.

interest. Hence there is a high level of confidence in the Board's decisions. Under the ALRC model, the benchmarking benefit is amplified as Board decisions must carry over to the same content subsequently delivered on other platforms.[26]

7.46 In the ALRC's view, the new scheme should take full advantage of these unique features of the Board. Therefore, the Board should have a role in classifying mainstream media content that has potential for significant reach across Australian audiences. This should also include content that might raise particular concerns in the community. For example, new forms of content that provide for significantly different or unusual viewer/player experiences may warrant scrutiny by the Board until their particular effects are better understood and public concerns have been allayed. The Regulator might also be guided by the content classified by independent bodies in other jurisdictions.

7.47 To maintain the experience expected of a benchmark decision maker, the Board should routinely make classification decisions across different forms of media content and the range of classification categories. However, there are practical limitations—including what constitutes a manageable volume of content that would allow the Board to make timely decisions at a reasonable cost.

7.48 The Regulator should also consider each industry's track record of classification decision-making and the quality of its classification processes. This should act as an incentive to industry to make sound classification decisions.

Recommendation 7–1 The Classification of Media Content Act should enable the Regulator to determine, of the content that must be classified, what content must be classified by the Classification Board. The determination should be set out in a legislative instrument.

Recommendation 7–2 The Classification of Media Content Act should provide that the Regulator, in determining the content that must be classified by the Classification Board, should have regard to matters including:

(a) the need for a classification benchmark, particularly for popular or new types of media content;

(b) the need for content to be classified by an independent decision maker;

(c) the classification of similar content in other jurisdictions;

(d) evidence of rigorous and reliable industry classification decision making;

(e) the capacity of the Classification Board to make timely classification decisions; and

(f) the cost to content providers of Classification Board decisions.

26 However, see discussion of modifications and additional content in Ch 8.

Feature films for cinema release

7.49 The ALRC considers that feature films for Australian cinema release provide a useful category of content that may be used to set an independent benchmark for classification decisions. These films have a high public profile and a large audience reach over time and across other media platforms—after their cinema release they may be downloaded online, sold on DVD, or screened on television. This is media content that, in all its forms, will ultimately be consumed by a significant proportion of the Australian population.

7.50 There is also a stronger consumer expectation of reliable and independent classification information for films screened in cinemas. This may be due, in part, to the costs incurred by people attending the cinema relative to other media content. This expectation may be reflected in the generally higher number of reviews of decisions[27] and complaints[28] made in relation to this content.

7.51 A consistent feature of classification systems in other jurisdictions, even where classification is voluntary, 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 United States, 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.[29]

7.52 The Motion Picture Distributors Association of Australia (MPDAA) reasoned that government regulation of the classification process provides a consistent, independent and compliant framework for theatrical film classification, concurring with the ALRC's view that these films provide a useful benchmark for classification decisions.[30] Another industry stakeholder, 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 Board.[31]

7.53 Singling out cinema release films is not about how they are accessed, or their impact relative to films provided in other formats, nor does the ALRC assume that major films will always be released first in cinemas.[32] Rather, cinema release films

---

27 In 2009–10 five of the eight applications for review were for cinema release films. In 2010–11 there were only two reviews and both were for computer games: <http://www.classification.gov.au /www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationReviewBoardDecisions_ClassificationReviewBoardDecisions> at 16 January 2012.

28 In 2010–11 there were 80 complaints for 472 cinema release films classified. These films represent 8.5% of the Board's workload for commercial applications yet they account for 12% of the complaints received. While the complaints relate to only a small number of titles, they spanned the range of classifications including content classified G and PG. On the other hand only 85 complaints were received for films and television series released on DVD though 3957 titles were classified: Classification Board, *Annual Report 2010–11*, 53, 54.

29 See Appendix 3 for more information on classification and content regulation in other jurisdictions.

30 Motion Picture Distributors Association of Australia, *Submission CI 2513*.

31 National Association of Cinema Operators - Australasia, *Submission CI 2514*.

32 Australian Federation Against Copyright Theft, *Submission CI 2517*; Motion Picture Distributors Association of Australia, *Submission CI 2513*; Classification Board, *Submission CI 2485*; Australian Home Entertainment Distribution Association, *Submission CI 2478* argued that this proposal assumes that

provide a practical way to capture a finite, readily identifiable subset of content that has wide appeal, represents many entertainment genres and will likely have a significant reach across the wider Australia population, taking into account total distribution/views of these films additional to their cinema screenings.

7.54 Another option might be to require that all 'large budget' or 'likely to be popular' films (whether cinema release, screened online, broadcast on television or provided on DVD) go to the Board for classification. Some might suggest this is more consistent with the platform-neutral rule. However, defining a 'large budget' or 'likely to be popular' film for Board benchmarking purposes is arguably difficult and would create uncertainty for the Board, consumers and industry.

7.55 For these reasons, films that have a cinema release serve a useful independent benchmarking purpose and the ALRC recommends that, on commencement of the new scheme, they be classified by the Board.[33] Where a film's first release is on another platform and there is uncertainty about its cinema release, it may be pragmatic for the content provider to submit it to the Board for classification to avoid content being classified twice.[34]

Computer games likely to be MA 15+ or higher

7.56 In Chapter 6, the ALRC recommends 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 benchmark decision.

7.57 Computer games with strong or high level content—particularly violence—have been the subject of extensive public debate and controversy,[35] although some of this controversy is likely to abate in light of the decision by the Standing Committee of Attorneys-General to introduce an R 18+ classification for computer games.

7.58 On balance, just as consumers might expect certain assurances about the classification of high profile, heavily promoted films, the ALRC considers that the profile of major release games and the ongoing concerns about violent computer games, justify Board classification.

7.59 Submissions from the computer games industry were generally opposed to Board classification of this subset of computer games. The Interactive Games and Entertainment Association (iGEA) argued that: the volume of games would be too great for the Board to cope with; that the games industry would be inequitably subject

cinema release is the first release platform and that this is inconsistent with growing trends to release films first on other platforms such as DVD or video-on-demand.

33 In Ch 6 the ALRC recommends that films screened at film festivals should be exempt from classification obligations.

34 Duplication of classification would occur if an industry classifier classifies the product first but it is subsequently released in cinemas, requiring it to be classified again by the Board.

35 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. The proposed guidelines are available at <www.classification.gov.au>.

to high direct classification costs; and that if games at the MA 15+ classification are no longer legally restricted, they do not need to be classified by the Board.[36] In relation to computer game applications (apps), there was additional concern that many developers (including individuals and young people) would have limited capacity to apply and pay for Board classifications.[37]

7.60 The iGEA suggested that authorised industry classifiers, complemented by an efficient and reliable post-release audit and complaint handling system, would be a better way to manage this content.[38]

7.61 While post-classification audits might be one way to signal benchmarks, original classification decisions made by an independent Board provide for frequent, proactive and publicly visible benchmarks, which the ALRC considers of greater benefit in an industry-focused classification model.

7.62 The content that the Board must classify has been substantially narrowed under the ALRC's recommendations, providing greater capacity to deal with the larger volume of computer games. Classification bodies in other jurisdictions, such as the Entertainment Software Rating Board (ESRB) and Pan European Game Information (PEGI), also classify large volumes of computer games, the costs of which are recovered by fees to applicants for classification.

7.63 Furthermore, requirements to have certain content classified by the Board should not act as a 'barrier to Australia's participation in any international solution to classifying the massive amount of computer games that are delivered exclusively over the internet and on mobile devices'.[39]

7.64 Cooperative efforts, whether by industry or government, to establish harmonised international classification platforms that involve input from national classification bodies should be encouraged. In this regard, the ALRC particularly notes the ESRB and PEGI initiatives to develop innovative and streamlined approaches for classifying mobile games and apps in partnership with industry peak bodies and commercial entities.

7.65 The Regulator's power to determine what content must be classified by the Board provides the flexibility to amend the legislative instrument so that some computer games might in future be classified by alternative means. Furthermore, the ALRC recommends that the new scheme allow for some media content to be deemed to have the equivalent Australian classification, if it has been classified by a classification body or system, authorised for the purpose by the Regulator (see Recommendation 7–6). Over time, this should facilitate the availability of more classified content whilst reducing the administrative and cost burden on content providers.

---

36 Interactive Games and Entertainment Association, *Submission CI 2470*.
37 Google, *Submission CI 2512*; Confidential, *Submission CI 2510*A; Confidential, *Submission CI 2506*.
38 Interactive Games and Entertainment Association, *Submission CI 2470*.
39 Ibid.

Recommendation 7–3 The Classification of Media Content Act should provide that, on commencement of the new National Classification Scheme, of the content that must be classified, the following content must be classified by the Classification Board:

(a) feature films for Australian cinema release; and

(b) computer games that are likely to be MA 15+ or higher.

Industry classification

7.66 The ALRC recommends that, apart from the media content that the Regulator determines must be classified by the Board, all other media content may be:

- classified by the Board; or
- classified by an authorised industry classifier;[40] or
- deemed to be classified because it has been classified under an authorised classification system.

7.67 Such media content will commonly include:[41]

- feature films not for cinema release, for example, films on DVD, digital downloads available on the internet, and those broadcast on television;
- television programs that are broadcast on television (including subscription television), provided via television networks online and hosted on websites such as YouTube;[42] and
- media content classified by the Board but later modified.

However, as discussed in Chapter 6, the ALRC recommends that this content should only be required to be classified if it is both likely to have a significant Australian audience and made and distributed on a commercial basis.

7.68 Any content that a content provider voluntarily chooses to have classified may also be classified by the Board or an authorised industry classifier—such as computer games likely to be classified G, PG and M.[43] Later in the chapter, the ALRC recommends developing classification instruments to facilitate efficient classification of content, such as content that would otherwise not need to be classified.

---

40 Content providers should not be compelled to use authorised industry classifiers. It should be open to them to submit content to the Board accompanied by the relevant fee for classification if they so choose.

41 In Ch 10 it is recommended that content likely to be X 18+ does not need to be classified but must be restricted to adults. If the government determined that this content should be classified, then the ALRC recommends that it should be classified by authorised industry classifiers.

42 As discussed in Ch 6 the ALRC uses the phrase 'television program' in the absence of a popularly understood, media-neutral alternative phrase. It is intended to capture television programs that are broadcast, distributed online, on physical media, or otherwise.

43 Some major content providers might continue to classify content—even though it does not fall within the mandatory requirements—in response to consumer demand for classification information.

7.69 Under the ALRC's model, most content that must be classified may be classified by industry. This recognises industry's longstanding involvement in the classification of television content and current arrangements whereby industry assessors make classification recommendations to the Board in relation to films, television series and computer games.[44] Greater industry classification of content was widely supported—subject to appropriate government regulatory oversight.[45]

7.70 Of the content that must be classified under the ALRC model, industry will generally be responsible for content that is relatively straightforward to classify or for which industry already has experience in classifying or assessing. As Telstra remarked:

> giving classification responsibility for the most prominent and the most sensitive forms of content to the Classification Board would provide a reliable baseline of classification treatment for this content that could then be applied by authorised industry classifiers to less prominent and sensitive forms of content.[46]

7.71 Allowing industry to classify this media content should significantly reduce the cost and administrative burden of classification. The ALRC considers that the efficiency and ease of industry classification, assisted by their experience and understanding of audience expectations, and a market incentive to be responsive to consumer feedback, should motivate industry to comply with classification requirements and may encourage the classification of a greater volume of content.

7.72 Later in this chapter, the ALRC recommends checks and safeguards, including mechanisms for consumer complaints, audits by the Regulator and reviews by the Board, all of which are designed to manage industry classification activities.

Recommendation 7–4 The Classification of Media Content Act should provide that, other than media content that must be classified by the Classification Board, media content may be:

(a) classified by the Classification Board;

(b) classified by an authorised industry classifier; or

(c) deemed to be classified because it has been classified under an authorised classification system.

---

44 The existing authorised assessor schemes would no longer be necessary under the ALRC recommendations for industry classification—as most of the content currently assessed under these schemes would be content able to be classified by industry classifiers.

45 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; Arts Law Centre of Australia, *Submission CI 2490*; National Association for the Visual Arts, *Submission CI 2471*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; E Steward, *Submission CI 1048*; C Foale, *Submission CI 206*.

46 Telstra, *Submission CI 2469*.

Authorisation

7.73 Public confidence in the classification process and classification decisions is founded upon decision makers consistently applying specified classification criteria, adhering to agreed standards, and employing sound decision-making practices.

7.74 To that end, industry classifiers should apply statutory classification criteria and categories.[47] The object is that all classification decisions—whether they are made by the Board or industry—will be made in the same way, using the same classification tools for the same classification outcome.

7.75 To ensure that all industry classifiers are classifying content consistently and properly applying the statutory classification criteria, industry classifiers should be authorised to classify content by the Regulator and should only be authorised if they have completed training approved by the Regulator.

7.76 Requiring the authorisation of industry classifiers provides the Regulator with the means to monitor the activities of an expanded and diverse group of classifiers—essential to its role in overseeing industry classification. The ALRC considers that such a requirement connects the classifiers to the broader regulatory framework and establishes a relationship that reinforces obligations to comply with classification requirements separate from and beyond those of industry alone.

7.77 Authorisation processes might also involve renewing authorisations periodically and undertaking refresher training—to ensure that classifiers stay up to date with changes in legislation, including the statutory classification criteria, and to properly maintain their classification skills and knowledge.

7.78 Authorised classifiers may be employed full-time by major content providers or they may be engaged by content providers on a classification task basis. Classifiers that are authorised and trained to meet the same minimum requirements and standards may have greater mobility and opportunities to work across media content industries.

Training

7.79 The AGD 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 networks, that employ industry classifiers. The ALRC considers that these arrangements would serve as a useful model for the Regulator's training of industry classifiers.

7.80 Robust and comprehensive training of all industry classifiers 'to ensure that there is consistency and accuracy in classification decisions' was supported by stakeholders.[48] Similarly, submissions noted that it was appropriate for the training and authorisation framework to be administered by the Regulator.[49]

---

47 See Ch 9.

48 For example, Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*.

49 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; N Goiran, *Submission CI 2482*; Telstra, *Submission CI 2469*.

7.81 In the ALRC's Discussion Paper, the ALRC asked whether classification training should only be provided by the Regulator, or whether it should become a part of the Australian Qualifications Framework.[50] The Discussion Paper noted that private providers may wish to become involved in accredited training programs, or that the vocational education and training sector may wish to offer approved short courses in media classification.

7.82 A number of submissions, including from industry, argued that training should be exclusively provided by the Regulator 'for the purpose of consistency and effective monitoring'.[51] For example, FamilyVoice Australia submitted:

> If it was made a part of the Australian Qualifications Framework this would mean that it could be offered by any provider subject to the normal accreditation and auditing under the AQF. With such a dispersal of the actual training providers it would remove the Regulator one step further from ensuring that all training adequately prepared classifiers to comply with the requirements of the National Classification Scheme. [52]

7.83 A key theme in industry submissions was that the training regime should involve input from 'experienced classifiers across a range of media content industries' and incorporate 'on-the-job' training.[53] The ALRC notes that classification bodies and Regulators in other jurisdictions provide classification training in-house, and as the Classification Board asserted:

> [its] benchmarking role takes on equal, if not greater, significance in the approval of training course content which will equip authorised industry assessors to classify media content that aligns with community expectations in a consistent way, but that is also responsive and adaptive to any movement in benchmarks.[54]

7.84 Some submissions from individuals expressed support for classification training becoming part of the Australian Qualifications Framework (AQF), some noting that it would enable more people to be 'educated about how media is classified'.[55] While the iGEA supported the general proposal, it suggested a cautious approach, as 'classification training should be low cost' and 'able to be undertaken within a reasonably short amount of time'.[56]

7.85 Other submissions observed that, even with the expansion of industry classification, there would still 'likely to be only limited employment opportunities for professional classifiers'.[57] Taking into account the number of classifiers and authorised

---

50 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 7–2.

51 Free TV Australia, *Submission CI 2519*; FamilyVoice Australia, *Submission CI 2509*; Foxtel, *Submission CI 2497*; Classification Board, *Submission CI 2485*; N Goiran, *Submission CI 2482*.

52 FamilyVoice Australia, *Submission CI 2509*.

53 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; Australian Subscription Television and Radio Association, *Submission CI 2494*.

54 Classification Board, *Submission CI 2485*.

55 A Hightower, *Submission CI 2511*; D Henselin, *Submission CI 2473*; Watch On Censorship, *Submission CI 2472*; D Mitchell, *Submission CI 2461*; M Smith, *Submission CI 2456*.

56 Interactive Games and Entertainment Association, *Submission CI 2470*.

57 R Williams, *Submission CI 2515*; Classification Board, *Submission CI 2485*.

assessors who are already working in media content classification, the ALRC notes the view that commercially provided AQF courses, may not be 'sufficiently robust in the long-term' and 'would likely be conducted infrequently and in small numbers'.[58]

7.86 Training should be conducted by professionals with appropriate qualifications. On balance, the ALRC considers it important that the Regulator, in monitoring industry classification decision-making, has continuous oversight by also developing and delivering classification training. This will help maintain a high level of public confidence in the quality of classification decision-making and the integrity of the classification scheme.

7.87 One body, the Regulator, should be responsible for the centralised development and delivery of classification training. To ensure that the training regime is robust and provides for skilled and knowledgeable industry classifiers, the ALRC suggests the new training framework include:

- a statutory requirement that provides for consistent, minimum classification standards, skills and knowledge for all authorised classifiers—by mandating that they complete the training program provided for by the Regulator;
- a comprehensively redesigned training program that provides for recognition of prior training and classification experience, supervised minimum hours of on-the-job classification and mentoring by experienced classifiers;
- requirements for minimum training qualifications for trainers delivering classification training;
- training developed in consultation with the Director of the Board;
- opportunities for industry classifiers to have input to training courses; and
- consideration of training time and cost.

7.88 While the Regulator should continue to have responsibility for delivering classification training, additional training demand—if it arises—could be met by external providers who should be accredited for the purpose. To this end, the ALRC suggests that the Regulator explore opportunities to accredit media content professionals or industry bodies that represent content providers with classification experience.

Recommendation 7–5 The Classification of Media Content Act should provide that industry classifiers must have completed training approved by the Regulator and be authorised by the Regulator to classify media content.

58 Classification Board, *Submission CI 2485*.

Authorised classification systems

7.89 The ALRC recommends that the Regulator should have the power to determine that films, television programs and computer games that have been classified under an authorised classification system are 'deemed' to have an equivalent Australian classification. For example, the Regulator might authorise the Pan-European Games Information system (PEGI), and determine that a computer game given a '7' PEGI classification will be deemed to be classified PG in Australia.

7.90 However, to maintain the integrity of Australia's classification scheme, the Regulator should only authorise robust and comprehensive classification processes that incorporate classification criteria comparable to those provided for under Australian law. Essentially, the Regulator must be satisfied that authorised classification systems deliver classification decisions comparable to the decisions that might be made if content were classified by an Australian classifier operating under the Australian classification scheme.

7.91 There are a number of advantages of recognising international classification systems. Most importantly, the significant growth in the volume of media content, often produced by individuals, suggests that some international cooperation is vital to ensuring that certain types of content will continue to be classified. The ALRC considers that an individual who creates a simple online computer game should not be expected to have his or her game classified under the national classification systems of every country in the world.

7.92 Similar approaches are used by New Zealand, in applying certain Australian and British classification decisions; and Canada, which references certain US classification decisions.[59] A number of submissions to this Inquiry supported the concept of recognising classification systems in other jurisdictions.[60] Classification systems developed by major global content providers might also potentially be recognised.[61]

7.93 Authorising other classification systems would assist industry to efficiently provide classification information to Australian consumers under Australian classification markings. It would also provide for more classified content—without requiring additional classification activity on the part of the content provider. For example, there is scope to use this approach to achieve classification outcomes for

---

59 New Zealand 'cross-rates' films and computer games classified G, PG or M by the Australian Classification Board in the first instance or if the content has not been classified in Australia, they refer to decisions of the British Board of Film Classification, *Films, Videos, and Publications Classification Regulations 1994* (NZ), cls 4(1),(2). Cross-rated films must carry the corresponding New Zealand classification label but computer games need not—that is, they may retain the classification marking of the country from which the classification decision originated: <http://www.censorship.govt.nz/industry/industry-games.html> at 20 January 2012. Since 2005, a number of Canadian provinces including Manitoba, Ontario and British Columbia have legislated to adopt the classifications for computer games classified by the Entertainment Software Rating Board: See Entertainment Software Ratings Board, *Canadian Advisory Committee to Provide Advice on Video Games* (Press Release, 10 June 2005).

60 Interactive Games and Entertainment Association, *Submission CI 2470*; A Van Der Stock, *Submission CI 1398*; D Gormly, *Submission CI 643*; D Myles, *Submission CI 98*.

61 Internet Industry Association, *Submission CI 2528*; Google, *Submission CI 2512*.

content that industry might wish to have classified even though it may not be required to do so, for example, computer games with a likely classification of G, PG or M.

7.94 Where the Regulator considers that a particular item of media content has generated controversy in another jurisdiction or is likely to have a high profile on release, it would have the capacity to call it in for classification by the Board or request the content provider to classify the product, rather than allow it to be deemed. Content providers could be encouraged to make similar judgements of their own volition to minimise the risk of complaints or an application for review of the classification.

7.95 A legislative instrument should identify the authorised systems, the media content to which the provisions might apply and the corresponding Australian classifications. It could be crafted to be very specific, so that it might only apply to a certain type of content up to a particular classification (for example computer games likely to be classified MA 15+). It should also note that content may not be deemed to be Prohibited.

7.96 The Regulator's determination concerning what content is to be classified by the Board is intended to operate in parallel with the Regulator's determination about content that is deemed to be classified. The Regulator should not exercise its power to make a determination that would be inconsistent with the operation of another determination.

7.97 The Regulator's website should explain to consumers what content is deemed and how the system works including providing links to the websites of the authorised classification system. In this way, consumers can become familiar with how the content is classified originally and search individual decisions to obtain more details on the reasons for the classification.

Markings and consumer advice for deemed content

7.98 In Chapter 8, the ALRC recommends that content that must be classified should carry Australian classification markings. This would also apply to content that both must be classified and has been deemed to be classified. Decisions for deemed content should be registered on the Regulator's classification decisions database.

7.99 Content that must be classified and has been deemed to be classified should also carry consumer advice—where the authorised classification system provides consumer advice with classification decisions.

7.100 The obligation to use Australian markings for deemed media content should not, however, apply to content that is not required to be classified. This distinction may be important—as the Regulator should not be discouraged from authorising classification systems due to concerns about imposing statutory markings obligations on some content providers. However, it would be open to providers of this deemed content to apply the Australian markings if they choose to.

Authorised classification systems–an example

7.101 The following example demonstrates how the deeming recommendation might be implemented in practice.

7.102 The PEGI and the ESRB have been used because they are well established classification systems that operate across the major European and North American computer game markets.[62] Their classification bodies are established independently of industry and classification decisions are designed to reflect community standards. PEGI, in particular, is an example of a harmonised classification model that grew from a cooperative approach seeking to develop a classification system that was acceptable to European Union member states.[63]

7.103 Under the ALRC model, the Regulator would have the power to determine that the PEGI and the ESRB systems are authorised classification systems. The Regulator might further determine that a computer game that has been classified under either classification system is deemed to have the corresponding Australian classification as shown in the tables below.[64]

7.104 The Regulator might also determine that if a game has been given a classification under both the PEGI and ESRB systems, then the game will be deemed to have the highest corresponding Australian classification.

PEGI classification	Corresponding Australian classification
3	G
7	PG
12	M
16	MA 15+
18	R 18+

Table 1: PEGI classifications and possible corresponding Australian classifications

ESRB classification	Corresponding Australian classification
E (6)	G
E (10)	PG
T (13)	M
M (17)	MA 15+
AO (18)	R 18+

Table 2: ESRB classifications and possible corresponding Australian classifications

62 M McBride, *Submission CI 1928*; L Geyer, *Submission CI 1863*; S Schwietzke, *Submission CI 1740*.

63 'The fact that PEGI has been designed to meet varied cultures standard and attitudes across the participating countries and that society representatives such as consumers, parents and registered groups were involved in the set up of the PEGI system is of utmost importance', Viviane Reding, European Commissioner for Education and Culture, 'Inauguration of the PEGI system' (Official Launch and Inauguration Meeting of the PEGI Boards of Governance and Appeal, April 2003).

64 As explained earlier in the chapter, the Regulator may determine that deeming applies to a narrow and more specific segment of computer games (or films or television programs as the case may be).

Matters the Regulator must consider

7.105 The Classification of Media Content Act should set out the matters the Regulator should have regard to in determining whether another classification system should be authorised for the purpose of deeming.

7.106 It is important that consumers can be confident the system has been thoroughly assessed before being authorised. Content providers would also expect these other systems to be carefully assessed so the integrity and value of Australian classification decisions is not compromised.

7.107 While no two classification systems will be entirely aligned, the ALRC considers it important that elements of the National Classification Scheme be reflected in the authorised classification system including: independent decision-making; regard for community standards, particularly the need to protect children from harm; meaningful classification information; transparency of decisions and classification processes; availability and integrity of review mechanisms; efficient and accessible public complaints processes; comparable classification categories and criteria and endorsement by governments in other jurisdictions.

7.108 There may be concern about the lack of correlation between the classification categories and community standards that exist in Australia and other nations, given significant differences in cultural attitudes and social norms.[65] However, the ALRC considers that there is potential for consistency in classification outcomes and, by having regard to the factors outlined above, it should be possible to conclude that decisions made under particular systems were arrived at in a similar manner and for similar reasons to decisions made Australian classifiers applying Australian statutory classification criteria and standards.

Recommendation 7–6 The Classification of Media Content Act should enable the Regulator to determine, in a legislative instrument, that certain films, television programs and computer games with a classification made under an authorised classification system, are deemed to have an equivalent Australian classification.

Recommendation 7–7 The Classification of Media Content Act should provide that in determining whether a classification system is an authorised classification system, the Regulator should have regard to matters including:

(a) the comparability of classification decision-making processes, classification categories and criteria with the Australian classification scheme;

(b) the independence and composition of decision-making bodies;

65 For example, in relation to religion, violence, drug use and homosexuality.

(c) the endorsement or adoption by national classification regulatory regimes;

(d) the transparency of classification decision-making processes and classification criteria;

(e) complaints and review mechanisms;

(f) public reporting of classification activities; and

(g) research and development activities.

Authorised classification instruments

7.109 The ALRC recommends that a new classification scheme should allow for the development of simple, accessible, fast, cost-effective classification instruments approved for the purpose of classification by the Regulator. While the Regulator may develop instruments, there are opportunities for industry to be innovative in this area and develop classification instruments.

7.110 An instrument might take the form of a dynamic 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 or registered in the classification decisions database.

7.111 Online content assessment forms and online classification applications already feature as part of the classification process in some jurisdictions:

- The 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.[66]
- The ESRB 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.[67]

66 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.

67 For more information about the ESRB's process for classifying computer games, see <www.esrb.org/ ratings/ratings_process.jsp> at 2 August 2011.

- 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.[68]

7.112 The above systems still incorporate some additional 'pre-release' classification activity by the relevant classification body, whereas the ALRC envisages classification instruments, similar to those recently announced by the ESRB and PEGI,[69] that generate stand-alone classification decisions that would not rely upon additional input or action by the Regulator, the Board or an industry classifier.

7.113 Both the CTIA-The Wireless Association Mobile Application Rating System with the ESRB and PEGI Express systems are fully automated web-based applications that deliver immediate classification decisions for mobile games and apps, based on the classification criteria used to classify computer games under their respective classification systems.[70]

7.114 Likewise, the instruments recommended by the ALRC should generate formal classification decisions that reflect the statutory classification criteria and categories, consistent with all other classification decisions made under the new scheme. The Regulator should only authorise instruments that incorporate the statutory classification criteria and classification categories.

7.115 One stakeholder expressed concern that authorised classification instruments might affect consistency in classification decision-making.[71] Foxtel also submitted that a simplistic 'tick the box' approach could not meaningfully account for central decision-making principles such as context and the subtleties in the presentation of classifiable elements.[72] In the ALRC's view, this should not be a barrier to developing innovative classification instruments to be used for a designated or limited class of content, particularly in light of developments in other jurisdictions that would confirm the viability of such tools.

7.116 To address these concerns, the Act might prescribe the content that may be classified using these instruments. For example it might prescribe that they only be used for content that is voluntarily classified, such as music with explicit lyrics, adult magazines, and G, PG and M computer games. This would encourage and facilitate the classification of content that is not required to be classified by law, without imposing a significant cost and administrative burden.

---

68 For more information on the BBFC's Watch and Rate system, see <www.bbfc.co.uk/customers/watch-and-rate/> at 1 September 2011.

69 The CTIA–The Wireless Association Mobile Application Rating System with ESRB was announced on 29 November 2011. The PEGI Express system was launched on 31 August 2011.

70 More information about these system may be found at <www.ctia.org/media/press/body.cfm/prid/2147> at 24 December 2011 and <www.pegi.info/en/index/id/1068/nid/media/pdf/352.pdf> at 24 December 2011.

71 I Graham, *Submission CI 2507*.

72 Foxtel, *Submission CI 2497*.

7.117 These authorised instruments could also be used to assist content providers to determine whether their content is adult content for the purpose of meeting obligations to restrict access.[73]

7.118 Alternatively, the Act could enable the Regulator to determine what content may be classified using an authorised instrument. In which case, the Act should also prescribe the matters the Regulator must consider in determining what content might be classified using an instrument, such as the sophistication of the instrument and the need for particular types of content to be classified by trained classifiers.

Recommendation 7–8 The Classification of Media Content Act should enable the Regulator to develop and authorise classification decision-making instruments, such as online questionnaires.

Checks and safeguards

7.119 For some stakeholders, allowing industry to classify its own content raises concerns about achieving an acceptable balance between content providers' commercial interests and community needs and concerns.[74] For example, ACCM stated that:

> 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.[75]

7.120 Moving to significantly greater classification of content by industry, calls for government oversight and appropriate checks and safeguards. The ALRC considers it important that the Regulator has adequate powers to monitor industry classification decision making and penalise serious breaches.

7.121 All industry classifiers—whether they classify for television networks, film distributors or other content providers—should be subject to the same Regulatory oversight. This is appropriate in a convergent media environment, where industry classifiers are doing the same job for major content providers that deliver content in multiple formats across different platforms.

7.122 The ALRC notes the opposition of the television sector to the perceived increase in regulatory oversight of their sector, specifically in relation to review and audit activities.[76] This recommendation does not imply that current television classification practices are necessarily inadequate. However, the same regulatory oversight is

---

73 See Ch 10.

74 Collective Shout, *Submission CI 2450*; FamilyVoice Australia, *Submission CI 85*.

75 Australian Council on Children and the Media, *Submission CI 1236*.

76 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*.

recommended to achieve greater platform neutrality and to give consumers sufficient comfort and clarity regarding the way government oversees all industry classification activities.

7.123 The recommended checks and safeguards build upon the strengths of existing arrangements in relation to the current authorised assessor schemes provided for under the *Classification Act* and checks and safeguards incorporated under some existing industry codes.

Complaints

7.124 Similar to current arrangements, the ALRC recommends that complaints about the classification of content should be directed, in the first instance, to the content provider responsible for the classification decision. A complainant may lodge a complaint with the Regulator where that complainant considers the complaint has not been satisfactorily resolved. Under the ALRC's model, the Regulator would have powers to investigate valid complaints.[77]

7.125 Industry codes should include guidance on complaint-handling mechanisms. 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, where appropriate.

7.126 The Regulator should have the authority to investigate complaints about classification decisions and unclassified or unrestricted media content. In the course of investigating a complaint (especially more complex or serious complaints), the Regulator may liaise with the content provider to ascertain how the original complaint was initially addressed, to obtain reasons for the classification decision (if classified content) or to discuss options for resolving the complaint.

7.127 The Regulator may, in response to a valid complaint about media content, issue the content provider with a 'classify' notice or a 'restrict access' notice.[78]

7.128 The Regulator may also make an application to the Board to classify content or review the original classification decision, arising from a complaints investigation. It would be uncommon for the Regulator to take such action in response to an individual complaint alone, although it would be open for it to do so where an investigation exposed potentially serious breaches of classification laws.

7.129 Numerous and significantly serious complaints would generally trigger more substantial Regulator action, such as submitting applications to the Board for classification decisions or reviews of classification decisions.[79]

---

77 The Regulator should have a broad discretion whether to investigate complaints: see Rec 14–2.
78 See Chs 6, 10.
79 Enforcement guidelines are discussed in Ch 16.

Reviews of classification decisions

7.130 A review of a classification decision involves the making of a new decision on the merits that replaces the original decision. Classification decisions for all media content that must be classified should be reviewable, including television program content. 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.

7.131 Other content that has been voluntarily classified and content classified under an authorised classification system should also be subject to review.

Who should conduct reviews?

7.132 The ALRC recommends that the Board, rather than the Review Board, be responsible for reviewing classification decisions—that is, to make a new classification decision in response to an application for review. This means the Review Board would cease to operate.

7.133 This is intended to streamline the review process, simplify administrative arrangements and provide for potentially quicker review turn-around times. Most importantly this recommendation utilises efficiently the capacity of trained and experienced full-time Board classifiers.

7.134 Currently, the *Classification Act* provides for reviews of classification decisions. The Review Board makes a fresh decision on the merits after considering the material and hearing submissions by the applicant and other parties with an interest in the decision. This generally occurs in response to an application for review from the original applicant or the publisher of the media content.

7.135 A criticism of the current review arrangements is that the cost of reviews is too high.[80] Operations of the Review Board are expensive, as most Review Board members travel to Sydney from across Australia to attend hearings and high-level secretariat support is provided by the AGD for all Review Board activities. As Review Board members are part-time and not generally located in Sydney, organising reviews can also be logistically and administratively time-consuming.

7.136 One submission 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.[81] A lack of classification decision-making experience may have

---

80 The Arts Law Centre of Australia, *Submission CI 1299*; Confidential, *Submission CI 1185*; J Dickie, *Submission CI 582*. The fee for review of a classification decision is $10,000—which only recovers part of the full cost of a review with the remainder funded by government: Attorney-General's Department, *Cost Recovery Impact Statement: Classification Fees*, September 2011–June 2013.

81 MLCS Management, *Submission CI 1241*.

implications for reviewing decisions of industry classifiers who are more regularly engaged in the classification of more media content. [82]

7.137 The ALRC recognises the value of a review mechanism and therefore recommends that the new classification scheme continue to provide for classification decisions to be appealed, but that the function should reside with the Board, rather than the Review Board.[83]

7.138 There was some opposition to the abolition of the Review Board, with submissions arguing that the Board would be unable to independently review its own decisions—the primary concerns being the potential for bias and conflict of interest.[84]

7.139 As the Arts Law Centre of Australia and the National Association for the Visual Arts both suggest the Federal Court process of appeal 'is a model which could be replicated by the Classification Board so as to ensure transparency and avoid the perceived bias attached to a self-review function'.[85] Under the *Federal Court of Australia Act 1976* (Cth), the first time a case is heard in the Federal Court, it is heard by a single judge only.[86] If a party to the case wants to appeal the Judge's decision, this appeal will be heard by a Full Court of the Federal Court,[87] which must consist of at least 3 Federal Court Judges.[88]

7.140 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.[89] However, the bias rule will not necessarily be excluded if bias is apprehended for other reasons. For example, a Board member involved in a primary decision sits on the panel reviewing that decision may give rise to an apprehension of bias.

7.141 The new Act should therefore provide statutory requirements for the composition of review panels, including making explicit whether primary decision makers are to be allowed to sit on reviews. The MPDAA suggested that legislation prescribe that the majority of classifiers on the Review panel should not have been involved in the classification decision being appealed.[90] The ALRC further suggests that Board procedures should refer to the maximum size of panels for original classification decisions.

---

82 Since 2007 to date, the Review Board has conducted between two and eight reviews annually: See Classification Review Board's Annual Reports from 2006–07 to 2010–11.

83 Decisions of the Board are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Judicial review ensures that the decision maker used the correct legal reasoning or followed the correct legal procedures–it is not the re-hearing of the merits of a particular case.

84 A Hightower, *Submission CI 2511*; FamilyVoice Australia, *Submission CI 2509*; I Graham, *Submission CI 2507*.

85 Arts Law Centre of Australia, *Submission CI 2490*; National Association for the Visual Arts, *Submission CI 2471*.

86 *Federal Court of Australia Act 1976* (Cth) s 20(1).

87 Ibid s 25(1).

88 Ibid s 14(2).

89 *Builders' Registration Board (Qld) v Rauber* (1983) 47 ALR 55, 65, 71–73.

90 Australian Federation Against Copyright Theft, *Submission CI 2517*; Motion Picture Distributors Association of Australia, *Submission CI 2513*.

7.142 The Board would only be reviewing its 'own' decisions in relation to the narrow segment of content that the ALRC recommends must always be classified by the Board. This would primarily affect content providers of feature films for cinema release and computer games likely to be classified MA 15+ and above, whose industry peak bodies indicated support for the ALRC's recommendation provided that the new Act addresses issues of perceived bias and conflict of interest.[91] In all other cases the Board would be reviewing an industry classifier's classification decision.

7.143 To maintain transparency and consistent with current practice, the ALRC recommends that Board should provide detailed reasons for each review decision and to do so within a legislatively specified time frame. Likewise, parties to a review including the original applicant for classification, should have the opportunity to make submissions in person to the Board, as part of the review hearing.

7.144 This review model is preferable to one that would see the Regulator being responsible for appeals of classification decisions, as suggested in some submissions.[92] Although the ALRC recommends that the Regulator is established as a separate agency that is arms-length from Government, it is still an agency of government—and therefore should not make classification decisions either in the first instance or on appeal. Crucially, the Regulator is not intended to be a classification body.

Who may apply for a review

7.145 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.[93] 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:

- the Australian Government Minister responsible for the *Classification Act*;
- applicants for the classification of content and publishers of the content that was classified; and
- a 'person aggrieved' by the decision, as defined in the *Classification Act*.[94]

7.146 To provide industry with a level of certainty regarding classification decisions, without undermining access to a review mechanism, these limits should be retained. Likewise, to provide the broader community with access to the appeals process, the ALRC suggests retention of the provisions that allow the Minister responsible for classification to seek reviews of classification decisions. Although the ALRC is recommending a Commonwealth classification scheme, it would be appropriate to continue to provide State and Territory Governments with the opportunity to make

---

91 Motion Picture Distributors Association of Australia, *Submission CI 2513*; Interactive Games and Entertainment Association, *Submission CI 2470*.

92 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*.

93 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 34.

94 A State or Territory Censorship Minister may also request that the Australian Government Minister apply for a review: Ibid ss 42(1), (2).

requests for classification reviews.[95] This may go some way to addressing concerns that the views of Australians in different parts of the country would not be adequately catered for under a Commonwealth classification scheme.[96]

7.147 The ALRC considers that these opportunities, subject to appropriate limitations, are important and necessary safeguards in a co-regulatory scheme that gives industry the greater share of classification responsibility.

Recommendation 7–9 The Classification of Media Content Act should provide that, in addition to classifying media content submitted for classification, the Classification Board is responsible for reviewing classification decisions, including its own, on application. Therefore the Classification Review Board would cease to operate.

Audits of industry classification decisions

7.148 As part of the quality-assurance process and monitoring of industry classification decision making, the Regulator should have the power to undertake post-classification audits of media content that must be classified and media content that must be restricted to adults. In conducting audits, the Regulator may draw on the classification experience of the Board as the independent benchmark decision maker.

7.149 Even among submissions that favoured industry classification, there was support for government checks of industry, including regular audits and random sampling of classification decisions.[97]

7.150 Audits would be the primary mechanism by which the Regulator proactively manages industry classifiers and classification activities, to maintain a high standard of decision-making. Audits would be the means for advising content providers and/or individual classifiers about any issues identified with the classification decision-making process and might prompt remedial action to assist classifiers to improve their job performance. This might involve liaising with the employing organisation and suggesting additional training or supervision. In some cases, audit outcomes might see content providers revisiting decisions as appropriate. Audits would also provide an evidence base of serious and repeated misconduct—in which case the Regulator would have options to impose sanctions, as discussed below.

---

95 Likewise, the new scheme should provide for State and Territory Governments to be consulted before recommendations for appointments to the Board are made.

96 Victorian Government, *Submission CI 2526*; Attorney General of Western Australia, *Submission CI 2465*.

97 F Stark, *Submission CI 2283*; G Menhennitt, *Submission CI 2017*, I Cullinan, *Submission CI 1464*; D Burn, *Submission CI 1260*; D Judge, *Submission CI 175*. The television sector expressed opposition to any auditing of their decisions in response to the Discussion Paper (ALRC DP 77).

7.151 Classification bodies in other jurisdictions are increasingly using post-release audits to verify the accuracy of classification decisions—particularly where decisions are automated and dependent on information submitted by the content provider.[98]

7.152 To support the audit program the Regulator would need to establish procedures including notifying content providers of audit activity, requesting decision documentation and media content, time-frames for completing audits and advising audit outcomes. The audit processes of the ESRB and PEGI might offer some useful guidance in this regard.

Recommendation 7–10 The Classification of Media Content Act should enable the Regulator to conduct audits of industry classification decisions.

Call-in notices

7.153 The *Classification Act* provides for the Director of the Board to call in submittable publications, films or computer games where there are reasonable grounds to believe that such content is unclassified and not exempt from classification.[99] In the case of computer games, they may also be called in if the Director has reasonable grounds to believe that they contain contentious material.[100]

7.154 In the ALRC's view, the Regulator should have a similar power under the new Act, to call in content that must be classified or to which access should be restricted, including where it has reasonable grounds to believe that:

- the content should be restricted;
- the content is unclassified;
- the content has been incorrectly classified; or
- the content may be RC.[101]

7.155 Call-in notices may be issued for unclassified content (that should either be classified or access to which should be restricted) or classified content (for review of the classification decision). As stated earlier, any formal classification decision, whether made by the Board or industry and regardless of the media content, is reviewable.

7.156 The Regulator may have reasonable grounds to believe that call-in action is necessary and appropriate. This may arise from complaints investigations or programmed audit activity. Allowing the Regulator to call in media content for review,

---

98 The CTIA–The Wireless Association Mobile Application Rating System with ESRB and the PEGI Express systems both incorporate processes for auditing content post-release.

99 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23, 23A, 24(1A).

100 Ibid s 24(1).

101 The ALRC intends that the Regulator's powers to call in content be limited to the content that has been classified or would ordinarily be required to be classified or restricted. However, any media content may be submitted to the Board for classification, upon application and payment of the relevant fee.

in exceptional circumstances where it is warranted, provides complainants and the wider public with an avenue for redress where a classification decision is particularly contentious or has been improperly made.

7.157 Call-in notices would supplement 'classify' notices and 'restrict access' notices. The important difference between call-in notices and these other notices is that a call-in notice requires the content provider to submit an application to the Board for classification of the content or review of the original classification decision. Whereas content providers may choose to get their content classified by the Board or by an authorised industry classifier in response to a 'classify' or 'restrict access' notice.[102]

Recommendation 7–11 The Classification of Media Content Act should enable the Regulator to call in:

(a) unclassified media content for classification by the Classification Board; and

(b) deemed content or content classified by authorised industry classifiers, for review of the classification decision by the Classification Board.

The call-in power should be confined to content that must be classified or to which access must be restricted.

Sanctions regime for industry classifiers

7.158 Sanctions are another means of protecting consumers and ensuring that the integrity of the entire classification scheme is maintained. Sanctions are intended to be a 'last resort' to prevent industry classifiers from continuing to make classification decisions where decisions are repeatedly misleading, incorrect or grossly inadequate.[103]

7.159 The ALRC recommends that the new Act provide for a regime of sanctions that might be applied against industry classifiers, who repeatedly make decisions that are 'misleading, incorrect or grossly inadequate'.[104] The range of sanctions should be similar to the range of sanctions in the current *Classification Act* and related legislative instruments that apply to authorised assessors.[105]

7.160 Sanctions should generally only be used if other informal action has not remedied the situation. For example, liaison between the Regulator and the classifier and/or the content provider to discuss the classification problems and allowing time for remedial action, such as re-training and additional supervision.

---

102 See Chs 6, 10.

103 In Ch 16 the ALRC discusses the use of enforcement guidelines outlining the factors the Regulator should take into account and the principles it should apply in exercising its enforcement powers.

104 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 22E.

105 Ibid s 22E, 31(3); *Classification (Authorised Television Series Assessor Scheme) Determination 2008*; *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* (Cth).

7.161 In some circumstances, it may be more appropriate to 'address issues of non-compliance at the level of the corporation rather than the individual', in which case the Regulator should have the power to issue financial penalties to the company or organisation responsible for the classification decision-making.[106] As the Classification Board observed:

> It may be possible, for example, for an industry assessor to be placed under undue pressure by an employing company/classification applicant (whether they are an employee of that company or a consultant or contractor) to deliver a certain classification outcome, or for a company to 'shop around' industry assessors to get the classification outcome they desire.[107]

7.162 In order to provide industry classifiers with guidance on best practice, industry codes should include information on maintaining records of classification decisions and reasons for decisions, and internal quality assurance controls, including escalating contentious, borderline or difficult classification decisions to supervisors or managers.

7.163 In the interests of procedural fairness, decisions of the Regulator to impose sanctions against industry classifiers and/or the organisations responsible for classification decision-making should be reviewable by the Administrative Appeals Tribunal.

Recommendation 7–12 The Classification of Media Content Act should provide for civil and administrative penalties in relation to improper classification decision making. The Regulator should be enabled to:

(a) pursue civil penalty orders against content providers;

(b) issue barring notices to industry classifiers; and

(c) revoke the authorisation of industry classifiers.

Classification decisions database

7.164 The ALRC recommends that the Regulator administer a centralised database to record classification decisions made by the Board and authorised industry classifiers. Several submissions suggested that this database should include details such as the classification decision plus consumer advice, whether it is a Board or industry classification, the responsible organisation or classifier[108] and whether the content is original or modified.[109]

---

106 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.

107 Classification Board, *Submission CI 2485*.

108 To protect classifiers' privacy, individuals' names need not be recorded but some form of unique identifier should be used.

109 FamilyVoice Australia, *Submission CI 2509*; I Graham, *Submission CI 2507*; Classification Board, *Submission CI 2485*.

7.165 The database will facilitate consumers' access to accurate and up-to-date classification information in a central location as well as assist consumers to identify where complaints should be directed in the first instance.[110]

7.166 Under the classification model recommended by the ALRC, industry will also need access to a central and reliable database to check whether content has already been classified. Free TV Australia suggested that:

> the existing Classification Database be expanded to become a central database administered by the Regulator, where all authorised industry classifiers could enter their decisions, which can then in turn be accessed by other authorised industry classifiers. The database would need to include adequate information to enable users to clearly discern whether any modifications had occurred, or whether the classified content was in its original form.[111]

7.167 Foxtel further submitted that classifiers should be required to enter their reasons for the classification—including key depictions or themes—to assist the subsequent classifier to understand what elements contributed to the classification, which is particularly important when the reasoning for a decision is relied upon to edit content.[112]

7.168 It is important that recording decisions on the database should be as simple and efficient as practically possible for all classifiers. Furthermore, the benefit that industry would derive from a centrally administered database, both in terms of its own classification activities and in providing classification information to its audience and consumers, might also justify its contributing financially to the administration of the database.

110 FamilyVoice Australia, *Submission CI 2509*.
111 Free TV Australia, *Submission CI 2519*.
112 Foxtel, *Submission CI 2497*.

8. Markings, Modifications, Time Zones and Advertising

Contents

Summary 181
Markings 182
Markings rules should be in industry codes 182
Markings only required for content that must be classified 184
Markings online 185
Modifications 186
Changing platforms 188
3D content 189
Packaging media content 190
Classified content sold with other classified content 190
Classified content sold with unclassified content 190
Computer game 'mods' and expansion packs 191
New consumer advice 192
Television time-zone restrictions 193
Advertisements for films, television programs and computer games 197
Assessing suitability 198
Public display of media content 200
Outdoor advertising 201

Summary

8.1 This chapter deals with laws that attach to content that must be classified—laws that prescribe how such content should be marked, packaged and advertised, and laws relating to when and where this content may be screened. Content that the ALRC recommends should be required to be classified is discussed in Chapter 6, and includes feature films, television programs, and computer games likely to be MA 15+ or higher.

8.2 In this chapter, the ALRC recommends that the Classification of Media Content Act (the new Act) should provide that for content that must be classified, content providers must display a classification marking. This marking should generally 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. The ALRC suggests that the detail concerning precisely when and how such markings should appear should be provided for in industry codes approved by the Regulator.

8.3 This chapter also discusses when classified content is changed such that it should be reclassified, or given new consumer advice. The ALRC recommends a more flexible modifications policy, which should reduce the need for the same content to be classified twice. However, the ALRC also suggests laws that will ensure content is not sold in packages with classification markings or consumer advice that is not appropriate for the content.

8.4 The ALRC also considers the phasing out of time-zone restrictions imposed on commercial broadcasting services, in the context of the digital switchover and as parental locks become used more widely.

8.5 In the ALRC's model, advertisements for content that must be classified would be treated in much the same way as advertisements for other products, services and media content. This means that they would be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. However, these codes should be amended to provide that, in determining the suitability of an advertisement, consideration should be given to the classification or likely classification of the content that is being advertised.

8.6 The chapter concludes by considering whether some media content displayed in public, such as higher-level outdoor advertising, should be prohibited.

Markings

8.7 The primary purpose of requiring some content to be classified is to provide people with information or warnings to help them choose media entertainment for themselves and their families. Classification markings and consumer advice are the principal means of communicating that information.[1]

8.8 The ALRC recommends that the new Act should provide that content providers must display a classification marking for content that must be classified and has been classified.[2] 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. A similar proposal in the Discussion Paper[3] was broadly supported in submissions.[4]

Markings rules should be in industry codes

8.9 Currently, classification symbols or markings must generally be displayed on packaging and advertisements for submittable publications, films and computer

---

1 The classifications themselves are discussed in Ch 9. This section relates to when and how the markings for those classifications should be displayed.

2 See Recs 6–1 and 6–2 for the content that the ALRC recommends must be classified.

3 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 8–5.

4 See, eg, Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*, Advertising Standards Bureau, *Submission CI 2487*; Outdoor Media Association, *Submission CI 2479*; D Henselin, *Submission CI 2473*, Watch On Censorship, *Submission CI 2472*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

games.[5] If some content has not been classified, advertising must display a 'Check the Classification' (CTC) marking. Legislative instruments prescribe, in some detail, where and how markings must be displayed.[6] 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'.[7]

8.10 For classified television content, the markings requirements are prescribed in industry codes, approved by the Australian Communications and Media Authority (the ACMA). The code for commercial free-to-air television 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.[8]

8.11 This code also 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.[9]

8.12 Effective classification regulation relies on clear and consistent classification markings. In the ALRC's view, content providers should not be free to mark their product in whichever way they please. However, content and advertising is now delivered in many different ways—on various platforms or devices and through various websites, applications and computer programs. This suggests that markings rules may be better placed in industry codes, than legislative instruments. Such codes can be more flexible and informed by industry and developments in technology. In the Discussion Paper, the ALRC proposed that the new Act contain a high-level principled rule concerning the display of classification markings, and that the detail of how and where such markings should be displayed—where this detail is necessary—should be in industry codes.[10]

---

5 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* (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).

6 *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).

7 *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) s 5.

8 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 15 September 2011, cls 2.18, 2.19.

9 Ibid, cls 2.18, 2.19.

10 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 8–5.

8.13 Several stakeholders agreed that these marking requirements should be set out in industry codes.[11] Free TV Australia (Free TV), for example, submitted that this would 'enable each industry to develop a regime that is suitable for the content delivery environment':

> Because industry codes can be amended more easily than legislation, such an approach will also provide more flexibility. If there are changes to the content delivery environment, the codes can be amended accordingly.[12]

Markings only required for content that must be classified

8.14 In the Discussion Paper, the ALRC proposed that these marking requirements should apply to content that must be classified *and* has been classified.[13] The Advertising Standards Bureau suggested that the marking requirements should perhaps apply to content that must be classified *or* has been classified.[14] Although the ALRC encourages the voluntary classification of some content, including lower level computer games, it seems unreasonable to impose a marking obligation on content providers who choose to have their content classified. A content provider may choose to classify a website, for example, to ensure it is not R 18+, and so not subject to proposed laws requiring providers to take reasonable steps to restrict access.[15] If the content is then classified M or MA 15+, the content provider would then be under no obligation to restrict access. It would be unfair to impose a markings obligation on content providers that only choose to classify their content out of caution.

8.15 However, it would be open to content providers to use markings for content they classify voluntarily. The ALRC anticipates that some content providers will consider it desirable to classify and mark their content, despite there being no mandatory requirement to do either.

8.16 In Chapter 7, the ALRC recommends that the Regulator should have the power to deem certain content to have an Australian classification, if the content has been given an equivalent classification under a system approved by the Regulator.[16] Some content may be deemed to be classified, even though it is not content that must be classified. This is important so that content providers who voluntarily classify content, perhaps so they can sell their content with Australian classification markings, may take advantage of this deeming scheme. However, other content providers should not necessarily be required to mark their content because it is deemed to be classified, if they would not otherwise be required to classify or mark their content.

---

11 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; Interactive Games and Entertainment Association, *Submission CI 2470*.

12 Free TV Australia, *Submission CI 2519*.

13 See Recs 6–1 and 6–2 for the content the ALRC recommends must be classified.

14 Advertising Standards Bureau, *Submission CI 2487*.

15 See Ch 10.

16 The ALRC also recommends in Ch 7 that this power may be used to classify any film, television program or computer game, rather than only the content that the ALRC recommends should be required to be classified.

8.17 The ALRC recommends that the Regulator's 'deeming' power should be broad and flexible, so that content providers may take advantage of rigorous international classification decision making processes. However, this broad power should not result in placing an unreasonable regulatory burden on content providers who have no reason to provide Australian classification information. Accordingly, in the ALRC's view, only content that must be classified (and has been classified) should be required to display classification markings.

8.18 Classification markings should not be incorrect or misleading. The new Act should contain relevant provisions to this effect, similar to those in existing state classification enforcement legislation.[17] However, the ALRC suggests that an exception may be made for the X 18+ marking, considering this symbol is widely understood through much of the world to be a symbol for pornography.

Markings online

8.19 Several submissions noted the difficulty of requiring online content hosted overseas to carry Australian classification markings. Civil Liberties Australia, for example, said that companies in Australia might use Australian classification markings, but 'it is difficult to see anyone providing content intended for an international audience complying with this requirement'.[18]

8.20 Some submissions called for the recognition of international classification markings. The Internet Industry Association submitted that, in respect of online content,

> the classification regime should accommodate and recognise overseas classifications of content. This might occur by, perhaps, requiring that the overseas classification be displayed with the content, with a notice clearly indicating the country where the classification was made. Consumers might then also be provided with a link to information regarding the meaning of the foreign classification or an industry approved interpretation of the foreign classification in terms of local standards. This approach would greatly enhance the ability of online providers to source and make available a wider range of content.[19]

8.21 Google noted that much content on the Android Market is rated by the person who uploads the content. These ratings, Google submitted,

> apply globally, so while they tend to roughly approximate to the Australian content rating categories, there are differences. Requiring specific markings therefore becomes problematic, whereas if the framework were to recognise *similar* systems for markings, the policy objective may be achieved in a workable way.[20]

---

17 For example, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 15(2)–(3) provides that 'A person must not sell an unclassified film if the container, wrapping or casing in which the film is sold displays a marking that indicates or suggests that the film has been classified' and 'A person must not sell a classified film if the container, wrapping or casing in which the film is sold displays a marking that indicates or suggests that the film is unclassified or has a different classification'.

18 Civil Liberties Australia, *Submission CI 2466*.

19 Internet Industry Association, *Submission CI 2528*.

20 Google, *Submission CI 2512* (original emphasis).

8.22 The ALRC has sought to accommodate some of these concerns by recommending a narrower range of content that must be classified, and by confining mandatory classification requirements to content that is likely to have a significant Australian audience, and to content that is made and distributed on a commercial basis. Providers of such content should, in the ALRC's view, have an obligation to provide Australian classification information—particularly considering that this is, by definition, content that is likely to have a significant Australian audience.

8.23 The Australian classification markings are integral to the National Classification Scheme. The value of the scheme depends on the Australian public recognising and understanding the symbols. The requirements to display these symbols for certain content should not be removed lightly. However, the Australian Government could consider whether the Regulator should also be given the power to determine, in some circumstances, that content that must be classified may carry international classification markings, rather than the equivalent Australian classification marking.

8.24 Some global platforms, particularly those of new or emerging content providers, may not be able to tailor classification markings to the countries from which users access the content. Those who cannot provide such information could perhaps also be taken to comply with their markings obligations if their website or platform directs users to where Australian classification information can be found.

8.25 In any event, because many Australians access content provided with international classification markings, the Regulator could provide information about the meaning of common international classification markings to assist Australian audiences.

Recommendation 8–1 The Classification of Media Content Act should provide that content providers must display a classification marking for content that must be classified and has been classified. This marking should be shown, for example, before broadcasting the content, on packaging, on websites and programs from which the content may be accessed, and on advertising for content directed to Australian audiences.

Modifications

8.26 The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*) 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'.[21] The Act also prescribes a list of changes that do not amount to a modification.[22] This provision has been applied strictly by the courts. In *Muscat v Douglas*, Buss JA stated that:

21 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 21(1).
22 Ibid s 21.

> Any partial or minor change or alteration to a classified film constitutes a modification for the purposes of that provision. The change of status from classified to unclassified is automatic and immediate.[23]

8.27 This strict and prescriptive modification rule has been the subject of 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 account for the fact that much online content is dynamic and changes constantly.

8.28 The ALRC considers that the new Act should provide that classified content only becomes unclassified if it is modified in such a way 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, change the classification of content. Whether something has been modified should depend on the content itself, not on the type of modification.

8.29 However, only minor changes should be considered 'modifications'. 'Modify' means to 'make partial or minor changes to; alter without radical transformation'.[24] As discussed later in this chapter, adding extra content will often not be a 'partial or minor' change.

8.30 Submissions were broadly supportive of the ALRC's proposal to set limits to the kind of modifications that would declassify content that has been classified.[25] Free TV, for example, supported the proposed definition of modify, and said it 'will, to a degree, reduce double handling of material'.[26] Telstra also supported the proposal, noting that it would 'not reduce the scope or accuracy of the classification information provided to consumers in any way', and would 'avoid the current costs associated with the valueless duplication of classification assessment processes as content is distributed across multiple platforms'.[27]

8.31 The Interactive Games and Entertainment Association (iGEA) welcomed the proposal, which will 'effectively allow certain modifications of computer games, including expansion packs and downloadable content, to legitimately share the classification of the original game and be marked accordingly'.[28]

---

23 *Muscat v Douglas* [2007] 32 WAR 49, per Buss JA, at [143]–[144].

24 Ibid, per Buss JA, citing the *Shorter Oxford English Dictionary*.

25 See Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–7.

26 Free TV Australia, *Submission CI 2519*.

27 Telstra, *Submission CI 2469*.

28 Interactive Games and Entertainment Association, *Submission CI 2470*. See also FamilyVoice Australia, *Submission CI 2509*; Arts Law Centre of Australia, *Submission CI 2490*.

8.32 However, some submissions called for a more certain rule. The Australian Federation Against Copyright Theft, for example, submitted that the proposed definition:

> may raise some issues in practical application since it lacks any objectively verifiable criteria. The inclusion of examples of modification for different programs in an Industry Code may be a useful way to provide practical guidance on the interpretation of 'modify' while retaining the flexibility of the proposed ALRC definition.[29]

8.33 The ALRC's recommendation requires content providers to consider whether changed classified content is 'likely' to have a different classification. Foxtel said that it did not support regulations which require classifiers to decide on 'likely classifications':

> the scheme should either provide that content is required to be classified or it is not required to be classified. This is because the 'likely' pre-decision is, in fact, a classification decision.[30]

8.34 In the ALRC's view, assessing the likely classification of content differs from classifying the content in a few important respects. Generally only trained and authorised classifiers can make classification decisions, whereas others may assess the likely classification. For some content, very little work may need to be done to determine its likely classification. Finally, formal classification decisions may need to be recorded and registered with the Regulator on a database.[31] So, classifying content will generally have a greater regulatory burden and a higher cost than assessing the likely classification of content.

8.35 Under the ALRC's scheme, if a computer game is modified (that is, changed in a minor way), and that modification is unlikely to change the classification of the game, then the modified version of the game will have the same classification as the original version. If the classification is likely to change, however, the game will need to be reclassified. In the ALRC's view, this should ensure that changes to computer games that significantly increase impact are treated appropriately.[32]

Changing platforms

8.36 In the ALRC's view, changing platforms should not cause classified content to become unclassified. If a content provider has content classified for one platform (for example, television), then it or another content provider may use that classification decision for the same content published on another platform (for example, DVD or the internet). This is an important feature of the ALRC's model, and one of the advantages of platform-neutral classification regulation.

---

29 Australian Federation Against Copyright Theft, *Submission CI 2517*. See also Motion Picture Distributors Association of Australia, *Submission CI 2513*; Australian Home Entertainment Distribution Association, *Submission CI 2478*.

30 Foxtel, *Submission CI 2497*.

31 This database is discussed in Ch 7.

32 Computer game 'mods' and expansion packs are discussed further below.

8.37 Likewise, the classification decisions of the Classification Board (the Board) should also usually be used by all subsequent providers of the classified content. For example, if the Board classifies a film for cinema release, and a year later a television station broadcasts the same film, then under the ALRC's scheme, the television station must use the Board's classification—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

8.38 Currently, the 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 Board before being exhibited in Australia. Film distributors have criticised this, arguing that it is costly and unnecessary to classify twice what they argue is essentially the same film. Distributors argue that the two versions have always received 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.

8.39 The Motion Picture Distributors Association of Australia criticised 'the notion that remaking the film in a revised format is a "modification", even where there was no change to the content', and submitted that the Act:

> should define that it is only content modification, not format variation—such as 2D or 3D—that might require a new classification, and that the perceived impact of the format is not a relevant factor.[33]

8.40 The ALRC agrees that it should not be necessary to classify both the 2D and 3D versions of a film—unless one version of the content is likely to have a different classification from the other version.

8.41 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, and any change in the actual impact of the content by a modification, rather than the abstract question of whether one type of modification alters impact. The ALRC considers that the Act should not prescribe specific types of changes that would or would not declassify content.

8.42 The definition of 'modify', recommended 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.

33 Motion Picture Distributors Association of Australia, *Submission CI 2513*.

Recommendation 8–2 The Classification of Media Content Act should provide that if classified media content is modified, so that the modified content is likely to have a different classification from the original content, the modified content becomes unclassified. The Act should not prescribe specific types of modifications that operate to declassify content.

Packaging media content

Classified content sold with other classified content

8.43 If multiple classified films, computer games or television programs are sold as a package—for example, a box set of DVDs—then this package of content should not have to be reclassified as though it were new content. Rather, the package should display the classification marking of the content in the package that received the highest classification.

8.44 The relevant markings determination currently provides that a container that holds more than one film or computer game must display the markings applying to the film or computer game included in the container that has the highest classification.[34]

8.45 The ALRC proposes that the new Act should provide that, where multiple pieces of classified content are sold or distributed together as a 'package' (even if the package only amounts to one media disc, or one computer file, with multiple pieces of content), then the package should display the classification of the content with the highest classification.

Classified content sold with unclassified content

8.46 A related scenario concerns packages containing content that must be classified and other content that is not required to be classified. A DVD, for example, may be sold that contains a feature film that must be classified, and other content that, if it were sold separately, would not be required to be classified, such as a short interview with the director of the film.

8.47 It is important that 'extras' and other content not be sold in a package marked with a lower classification than the extra content would receive if it were classified. Accordingly, the ALRC suggests that the new Act should provide that unclassified media content must not be distributed in a package marked with a lower classification than the extra content would receive if it were to be classified.

8.48 For example, if in an interview, the director of the children's film used strong coarse language, parents would hardly expect the interview to be sold on a disc classified G. Distributors may, of course, choose to have higher-level content sold with a feature film with a lower classification; but if they do so, the distributor should have the extra content classified.

---

34 *Classification (Markings for Films and Computer Games) Determination 2007* (Cth) s 32.

8.49 Sometimes an 'extra' sold with a feature film, such as a television program about the making of the feature film, might itself meet the definition of content that must be classified.[35] In this case, the extra will need to be classified (but the feature film will not need to be reclassified). The introduction of authorised industry classifiers will reduce the cost of classifying this content.[36]

Additional content scheme

8.50 Under the ALRC's model, there is no need for an 'additional content scheme'. Currently, this scheme allows authorised assessors to submit to the Board assessments of 'additional content' in a film. Additional content is defined to include: additional scenes for the classified film, such as alternative endings or deleted scenes; a film of the making of the classified film; and interviews with, and commentaries by, directors, actors and other persons involved with the making of the classified film.[37] The assessments are considered by the Board when it classifies the new 'film' that essentially consists of all of the content on the DVD or disc—the feature film and additional content.

8.51 Under the new scheme, this additional content does not modify or declassify the feature film, even if it is sold on the same media disc. However, if the additional content is unclassified, it must not be sold on a disc or in a package with classified content, unless it is likely to have the same or a lower classification as the classified content. In the ALRC's view, this is an efficient and effective process that maintains the integrity of the classification scheme.

Computer game 'mods' and expansion packs

8.52 In Chapter 6, the ALRC suggests that only computer games that are 'works', that is, games that are 'produced for playing as a discrete entity', should be required to be classified.[38] 'Mods' and expansion packs will rarely be produced for playing as a discrete entity, and therefore would not meet the definition of content that must be classified. If they are sold separately, therefore, they should not need to be marked and classified.[39] In the ALRC's view, this is an appropriate and effective means of dealing with the volume of separate 'mods' and expansion packs that can be released, many made and produced by users rather than the original developers.

8.53 However, this does not mean they may be sold with classified content, under a classification marking that is lower than the 'mod' or expansion pack would receive if it were classified. This would undermine the integrity of the scheme, and give misleading information to consumers and parents.

---

35 See Recs 6–1 and 6–2 for the content the ALRC recommends should be required to be classified.

36 See Ch 7.

37 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5.

38 However, these games should only be required to be classified if they are also likely to be MA 15+ or higher, made and distributed on a commercial basis, and likely to have a significant Australian audience: see Rec 6–2.

39 In the new Act, it may prove unnecessary to have a definition of 'add-on', as there is in the *Classification Act*. This content can be treated in the same way as other media content.

8.54 As noted above, the ALRC suggests that the new Act should provide that unclassified media content must not be distributed in a package marked with a lower classification than the content would receive if it were to be classified.

8.55 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.

8.56 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.[40]

New consumer advice

8.57 Modifying classified content and selling packages of content might, in some cases, call for new consumer advice.[41]

8.58 Sometimes classified content may be modified in such a way that the content does not need a new classification, but it does need new consumer advice. For example, a director's cut of an M-classified feature film may include a sex scene that was not in the original film; the scene might still be suitable for an M-classified film, but it should usually be noted in consumer advice.

8.59 Likewise, where multiple pieces of content are sold in a single package, it will sometimes be necessary to give the content new consumer advice. For example, if one episode of an M-classified television series has consumer advice for violence, and another episode of the same series has consumer advice for sex scenes, and both episodes are later sold together on a DVD, then the consumer advice for the DVD should usually reflect both the violence and the sex, even if all the content on the DVD will still be M and does not need to be reclassified.

8.60 Accordingly, the ALRC suggests that the new Act should provide that if classified content is sold in a package with other classified or unclassified content, so that the consumer advice no longer gives accurate information about the content, then the content must be given new consumer advice, even if the content does not need to be given a different classification.

8.61 The new Act should also provide that if classified content is changed, such that the consumer advice no longer gives accurate information about the content, then the

---

40 Interactive Games and Entertainment Association, *Submission CI 1101*.

41 Consumer advice is discussed in Ch 9, and refers to the few words beside a classification marking, such as 'Strong violence', that give information about the classifiable elements of the content.

content must be given new consumer advice, even if the content does not need to be given a different classification.

8.62 In Chapter 7, the ALRC recommends that the Act should empower all classifiers, including trained industry classifiers, to determine consumer advice, even if the content has already been classified. It is important that consumer advice can be changed independently of the classification decision because otherwise some content might need to be resubmitted to the Board, at some expense to the distributor, simply to change the consumer advice.

Recommendation 8–3 The Classification of Media Content Act should provide that if classified content is changed, so that the consumer advice no longer gives accurate information about the content, then the content must be given new consumer advice, even if the content does not need to be given a different classification.

Television time-zone restrictions

8.63 Free-to-air television broadcasters in Australia are currently subject to time-zone restrictions. For example, the *Broadcasting Services Act 1992* (Cth) provides that they may only broadcast films classified:

- MA 15+ after 9 pm, and
- M after 8.30 pm, and between noon and 3 pm on school days.[42]

8.64 Further restrictions related to C, G and PG content, and restrictions that apply to content on the free-to-air digital channels, are outlined in codes of practice.[43]

8.65 These limitations are not imposed on subscription broadcast and narrowcast television, or for online content such as television streamed on the internet. Converging media environments, discussed in Chapter 3, may suggest that time-zone restrictions on free-to-air television are becoming less relevant. Content at the MA 15+ level may, in practice, now be watched at any time of day in any Australian home with subscription television, an internet connection, a recording device or a DVD.

8.66 Free TV 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;

42 *Broadcasting Services Act 1992* (Cth) s 123(3A)(c), (d), (3C)(c), (d).

43 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 15 January 2012.

- 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'.[44]

8.67 Free TV 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.[45]

8.68 In the Discussion Paper, the ALRC asked whether Australian content providers—particularly broadcast television—should continue to be subject to time-zone restrictions.[46] Many stakeholders argued that time-zone restrictions should be removed, often drawing upon similar arguments to those raised by Free TV.[47] For example, one person said the 'artificial restriction of content to time zones is a waste of time, effort and money':

> It is currently possible to watch an R 18+ movie on pay TV in your home at 8:30 am any day of the week. You can do the same for X 18+ movies on the internet. With the change to digital television nearly every set will have a child proof lock which will enable parents to restrict access based on the classification. Individuals need to be responsible for what content they consume and parents need to be responsible for their children's access to content in their home.[48]

8.69 The ABC and SBS said that the time-zone restrictions were developed to give parents 'confidence that they could limit the exposure of children to inappropriate material', but their effectiveness

> is diminishing over time as audiences shift from viewing scheduled television to on-demand viewing through personal video recorders, catch-up television services and platforms where no times zones apply, such as pay television and mobile services.[49]

8.70 Some stakeholders pointed to the wide availability of parental lock functions on televisions, particularly following digital switchover in 2013.[50] Foxtel, for example, noted that it has an 'advanced and integrated parental control system to assist parents protect their children, which makes time zones on [subscription television]

---

44 Free TV Australia, *Submission CI 1214*.
45 Ibid.
46 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 8–1.
47 See, eg, Free TV Australia, *Submission CI 2519*; A Hightower, *Submission CI 2511*; D Henselin, *Submission CI 2473*; Telstra, *Submission CI 2469*.
48 R Harvey, *Submission CI 2467*.
49 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.
50 See, eg, Free TV Australia, *Submission CI 2519*; Telstra, *Submission CI 2469*.

unnecessary'.[51] Free TV also noted that 'the sort of content that the time-zone system was designed to promote (such as content suitable for children) is now readily available on two advertisement-free, dedicated, government funded children's channels (ABC2 and ABC3)'.[52]

8.71 However, some argued that there continues to be a community expectation that certain television channels are 'safe', particularly for children, at certain times of the day, and that therefore time-zone restrictions are still important. Foxtel, for example, submitted that although times zones should not apply to subscription television, or other fee-based or on-demand services, they should be retained on free-to-air television, 'given the near universal reach' and 'broad appeal' of free-to-air television channels, 'which are more likely to attract children'.[53]

8.72 FamilyVoice Australia submitted that time-zone restrictions should be maintained, and would remain relevant

> as long as there is a sector of broadcasting which is (a) free to air and (b) easily viewed at the time it is broadcast simply by switching on the relevant device.[54]

8.73 FamilyVoice submitted that only material suitable for children to watch unsupervised should be shown at certain critical periods of the day. It also stated that restrictions should continue to be placed on PG media, and that material that is unsuitable for viewing by persons under 15 should not be shown before 9.30 pm.[55] Free TV, on the other hand, suggested that if some time-zone restrictions were maintained, then they should at least be made consistent with the more recent restrictions on the free-to-air digital channels, so that PG content may be shown at any time of the day, M content from 7.30 pm, and MA 15+ content from 8.30 pm.[56]

8.74 Time-zone restrictions on broadcast television continue to be used throughout the world. The UK has a 9 pm 'watershed', before which time content inappropriate for children may not be broadcast. Free-to-air television in the United States of America may not broadcast material which is 'indecent' or 'profane' between 6 am and 10 pm, but these time restrictions are not placed on cable networks, even though the cable networks now account for over 85% of the US television audience. Time-zone restrictions are also in place in New Zealand, Canada and many other countries.[57]

8.75 Under the European Union's Audiovisual Media Services Directive (AVMS Directive), member States must ensure that broadcasters do not include programs which 'might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence' on their linear

---

51 Foxtel, *Submission CI 2497*.
52 Free TV Australia, *Submission CI 2519*.
53 Foxtel, *Submission CI 2497*.
54 FamilyVoice Australia, *Submission CI 2509*.
55 Ibid.
56 Free TV Australia, *Submission CI 2519*.
57 See Appendix 3.

services (scheduled services such as broadcast television).[58] Linear broadcasters must also restrict programs detrimental to minors 'by selecting the time of the broadcast or by any [other] technical measure' so that 'minors in the area of transmission will not normally hear or see such broadcasts'.[59]

8.76 In the ALRC's view, time-zone restrictions as they currently apply to commercial broadcasting services may become unnecessary in coming years. The restrictions are becoming anachronistic as media content is increasingly available online, such as on catch-up services, and on subscription television services at all times of the day. Parental locks also give parents greater control over the type of media content that may be watched on televisions and other devices in the home. Children's channels are also now available not only on subscription television, but on dedicated free-to-air television channels. However, the ALRC agrees with the ABC and SBS's submission that:

> A phased transition away from time zones is desirable, but is likely to require a significant public education campaign and robust technological solutions which give parents confidence that they will be effective in protecting children from inappropriate content.[60]

8.77 Industry and the Regulator should therefore plan for the gradual phasing out of these restrictions, perhaps by implementing a public education campaign about how to use parental locks effectively. However, the ALRC does not recommend the immediate removal of mandatory time-zone restrictions. As ABC and SBS submitted,

> policy makers and broadcasters will need to proceed carefully given that most audience members continue to view programs at their broadcast time, rather than time-shifted—at the end of 2011, only about 8% of all free-to-air prime-time viewing was time-shifted.[61]

8.78 Rather than prescribe the precise time-zone restrictions as the *Broadcasting Services Act* currently does, the new Act should provide that time-zone restrictions may be set out in industry codes which must be approved by the Regulator. This provides for a level of flexibility and will enable the restrictions to be adapted, or gradually phased out, in response to a changing media environment.

Recommendation 8–4 The Classification of Media Content Act should not mandate time-zone restrictions for broadcasting services, but these restrictions may be provided for in industry codes.

---

58 European Parliament, *Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services*, Directive 2010/13/EU (2010), art 27(1).

59 Ibid, art 27(2).

60 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.

61 Ibid (citation omitted).

Advertisements for films, television programs and computer games

8.79 The ALRC recommends that advertisements for content that must be classified should be treated in much the same way as advertisements for other products, services and media content. Advertisements for content that must be classified should continue to be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. The new Act should not, therefore, need to contain additional, mandatory provisions targeting advertisements for media content that must be classified, such as those provided for in existing state and territory classification enforcement legislation.[62]

8.80 However, the ALRC also recommends that advertisements for media content should be suitable for the audience likely to view the advertisement and that, in assessing suitability, content providers and the Advertising Standards Board should have regard to, among other things: the likely audience of the advertisement; the impact of the content in the advertisement; and the classification or likely classification of the advertised content.

8.81 Advertisements for content that must be classified—such as trailers for feature films—are currently expected to comply both with the mandatory laws under the national classification scheme and with industry codes, such as the Australian Association of National Advertisers' (AANA) Code of Ethics. 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].[63]

8.82 Currently, under the National Classification Scheme, certain content that has been classified should only be shown to 'commensurate audiences'. For example, the NSW classification enforcement Act provides that:

> 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.[64]

8.83 This means, for example, that advertisements for MA 15+ films should not be shown with films classified G, PG or M. The classification scheme also provides for

---

62 The requirement for advertisements to feature classifications markings, however, should be maintained, and is discussed earlier in this chapter.

63 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.

64 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 40(1).

advertisements for unclassified films and computer games to be assessed by the Classification Board or an authorised advertising 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).[65]

8.84 The Advertising Standards Bureau submitted that its processes for assessing complaints about advertisements for movies and other classifiable content are 'working effectively'.[66] However, currently, this self-regulation operates in addition to the mandatory statutory requirements outlined above that govern the advertising of some classified content.

8.85 In the ALRC's view, it is unnecessary to have advertisements for certain media content subject to greater regulation than other advertisements. Advertisements for films, television programs and computer games need not be subject to two sets of regulatory requirements (one voluntary, the other mandatory), and able to be reviewed by two separate boards (the Advertising Standards Board and the Classification Board).

8.86 Accordingly, the ALRC no longer considers it necessary for the new Act to contain a provision that mandates standards for advertisements for content that must be classified, as was proposed in the Discussion Paper. Instead, such standards should be set out in the existing industry codes.

8.87 This does not mean there should be a blanket exemption for advertisements in the definition of media content in the new Act. Rather, like all other media content, advertisements should be subject to the mandatory statutory requirement, recommended in Chapter 10, that content providers should take reasonable steps to restrict access to media content that is likely to be R 18+ or X 18+.[67] In the ALRC's view, it is important that all media content—including advertisements—should be subject to these statutory protections. This also means that there should be no need to have separate provisions in the new Act for publishing advertisements that have been or would be refused approval by the Classification Board, such as those now in the *Classification Act* and state and territory classification enforcement legislation.[68]

Assessing suitability

8.88 Advertisements for media content that must be classified should, in the ALRC's view, be suitable for their likely audience. In assessing suitability, the content provider—or if there is a complaint, the Advertising Standards Board—should have regard to the following matters, among others:

(a) the likely audience of the advertisement;

---

65 *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* cl 2.9.

66 Advertising Standards Bureau, *Submission CI 2487*.

67 Offences related to Prohibited content would also apply to advertisements: see Ch 12.

68 For example, *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 29, 30; and *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 38.

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

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

8.89 This idea was largely supported in submissions.[69] For example, the Advertising Standards Bureau submitted that it

> already assesses the suitability of advertisements for classifiable material which includes movies, TV programs, DVDs, games and advertisements wherever they appear (including the internet and social media). The Board looks at the Australian Association of National Advertisers (AANA) Code of Ethics which requires the Standards Board to look at the Discrimination; Violence; Sex, Sexuality and Nudity; Language and Community Standards. In assessing suitability of the advertisements for media content the Standards Boards takes into account the likely audience of the advertisement; the impact of the content and the classification or likely classification of the advertisement.[70]

8.90 A number of stakeholders argued that the classification or likely classification of content being advertised should not be the only matter relevant to determining the suitability of an advertisement. Free TV and the Motion Picture Distributors Association of Australia submitted that, in assessing the suitability of an advertisement, regard should be had to the content of the advertisement itself.[71] The National Association of Cinema Operators submitted, by way of illustration, that 'many comedies will carry an ultimate classification of M, but their trailers are very general in content and could not offend even a G or PG audience'.[72]

8.91 The ALRC agrees that the content of the advertisement itself should also be a relevant consideration. An advertisement for a violent film might itself have a very low impact; and it is conceivable that an advertisement for a children's film might have a higher impact than the film itself.

8.92 The AANA Code of Ethics does not, however, require consideration of the classification or likely classification of content being advertised. In the ALRC's view, this is an important consideration that should be incorporated into the AANA's Code of Ethics, particularly if the mandatory restrictions on advertisements in the National Classification Scheme were to be removed. FamilyVoice Australia submitted that it is 'not desirable to be showing extracts from MA 15+ programs during C, P, G and PG programs'.[73]

8.93 The ALRC recommends that in assessing the suitability of advertisements for media content, content providers and the Advertising Standards Board should have regard to the classification or likely classification of the advertised content. This is consistent with the principle that adult content should not be advertised to minors, and

---

69 See, eg, Motion Picture Distributors Association of Australia, *Submission CI 2513*; Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*; R Harvey, *Submission CI 2467*; Interactive Games and Entertainment Association, *Submission CI 2470*; D Henselin, *Submission CI 2473*.

70 Advertising Standards Bureau, *Submission CI 2487*.

71 Free TV Australia, *Submission CI 2519*; Motion Picture Distributors Association of Australia, *Submission CI 2513*.

72 National Association of Cinema Operators–Australasia, *Submission CI 2514*.

73 FamilyVoice Australia, *Submission CI 2509*.

content that may be suitable for a person in their late teens should not be advertised to young children.

8.94 Relevant industry codes may usefully provide further guidance on advertisements for content that must be classified. For example, industry codes might provide that advertisements for R 18+ content should not be shown with content for minors, and advertisements for MA 15+ content should not be shown with content for young children.[74]

8.95 Even with such measures in place, regulation is unlikely to entirely prevent minors from seeing advertisements for content that is not suitable for them, particularly if minors seek out the advertisement and use computers or media devices without activated filters or parental locks. Trailers for films and computer games are widely available on the internet, and are rarely restricted. As discussed further in Chapter 10, parental supervision, parental locks and internet filters are more likely to be effective in limiting or preventing minor's access to adult content, including advertisements for adult content.

Recommendation 8–5 Advertisements for content that must be classified should continue to be subject to the existing voluntary advertising codes, with complaints being handled by the Advertising Standards Board. These voluntary codes should be amended to provide that, in assessing the suitability of an advertisement for media content that must be classified, the following matters should be considered:

(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

8.96 Australians exercise considerable control over the content they choose for themselves and their families. They switch television channels and supervise children's entertainment, and may also use internet filters and parental locks on televisions. The public does 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. For example, Civil Liberties Australia submitted that 'public spaces are all about community, and therefore community standards should apply'.[75]

74 The National Association of Cinema Operators suggested that trailers for films likely to be MA 15+ or R 18+ should continue to be shown only to commensurate audiences, even though they submitted that similar requirements for lower-level films should be relaxed: see National Association of Cinema Operators - Australasia, *Submission CI 2514*.

75 Civil Liberties Australia, *Submission CI 1143*.

8.97 Dr Nicolas Suzor argued that there is 'a very strong distinction between access in public and in private', and that, therefore, classification policy should

> 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.[76]

8.98 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, this does not mean that all public media must necessarily be classified.

8.99 In Chapter 10, the ALRC recommends that content providers should take reasonable steps to restrict access to adult content, including media content on public display.[77] This would apply to media content displayed in public. However, the new Act could provide for further restrictions on the public display of media content. It might, for example, prohibit the public display of media content likely to be classified MA 15+ or higher. If the new Act contained such a provision, and if the Regulator considered that a particular piece of media content displayed in public was 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

8.100 The media content currently most commonly displayed in public is advertising—notably billboards. Outdoor advertising is largely self regulated, underpinned by the AANA's Code of Ethics[78] and a complaints-handling system administered by the Advertising Standards Bureau and adjudicated by the Advertising Standards Board.

8.101 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.[79]

8.102 In its report, the Committee concluded that the current classification scheme was inappropriate for regulating outdoor advertising.[80] The Committee expressed concern

---

76 N Suzor, *Submission CI 1233*.
77 This does not mean this content must necessarily be classified.
78 Australian Association of National Advertisers, *AANA Code of Ethics* 2009.
79 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.
80 Ibid, [3.55].

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'.[81]

8.103 The ALRC does not recommend that advertising be brought into the new classification scheme. However, this Report provides for authorised industry classifiers and industry-specific codes. This means that, if advertising were brought into the new 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 Board. Industry assessment or classification might minimise any expected financial and administrative burden on industry, which the Committee was concerned could come with 'Government classification'.[82]

8.104 If the Australian Government chose to bring outdoor advertising into the new co-regulatory 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 appropriate.

81 Ibid, [2.7].
82 Ibid, [3.57].

9. Classification Categories and Criteria

Contents

Summary 203
Classification categories 204
Existing categories 204
Common classification categories for media content 205
Abolition of publication-specific classification categories 206
Abolition of television-specific classification categories 207
Changes to existing category names and markings 208
Consumer advice 213
Consumer advice symbols 215
Power to determine consumer advice 216
Consumer advice guidelines 216
Classification criteria 217
Existing criteria 217
Common classification criteria for media content 218
Statutory criteria 223
Industry codes 225
Research 226

Summary

9.1 This chapter considers the classification categories and criteria used to classify content across different media content and platforms in Australia. The ALRC recommends that the classification categories be harmonised and the classification criteria[1] be combined in order that the same categories and criteria are applied in the classification of all media content—irrespective of its form and the platform by which it is delivered or accessed.

9.2 The effect of these recommendations is that all classifiers operating under the new National Classification Scheme will use the same classification tools to make classification decisions. For decisions made under this system, consumers can therefore expect to receive classification information in the same format knowing that it has the same meaning no matter what the media content.

1 The ALRC uses the term classification criteria in this chapter broadly to describe the current principles, criteria, guidelines and other matters that either must be applied or taken into account in making classification decisions currently. The ALRC's recommendation for 'statutory classification criteria' is discussed later in the chapter.

9.3 The ALRC recommends common classification criteria—the statutory classification criteria—to be applied in making all classification decisions. Likewise, it recommends statutory classification categories—for uniform application across all classified media content as follows:

Classification	**Descriptor**
G	General
PG	Parental Guidance
M	Mature
MA 15+	Mature Audience
R 18+	Restricted
X 18+	Restricted
Prohibited	Prohibited

9.4 This incorporates the following changes to the category names and markings:

- MA 15+ descriptor to be amended to 'Mature Audience';
- 'Unrestricted', 'Category 1 Restricted' and 'Category 2 Restricted' classifications now used for publications to be abolished;
- MAV 15+ and AV classifications used by some television broadcasters to be abolished; and
- Refused Classification (RC) to be re-named Prohibited.

9.5 For content that must be classified, the ALRC recommends consumer advice (such as 'Strong violence' or 'Moderate coarse language') be provided for all classification decisions, except for content classified G.

9.6 Research should supplement future reviews of classification categories and criteria and other major changes to the classification scheme. The ALRC therefore recommends that the Regulator's functions include research activities that may inform the development of classification policy, legislation and decision-making tools.

Classification categories

Existing categories

9.7 Under the *Classification Act* there are currently seven classification categories for films and five for computer games as follows:

Classification	**Descriptor**
G	General
PG	Parental Guidance
M	Mature

MA 15+	Mature Accompanied
R 18+ (films only)	Restricted[2]
X 18+ (films only)	Restricted
RC	Refused Classification[3]

9.8 There are also four classification categories for publications:

Classification	**Descriptor**
Unrestricted	
Category 1	Restricted
Category 2	Restricted
RC	Refused Classification[4]

9.9 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:

Classification	**Descriptor**
P	Pre-school[5]
C	Children[6]
G	General
PG	Parental Guidance
M	Mature
MA 15+	Mature Audience
MA 15+	Not suitable for people under 15[7]
MAV 15+	Not suitable for people under 15: Strong Violence[8]
AV	Adult Violence[9]
R 18+	Restricted[10]

Common classification categories for media content

9.10 The ALRC recommends the introduction of common classification categories—G, PG, M, MA 15+, R 18+, X 18+ and Prohibited—for uniform application across all classified media content. This would mean that the same classifications and markings

2 Commonwealth, State and Territory Censorship Ministers have agreed to an R 18+ classification for computer games: Standing Committee of Attorneys-General, *Communiqué 21 & 22 July 2011*. A bill to amend the *Classification* Act to establish an R 18+ classification for computer games was introduced by the Minister for Home Affairs and the Minister for Justice, Jason Clare MP, in February 2012.

3 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 7(2), (3).

4 Ibid s 7(1).

5 The P classification is only used by the commercial free-to-air television networks.

6 The C classification is only used by the commercial free-to-air television networks.

7 SBS describes its MA 15+ classification category as 'not suitable for people under 15' rather than 'Mature Audience'.

8 This classification category is unique to SBS.

9 This classification category is unique to commercial broadcasters.

10 R 18+ programs are only allowed to be screened on subscription television.

would be used in cinemas, on television, on DVD and computer games packaging, and on websites with classified content. In line with two of the guiding principles for reform, consumers would benefit from information that is clear and consistent and the approach reflects the goal of platform neutrality.[11]

9.11 Many individuals favoured the use of classification categories, markings and guidelines that are common to all forms of media content because, as one submission argued, 'different classification of the same content, according to different criteria, across cinema and DVD as compared to television is inconsistent and confusing'.[12] Others described it as 'illogical' and 'archaic'.[13] In particular, some submissions to the Issues Paper (ALRC IP 40) suggested that the different categories for publications are not well known or understood nor are some of the category variations used by certain television broadcasters.[14] 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.[15]

9.12 There was also support for uniform classification categories from industry and other stakeholder organisations because the disparate categories across media platforms contributes to consumer uncertainty in relation to the meaning of respective classifications and this ultimately undermines the value of classification information.[16]

9.13 The ALRC considers that the full range of classification categories should also be available for all media content and notes that the July 2011 decision of Censorship Ministers to introduce an R 18+ classification for computer games is consistent with this position.[17]

Abolition of publication-specific classification categories

9.14 The introduction of common classification markings would mean that the existing publications classifications—Unrestricted, Category 1 Restricted and Category 2 Restricted—would no longer be used.

---

11 See Ch 4, Principles 4 and 8.

12 S Ailwood and B Arnold, *Submission CI 2156*; J Jago, *Submission CI 1935*; M Fairhurst, *Submission CI 1888*; A Orman, *Submission CI 1700*; E Myles, *Submission CI 1615*; N Parker, *Submission CI 1545*; L Murray, *Submission CI 1259*.

13 S Bennett, *Submission CI 1277*.

14 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Collective Shout, *Submission CI 2450*; A Hightower and Others, *Submission CI 2159*; M Saunders, *Submission CI 2026*; C Firm, *Submission CI 1962*.

15 MLCS Management, *Submission CI 1241*.

16 Free TV Australia, *Submission CI 2519*, Australian Federation Against Copyright Theft, *Submission CI 2517*, Motion Picture Distributors Association of Australia, *Submission CI 2513*; FamilyVoice Australia, *Submission CI 2509*; Uniting Church in Australia, *Submission CI 2504*; Foxtel, *Submission CI 2497*; Arts Law Centre of Australia, *Submission CI 2490*; Collective Shout, *Submission CI 2477*; Australian Competition and Consumer Commission, *Submission CI 2463*.

17 Standing Committee of Attorneys-General, *Communiqué 21 & 22 July 2011*.

9.15 In Chapter 6, the ALRC recommends that publications should not generally be required to be classified. In Chapter 10, the ALRC recommends that, other than content that must be classified, all other media content that is likely to be R 18+ or X 18+, must be restricted to adults. However, if a publication were classified voluntarily, it should be given one of the common classifications recommended above: G, PG, M, MA 15+, R 18+, X 18+ or P.

9.16 The ALRC considers that these classifications are not only more familiar to consumers than those currently used for publications, but they would provide more guidance. The broader range of categories would also provide classifiers greater flexibility to assign a classification to a publication that better reflects the content of the material. For example, an adult magazine with realistic depictions of actual sexual activity between consenting adults might be assigned the X 18+ classification, while a book such as *American Psycho* by Bret Easton Ellis, that is currently classified Category 1 Restricted, might be classified R 18+, with consumer advice for high level violence and sexual violence.

9.17 Some submissions expressed concern that because the distribution of X 18+ films is illegal in most of Australia, the introduction of common classification categories would mean that X 18+ magazines could also no longer be lawfully sold.[18] Banning these magazines is not the intention of this recommendation. The aim of this recommendation is to provide for consistent and accurate classification information and labelling of content. This reflects guiding principle 4 that consumers should receive information about media content in a clear manner.

9.18 The Australian Government could choose to prohibit the distribution of some types of X 18+ content (eg films), and not others (eg magazines). This would be no less consistent than the current situation whereby the distribution of X 18+ films is not allowed but the distribution of pornographic magazines is permitted.[19] Whether some or all X 18+ media content should be prohibited is discussed in Chapter 10 and enacting a new classification scheme under Commonwealth legislative powers is considered in Chapter 15.

Abolition of television-specific classification categories

9.19 To harmonise the classification categories, the ALRC also recommends the removal of the MAV 15+[20] and AV[21] classifications, used by SBS and commercial television broadcasters respectively. The 'V' in these classifications refers to violence.

---

18 Eros Association, *Submission CI 2530*; ACP Magazines, *Submission CI 2520*; I Graham, *Submission CI 2507*; Lin, *Submission CI 2476*.

19 X 18+ films may not be sold in any Australian state, however Category 1 Restricted and Category 2 Restricted publications may be lawfully sold in all states and territories with the exception of Queensland.

20 This classification is used by SBS for content warranting an MA 15+ classification for the element of violence.

21 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.

In the ALRC's view, consumer advice is the better place to refer to the level of violence in a television program.

9.20 Stakeholders that support the proposal, including FamilyVoice 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.[22]

9.21 The national broadcasters and Free TV Australia supported the removal of these classification categories to 'eliminate inconsistencies across types of classified content'.[23]

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. Each item of media content classified under the National Classification Scheme should be assigned one of these statutory classification categories.

Changes to existing category names and markings

9.22 While there was strong support for uniform classification categories that would apply to all classified media content—irrespective of the platform—few submissions expressed unqualified support for the proposed C, PG 8+ and T 13+ categories.

9.23 Although the Discussion Paper proposed a new category and revised markings for the lower classifications, the ALRC recommends only some minor changes to the existing categories. First, a change of name to the 'Refused Classification' (RC) category (to be renamed Prohibited)[24] and secondly, the removal of legally enforceable access restrictions for MA 15+ classified content.[25]

9.24 The ALRC is persuaded by arguments regarding the cost-benefit of changing long standing classification categories with a high level of public awareness that are

---

22 FamilyVoice Australia, *Submission CI 85*.

23 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*.

24 See Ch 11.

25 See Ch 10. To reflect the changes discussed in Ch 10, the MA 15+ classification category descriptor should be amended from 'Mature Accompanied' to 'Mature Audience' and the black 'restricted' tag removed from the bottom of the marking. The descriptor 'Mature Audience' provides for consistency across media platforms—as this is the meaning of the MA 15+ classification applied under most of the television codes of practice, including subscription television.

generally supported.[26] It also considers that the case for change needs to be balanced against insufficient evidence that the existing categories are ineffective;[27] the need for research and consultation on the value of age references and the appropriateness of particular age thresholds;[28] and the absence of evidence that the reconfigured names and markings would be significantly more effective than the existing categories.[29]

9.25 Industry stakeholders, in particular, questioned the cost-benefit of changing classification categories.[30] Free TV Australia contended that the social costs (to the consumer) and the actual costs (to industry) of implementing the proposed classification category names and markings would far outweigh the benefits.[31]

9.26 Financial costs (for industry and/or government) might include: reclassifying the back catalogue of content that is still aired; retraining classifiers; changing marketing information, voice-overs and billboards; redesigning mainframe systems; and providing comprehensive and sustained education campaigns for audiences.[32] Social costs might include consumer confusion, varied community expectations where content is reclassified into different classification categories and consumer uncertainty that may lead to an increase in complaints as people adjust to the changes.[33]

9.27 The ALRC considers that, given that the benefits of the proposed changes are untested, and the potential for them to increase consumer uncertainty at a time when the public might be adjusting to potentially significant changes to the overall classification model, it would be premature to recommend this course of action.

9.28 Some respondents to the Issues Paper indicated that there may be confusion in relation to certain classification categories, for example between the M and MA 15+ classifications and G content that could be for a general audience or children.[34] While issues of clarity could potentially be addressed by the proposed categories, they might

---

26 In a review undertaken by ACMA, 96.8% of survey respondents stated they were familiar with the classification symbols shown before programs: Australian Communications and Media Authority, *Reality Television Review Final Report* (2007). This is consistent with the findings of research commissioned by the OFLC in 2005: Office of Film and Literature Classification, *Classification Study* (2005).

27 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Australian Subscription Television and Radio Association, *Submission CI 2494*; Classification Board, *Submission CI 2485*; Australian Home Entertainment Distribution Association, *Submission CI 1152*.

28 Foxtel, *Submission CI 2497*; Australian Council on Children and the Media, *Submission CI 2495*.

29 Australian Subscription Television and Radio Association, *Submission CI 2494*.

30 For example, Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; Australian Subscription Television and Radio Association, *Submission CI 2494*; Australian Home Entertainment Distribution Association, *Submission CI 2478*.

31 Free TV Australia, *Submission CI 2519*.

32 Ibid.

33 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; FamilyVoice Australia, *Submission CI 2509*; Foxtel, *Submission CI 2497*; Australian Home Entertainment Distribution Association, *Submission CI 2478*.

34 For example, M Buckner, *Submission CI 2350*; L Geyer, *Submission CI 1863*; D Cheai, *Submission CI 1539*; L Wilson, *Submission CI 1503*; A Wells, *Submission CI 166*.

also be managed to some extent through consumer education[35] and consumer advice that accompanies classification decisions. Given that an extensive public information and awareness campaign would be necessary if a new classification scheme is implemented, there would be an opportunity to reinforce understanding of the classification categories in that context.

9.29 In the ALRC's opinion, there may well be room for improving the usefulness of the classification categories and names—for example, the ALRC is concerned that under the ALRC model, there would remain two classifications for a 'mature audience': M and MA 15+.[36] Opportunities to further revise the classification categories should be taken when there is sufficient evidence to support change. If a new classification scheme is implemented, research could be conducted once it has been operational for a period of time, for example, to test the adequacy and effectiveness of the categories and markings. If changes were needed, steps to facilitate this—including developing, consulting and testing proposals—should follow.

9.30 It would seem that the existing categories and markings are sufficiently well known and understood by consumers, and there is limited evidence that change is warranted. Therefore the ALRC is not recommending the introduction of new and revised categories as previously proposed.

9.31 Some of the issues raised in submissions about the categories and markings proposed in the Discussion Paper are noted below.

Age references

9.32 There were mixed views on the appropriateness and suitability of the nomenclature and age references identified in the categories proposed in the Discussion Paper.[37] Some submissions commented that the emphasis should be on the knowledge and maturity of the child based on their level of schooling and ability, rather than a given age,[38] and that the age references should reflect research on child and adolescent development to provide for meaningful, rather than arbitrary distinctions between categories.[39] A number of submissions suggested alternative age references, for example 12+, because the distinction between the ages of 13 and 15 was too narrow.[40]

9.33 It was also submitted that age references could cause confusion by signalling that the content was suitable only for those within that age group. There were also

---

35 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; Interactive Games and Entertainment Association, *Submission CI 1101*.

36 Motion Picture Distributors Association of Australia, *Submission CI 2513*.

37 Free TV Australia, *Submission CI 2519*; Motion Picture Distributors Association of Australia, *Submission CI 2513*; FamilyVoice Australia, *Submission CI 2509*; Foxtel, *Submission CI 2497*; Classification Board, *Submission CI 2485*; Australian Home Entertainment Distribution Association, *Submission CI 2478*.

38 FamilyVoice Australia, *Submission CI 2509*; J Trevaskis, *Submission CI 2493*.

39 Australian Council on Children and the Media, *Submission CI 2495*; S Ailwood, *Submission CI 2486*; Collective Shout, *Submission CI 2477*.

40 Australian Federation Against Copyright Theft, *Submission CI 2517*; National Association of Cinema Operators - Australasia, *Submission CI 2514*; Motion Picture Distributors Association of Australia, *Submission CI 2513*.

concerns that parents would be disempowered as 'children develop a "graduation mentality", with eight year olds expecting to move from G to PG content and 13 year olds shunning G and PG content in favour of M content'.[41]

9.34 Others commented that the age references might mean some parents may be less likely to apply critical thought to their particular children's content options, believing that PG 8+ content must be 'alright' for any eight year old.[42] This approach would run counter to the usefulness of current categories that focus on descriptive terms such as 'Mature' and 'Parental Guidance Recommended' which Free TV Australia submits:

> require audiences (especially parents) to consider the likely content of the material and any accompanying consumer advice to determine whether the content is appropriate or desirable.[43]

9.35 Industry stakeholders were concerned that the proposed age references have implications for the content that might be permitted within those categories relative to the existing categories. There were concerns about 'bracket creep' and consequences for time-zone restrictions, audience behaviour and advertising revenue.

9.36 For example, the ABC and SBS cited documentary programs that are often not relevant to children and address themes not intended for children that are currently accommodated in the PG classification, yet under the proposed PG 8+ category, would need to be classified T 13+, because they are not intended for eight year olds.[44] This might have further consequences by affecting when the content may be broadcast (eg, only after 8.30 pm), which would prevent many documentaries from being screened early in the evening or during the day on weekends—a restriction that would disadvantage audiences by limiting the availability of educational and socially relevant content.[45]

Use of the term 'Teen'

9.37 Some submissions supported the introduction of T 13+ (Teen). However, others said the term 'Teen', unlike the other categories, prescribes an audience that may not necessarily be the intended or appropriate target of the content. This terminology may lead to confusion, as the Motion Picture Distributors Association of Australia explained:

> T 13+ may work well for a *Harry Potter* film with a teen viewership, but would be less useful for a film containing moderate impact material that deals with mature concepts, such as *Law and Order: Criminal Intent.*[46]

---

41 For example, FamilyVoice Australia, *Submission CI 2509*.
42 For example, Free TV Australia, *Submission CI 2519*.
43 Ibid.
44 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.
45 Ibid.
46 Motion Picture Distributors Association of Australia, *Submission CI 2513*.

9.38 Another stakeholder remarked that the association of T 13+ with teenagers (as opposed to the current M–Mature), may also deter adults from selecting the content—assuming that higher level MA 15+ and above content is targeted to them.[47]

The C (Children) classification

9.39 The C (Children) and P (Preschool Children) classifications are currently only used by free-to-air commercial television networks. These classifications are granted by the Australian Communications and Media Authority (the ACMA) on application if the content satisfies the requirements of the Children's Television Standard (CTS),[48] 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.

9.40 In the Discussion Paper, the ALRC proposed that the new Classification of Media Content Act should provide for a C classification that may be used for media content classified under the scheme. While some submitters welcomed the idea of information indicating that content would not require any parental guidance or supervision because it was specifically made for children, a range of submissions expressed concerns with the proposal.

9.41 Free TV Australia, for example, noted the potential for overlap between the C, G and PG 8+ classifications.[49] Another stakeholder queried whether this new classification could be sufficiently well-distinguished from the G classification so that 'it won't, in practice, be treated as a 'G' rating (or vice versa), and, in a few years, cause a confusion similar to that over the M15+/MA15+ film and games categories'.[50]

9.42 In their joint submission, the ABC and SBS submitted that there can be significant differences between content aimed at four year olds and content aimed at eight or 12 year olds—nonetheless, they are both types of content intended for children.[51]

9.43 The critical point raised by several key stakeholders is that the existing C and P classifications are not, strictly speaking, 'classifications' at all. As the Australian Council on Children and the Media (ACCM) points out, the ACMA labels are 'a

---

47 Foxtel, *Submission CI 2497*.
48 Australian Communications and Media Authority, *Children's Television Standards 2009*.
49 Free TV Australia, *Submission CI 2519*.
50 A Hightower, *Submission CI 2511*.
51 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.

guarantee of quality, devised for the purpose of enabling broadcasters to fill a quota. It is not a finely-tuned measure for saying whom the material is suitable for.[52] It is this dual purpose that gives rise to the current situation that sees some C material classified PG by the Classification Board (the Board) because it is not necessarily always suitable for all children.[53]

9.44 The ALRC considers that the CTS should not be conflated with content classification. A children's classification, consistent with the other classification categories, should reflect classification considerations only and be expressly about assessing the content's suitability for young children. However, explicitly de-coupling classification from the CTS would, among other things, necessitate different markings for CTS content and C classified content. It might also have workload implications as content would need to be both CTS assessed and subsequently classified (against criteria relevant to their distinctly different purposes).

9.45 The merits or otherwise of the CTS, whether it should be retained and its form and content are matters beyond the scope of this Inquiry but may be addressed under the Convergence Review. The ALRC considers that a C classification should not be introduced without fully examining its relationship to the CTS and is therefore not recommending a C classification at this time.

Consumer advice

9.46 'Consumer advice' refers to the words that appear alongside the classification marking, and is designed to give specific information about the content, for example 'Strong violence' or 'Moderate coarse language'.

9.47 The *Classification Act* currently requires 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, exhibit or otherwise distribute).[54]

9.48 Consumer advice requirements for free-to-air television and subscription broadcasters are outlined in their respective industry codes of practice. Provisions differ across the codes and are also different from those prescribed under the *Classification Act*.

9.49 Consumer advice is generally mandatory for content classified M and above while PG classified content will carry consumer advice in certain circumstances. For example, under the SBS code, PG programs will carry consumer advice where SBS considers it contains material of strength or intensity which SBS reasonably believes parents of young children might not expect.[55] The Free TV Australia code has a similar

52 Australian Council on Children and the Media, *Submission CI 2495*.
53 Ibid.
54 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 20.
55 Special Broadcasting Service, *Codes of Practice 2006: 4. Television Classification Code*.

provision in relation to consumer advice for PG classified content screened between 7.00 pm and 8.30 pm on weekdays or between 10.00 am and 8.30 pm on weekends.[56]

9.50 Submissions confirmed that consumers value this extra information.[57] It 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.[58]

9.51 Some industry submissions that expressed reservations about changing the classification categories, also pointed to consumer advice as the preferable mechanism for improving the clarity of classification information.[59]

9.52 Notwithstanding broad support, the television industry (both broadcast and subscription) was opposed to the ALRC's proposal to mandate consumer advice for all content classified PG and above, as it would result in a significant increase in the regulatory burden for their industry sector.[60] The sector contended that providing consumer advice for the large amount of PG classified content that they deliver—including back-catalogues of previously screened content—would have a substantial resourcing impact.[61] ASTRA further submitted:

> Given that the PG category cannot contain content that is more than mild in impact, this category is unlikely to contain depictions, references or themes that are strong enough to warrant the requirement for advice. [62]

9.53 The ALRC considers that providing consumer advice—as advice that identifies the classifiable elements that contribute to the classification—should not substantially increase the regulatory burden as it would ordinarily be a by-product of making the classification decision itself. Any new classification laws would not apply retrospectively, further minimising the obligation to provide consumer advice for back-catalogues of content classified before the laws took effect.

9.54 In the ALRC's view, consumer advice across the spectrum of classifications is important and valuable: for the lower classifications it enables parents and carers to be more selective about content for young children (a PG program with mild themes may

---

56 Free TV Australia, *Commercial Television Industry Code of Practice* (2010) <http://www.freetv.com.au/content_common/pg-code-of-practice.seo> at 13 November 2011.

57 For example, S Farrelly, *Submission CI 245*; A Wells, *Submission CI 166*.

58 Interactive Games and Entertainment Association, *Submission CI 1101*. See also Hunter Institute of Mental Health, *Submission CI 2136* that suggested consumer advice be used to provide better guidance in relation to media content that may include suicide themes or depictions of suicide.

59 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*.

60 Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*; Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497;* Australian Subscription Television and Radio Association, *Submission CI 2494*.

61 Free TV Australia further explained that there are many multi-episode (or daily) series which consistently contain low-level content (such as morning lifestyle programs) that are rated PG usually on the basis of the anticipated content rather than viewing every program in a series.

62 Australian Subscription Television and Radio Association, *Submission CI 2494*.

be preferable over a PG film with mild violence) and for the higher classifications it guides older children and adults selecting content for themselves (some adults may wish to avoid films with violence).

9.55 The provision of consumer advice is consistent with the principle that consumers should be provided with information about media content in a timely and clear manner.[63] The ALRC therefore recommends that classifiers making classification decisions for content that must be classified must also provide consumer advice except in relation to content classified G. Consumer advice should be optional for G content, but classifiers should be encouraged to provide it where content may raise issues for some young children.[64]

9.56 Subject to minimum statutory requirements regarding display of consumer advice (for example with classification information at point of sale and at the commencement of television programs), the ALRC suggests that industry codes may detail how and where consumer advice would be provided—taking into account the technological capability of the relevant platform and the most appropriate and effective ways to convey this information to audiences.

9.57 Voluntarily classified content would not be required to carry consumer advice, though content providers would nevertheless be encouraged to do so. In this context, a classification decision is sufficient information, given that it is provided over and above what is required by law.

Consumer advice symbols

9.58 Although the ALRC is not recommending a C classification for children's content, it considers there may be merit in considering alternative means for assisting parents to select content that is either appropriate or exclusively for young children.

9.59 Some submissions suggested that G classified content could be accompanied by special symbols that indicate to parents its suitability for very young children such as pre-schoolers.[65] This would have the advantage of achieving a similar outcome to a C classification that could be applied to all forms of media content, without creating confusion with the existing CTS-driven C and P classifications. If, in the future, the CTS were to be completely divorced from classification, the use of the symbols could potentially continue and replace the C and P labels.

---

63 See Ch 4, Principle 4.

64 Under the existing classification scheme, G classified content is for a general audience and should not exceed 'very mild' in impact. However, it is possible that G classified material might sometimes contain content that might affect some younger children and therefore warrants additional advice. For example, the public exhibition film *Toy Story 3* was classified G 'Some scary scenes'.

65 For example, Joint Submission Australian Broadcasting Corporation and Special Broadcasting Service, *Submission CI 2521*.

Power to determine consumer advice

9.60 In addition to providing for authorised classifiers to make classification decisions, the Classification of Media Content Act should enable authorised classifiers to determine consumer advice and also change the consumer advice of already classified content—including for content classified by the Board.

9.61 Sometimes consumer advice for previously classified content should be changed, even if the classification does not need to be changed.[66] For example, an MA 15+ film with 'Strong violence' may be released on DVD with previously deleted sex scenes. If the impact of the additional sexual content is strong then there would be no change to the MA 15+ classification, however because it is a factor that contributed to the MA 15+ classification decision it should be noted in the consumer advice.

9.62 In these circumstances, the content provider should be able to determine new consumer advice without needing to formally classify the content again. Similarly, if separate items of classified content are packaged together or repackaged such that the consumer advice should be changed (even if the overall classification for the box-set has not changed), an authorised classifier should determine new consumer advice.

Consumer advice guidelines

9.63 To assist all classifiers to apply consumer advice in a consistent manner, the ALRC also suggests that the Board publish guidelines for applying 'standardised' consumer advice, including a list of familiar consumer advice lines that classifiers may choose to use with each classification category.

9.64 These guidelines are not intended to be prescriptive but rather to minimise discrepancies in the practice of applying consumer advice between classifiers. For example, the guidelines might provide that:

- consumer advice should not list all the classifiable elements in the content in a 'catch all' manner (for example, 'contains sex scenes', 'moderate themes', 'coarse language' and 'moderate violence') but be a consistent and clear indicator of the *principal* elements—and their intensity and frequency—that determined the classification (for example, an MA 15+ film that received the classification due to the sexual content, would be accompanied by consumer advice for 'Strong sex scenes' even though the film might also contain moderate coarse language that would otherwise fall within a lower classification);[67]
- consumer advice descriptors should match the impact threshold for the assigned classification. For example, under the impact hierarchy in the Guidelines for the Classification of Films and Computer Games, content classified M is moderate in impact—therefore consumer advice descriptors should read, 'Moderate coarse language' or 'Moderate sex' or 'Moderate themes'.

---

66 See also the discussion about modified content in Ch 6.

67 Motion Picture Distributors Association of Australia, *Submission CI 2513*; Classification Board, *Submission CI 2485*.

- optional 'extended classification information' should take a standard form, for example MA 15+ for 'Strong violence and lower level sex'. Where content contains classifiable elements that fall below the impact for that category, but a classifier considers it important to flag them, it should be clear which element/s determined the MA 15+ classification (eg, 'Strong violence') and which elements may be of interest to some consumers although they could actually be accommodated at a lower classification (eg, 'Lower level sex').

9.65 Board–published guidelines would not prevent or limit industry codes from developing consumer advice lines tailored to meet the needs of specific audiences or to reflect particular features of the content.

Recommendation 9–2 The Classification of Media Content Act should provide that classification decisions for content that must be classified, other than G content, must also be assigned consumer advice. The Classification Board should publish consumer advice guidelines as a reference for all industry classifiers.

Classification criteria

Existing criteria

9.66 Under the existing classification framework, films, computer games and publications that advocate the doing of a terrorist act must be classified RC,[68] 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.[69] Online content referred to the Classification Board for classification is also classified under this decision-making framework. Likewise, industry assessors make classification recommendations for television series, computer games and additional content in films, and content assessors assess online content in accordance with the criteria and guidelines set out under the National Classification Scheme.

9.67 Under the Code, classification decisions are to give effect to, as far as possible, 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'.[70]

9.68 While the *Classification Act* sets out the classification categories for publications, films and computer games,[71] in *Adultshop.Com Ltd v Members of the Classification Review Board*, the Full Court of the Federal Court explained that the 'criteria for differentiating between the classifications is found in a combination of the

68 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A(1).
69 Ibid s 9.
70 *National Classification Code 2005* (Cth) cl 1.
71 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7.

Code and the Guidelines'.[72] The Code features separate tables, with distinct criteria, for publications, films and computer games which are 'prescriptive'.[73]

9.69 The classification guidelines 'help explain the different classification categories, and the scope and limits of material suitable for each category'.[74] Importantly, the guidelines do not stand alone, as 'they are to be read with the Code as a means of assisting the Board in applying its criteria'.[75] A separate set of guidelines exists for publications while films and computer games are currently covered by the one set of combined guidelines.[76]

9.70 In addition, the *Classification Act* sets out the following matters that must be taken into account in the making of a classification decision:

> (a) the standards of morality, decency and propriety generally accepted by reasonable adults;
>
> (b) the literary, artistic or educational merit (if any) of the publication, film or computer game;
>
> (c) the general character of the publication, film or computer game, 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 intended or likely to be published.[77]

9.71 The television codes of practice each contain details on the classification process for making decisions in relation to the media content they broadcast. While some of the industry codes refer to the Guidelines for the Classification of Films and Computer Games for the classification of films they broadcast, and incorporate similar principles that apply under the existing National Classification Scheme, the extent and manner in which they do so varies between broadcasters.[78]

Common classification criteria for media content

9.72 The ALRC recommends the introduction of common classification criteria that should be used to classify all media content in the same way, whether it is computer games, television programs or online content. Common classification criteria should enable classifiers to assess media content by having regard to the different features of media content which is more relevant in a convergent media environment.

---

72 *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31, [42].

73 Ibid, [43].

74 *Guidelines for the Classification of Films and Computer Games* (Cth).

75 *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31, [47].

76 The ALRC notes the agreement of State and Territory Censorship Ministers to develop separate classification guidelines for computer games in preparation for the introduction of an R 18+ category for computer games: see Standing Committee of Attorneys-General, *Communiqué 21 & 22 July 2011*.

77 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 11. The Classification Board must take these matters into account, or 'have regard' to them; they are not criteria or standards: *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31, [42]–[44].

78 For further details of classification criteria and guidelines used by the television industry refer to the respective codes of practice for ABC, SBS, Free TV Australia and ASTRA.

9.73 To give effect to this recommendation, the separate tables for publications, films and computer games, in the current Code should be consolidated into one media content table that provides a broad, high-level description of the content permitted in each of the classification categories. It would also mean combining the separate classification guidelines for publications with the classification guidelines for films and computer games and accounting for relevant elements of guidelines used by other platforms, such as television.

9.74 Many submissions favoured common classification criteria for application to all media content, regardless of the delivery platform. 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.[79]

9.75 The Classification Board also questioned whether the existing separate and media-specific classification criteria 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.[80]

9.76 Common classification criteria for all media content would remove the current anomaly requiring webpages to be classified under the Guidelines for the Classification of Films and Computer Games.[81] As the former Office of Film and Literature Classification observed as early as 2001, technical advancements have blurred the distinction between films and computer games:

> The issues raised by the convergence of media are not reflected in the existing classification scheme where different standards (or guidelines) are applied to publications, films and computer games. An approach where classification standards vary on the basis of the format or medium in which the content is distributed is increasingly difficult to maintain.[82]

9.77 The same classification criteria should be able to be applied to any type of media content—not just films, computer games and television programs that would be classified under the ALRC model. Content providers may choose to have other content classified, for example, art catalogues, books, radio programs or podcasts. In Chapter 10, the ALRC recommends that all content likely to be adult content must be restricted to adults. The classification criteria should therefore facilitate classification decision-making for all these purposes.

---

79 The Arts Law Centre of Australia, *Submission CI 1299*.

80 Letter from Donald McDonald, Director Classification Board to ALRC, 6 May 2011.

81 *Broadcasting Services Act 1992* (Cth) sch 7 cl 25.

82 Office of Film and Literature Classification, *A Review of the Classification Guidelines for Films and Computer Games: Discussion Paper*, (2001).

9.78 The ALRC considers it increasingly problematic to use classification guidelines that are distinguished according to traditional notions of what a film, computer game, television program or publication is. In the context of media convergence, it is essential that classification criteria account for features of content regardless of the form it may take. For example, e-books and computer games now 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'.[83]

9.79 A new classification scheme should also 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.[84]

9.80 The same thresholds and limits on content permitted in each classification category should also apply across all forms of 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, computer games or online content. It is the role of the classifier to determine whether the item exceeds the stated limits of the category and therefore should be assigned a higher classification.

9.81 Some submissions did not support combined classification criteria. The ACCM asserted that, while uniformity of classification categories and markings may be useful for consumers, it does not follow that the *criteria* underlying every classification need to be the same for all media or platforms—such uniformity can be justified only if the evidence is that the experience offered by all those media or platforms is the same.[85] Similar concerns, that combined classification criteria would not be able sufficiently to account for differences in forms of content, were raised in relation to the classification of publications.[86]

9.82 In the ALRC's view, a more uniform approach does not—nor should it—prevent the classification criteria from taking account of differences between content, for example, text versus moving images. However, 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.

---

83 MLCS Management, *Submission CI 1241*.
84 Ibid.
85 Australian Council on Children and the Media, *Submission CI 2495*.
86 ACP Magazines, *Submission CI 2520*, I Graham, *Submission CI 2507*.

9.83 This broad logic was the basis for introducing common classification categories and markings in 2005 and combining the previously different and separate classification guidelines for films and computer games in 2003. The need for guidelines that could be used to classify convergent media was foreshadowed by Dr Jeffrey Brand in his report analysing submissions on the draft combined classification guidelines, in which he stated that, 'if not now, then in the very near future the Guidelines for media forms will need to be combined'.[87]

9.84 Common classification criteria can and should account for the critical differences between media content, by considering the features of content—such as sound, moving images, interactivity, still images, text—and give guidance on how those features might affect the impact and the classification of the media content. It was 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.[88]

9.85 As an example, the current Guidelines for the Classification of Films and Computer Games that were combined and introduced in 2003 include explicit guidance on the treatment of interactivity (including specific limits on certain interactive content). Rather than refer to interactivity as a feature of computer games only, the guidance is framed in media-neutral terms so as not to exclude the possibility that interactivity might be a feature of other types of content as well.

9.86 The ALRC considers this media neutrality necessary and appropriate in order to account for interactive content whether it is a feature of a computer game or film or any other form of new media content available in future. The same goes for other features of content, including production techniques, such as slow motion, colour, close-ups, 3D, repetition, animation, sound effects, lighting—all of which may contribute to a greater or lesser impact for a particular item of content.

9.87 The recommendation for common classification criteria for all media content runs counter to the July 2011 decision of Censorship Ministers to introduce separate Guidelines for the Classification of Computer Games in preparation for the introduction of an R 18+ classification for computer games.[89] However the ALRC considers that concerns regarding interactivity and violence could be addressed under combined guidelines, as is currently the case.

---

87 *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 Dr Jeffrey Brand for the Office of Film and Literature Classification.

88 Confidential, *Submission CI 1980*.

89 Standing Committee of Attorneys-General, *Communiqué 21 & 22 July 2011*. The proposed new *Guidelines for the Classification of Computer Games* are available on the classification website at <www.classification.gov.au>.

Text and still images

9.88 The existing Guidelines for the Classification of Films and Computer Games provide a suitable template for new classification guidelines as they were developed following a comprehensive review process.[90] In 2005, with input from academics, classification experts and the public, these guidelines were significantly re-engineered including changes to their presentation, the language used and their structure.

9.89 The Guidelines for the Classification of Publications contain constructive and valuable guidance that would serve as a useful starting point for assessing content comprised of text and still images, as distinct from moving images or interactivity that are covered currently. For example, new classification guidelines should account for, among other things, 'written references', 'text depictions' and 'descriptions'.

9.90 In the ALRC's view, developing new guidelines for all media content that give due consideration to the features and properties of text and still image based content—and that do not necessarily lead to further restrictions or bans on content that is currently lawfully available—is possible.

9.91 For example, the Classification Board advised that the current Guidelines for the Classification of Publications for the Category 1 Restricted classification specify that,

> actual sexual activity may not be shown in realistic depictions ... Simulated or obscured sexual activity involving consenting adults may be shown in realistic depictions ... Genital contact is not permitted to be shown in realistic depictions.[91]

Therefore, consistent with the Guidelines for the Classification of Films and Computer Games, Category 1 Restricted publications may fit appropriately into the R 18+ category that permits realistically simulated sexual activity and nudity.

9.92 Likewise, the ALRC considers that, consensual sexually explicit activity of the type currently classified Category 2 Restricted may be appropriately accommodated in the X 18+ classification. However some submissions expressed concerns that if this recommendation were implemented, depictions of some activity such as 'consenting adult fetishes' might be banned because such depictions are currently permitted in the Category 2 Restricted classification under the Guidelines for the Classification of Publications but not permitted in the X 18+ classification under the Guidelines for the Classification of Films and Computer Games.[92]

9.93 New guidelines could permit, for example, still images of certain activity, while prohibiting moving images of the same activity.[93] Permitting content in a certain form, that might be limited or not permitted in another form, is already provided for under the Guidelines for the Classification of Films and Computer Games. For example: drug use is permitted in R 18+ classified films; while provisions regarding interactivity state

---

90 *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 Dr Jeffrey Brand for the Office of Film and Literature Classification.

91 Classification Board, *Submission CI 2485*.

92 A Hightower, *Submission CI 2511*, I Graham, *Submission CI 2507*; Lin, *Submission CI 2476*.

93 Eros Association, *Submission CI 2530*.

that as a general rule, material that contains drug use related to incentives or rewards is Refused Classification.[94]

9.94 The ALRC acknowledges that drafting new guidelines to incorporate the substance of the Guidelines for the Classification of Publications may not be a straightforward exercise, particularly as it would require careful attention to distinctions that allow for content in publications that may not be currently allowed in films and computer games.[95]

9.95 The ALRC considers that the drafting of new guidelines should be undertaken with relevant expert advice and in consultation with industry and the public. Concerns about anomalies between content currently permitted in publications but not in films and computer games—for example certain fetish activity—might also be addressed through further research into community views on the scope of the Prohibited classification category.[96]

9.96 Concerns that the new guidelines would not be able to be reengineered adequately to account for the unique features of publications and other text or still-image based content,[97] on balance, is not of itself justification for maintaining separate guidelines.

Statutory criteria

9.97 The ALRC considers that there should be a consistent process for making classification decisions, regardless of who is classifying the media content and which industry sector they represent. 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 platform.

9.98 Consistent decision making, including reviewing original classification decisions, may be best achieved by establishing 'statutory classification criteria' that provide for the same standards and requirements for classification decision-making by all classifiers. Telstra submitted that 'it does not believe there is any evidence supporting the need for differing statutory classification criteria for different forms of content'.[98] Furthermore,

> Multiple classification criteria across different forms of content increase regulatory compliance costs for industry. In this context, development of a single set of statutory classification criteria would not reduce the level of information or protection provided to consumers, while providing increased certainty and reduced costs to industry.[99]

---

94 The Classification Guidelines for Films and Computer Games refer to 'interactivity' as including the use of incentives and rewards, technical features and competitive intensity.
95 I Graham, *Submission CI 2507*; Lin, *Submission CI 2476*.
96 See Ch 11.
97 ACP Magazines, *Submission CI 2520*.
98 Telstra, *Submission CI 2469*.
99 Ibid.

9.99 The ALRC recommends that the Classification of Media Content Act should provide for one set of 'statutory classification criteria' and that all classification decisions be made applying these criteria. As the National Film and Sound Archive asserted, 'consistency in criteria would promote consistency in classification decision-making for the benefit of all audiences'.[100]

9.100 'Statutory classification criteria' refers to the criteria that should be applied and the matters that should be taken into account by all classifiers making classification decisions under the new classification scheme: that is, the criteria currently provided for under s 9A and the matters set out under s 11 of the *Classification Act*; the principles and criteria detailed in the consolidated Code (as discussed above); and the combined classification guidelines (as discussed above).

9.101 Currently under the *Classification Act*, content must be classified 'in accordance with the Code and the classification guidelines'.[101] This means the guidelines are binding. However, in the ALRC's view, classification guidelines should instead help classifiers apply the Code[102] and the Code should be paramount. This better accords with the plain meaning of the word 'guidelines', and should ensure that classifiers will not need to try to determine whether the code and the guidelines are consistent.

Primary or subordinate legislation?

9.102 The classification categories, the general matters or principles that must be taken into account when making a classification decision and the Code should all be set out in the Classification of Media Content Act.

9.103 The Code should be a schedule to the Act. Given that the Code establishes the crucial boundaries on content at each classification, it is appropriate that the Parliament consider changes that might relax or increase restrictions or provide for new prohibitions. Parliamentary responsibility meets concerns such as those expressed by one stakeholder, that a Commonwealth-only classification scheme would result in a single Commonwealth Minister 'being empowered to unilaterally determine and change the classification criteria in the National Classification Code'.[103]

9.104 A separate legislative instrument should set out the new media content classification guidelines, so that they may be more readily amended to respond flexibly to changing community attitudes and technological developments.[104]

---

100 National Film and Sound Archive of Australia, *Submission CI 1198*.

101 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9.

102 This is consistent with the ALRC's 1991 report that proposed draft legislation providing for guidelines to be issued 'to help people apply the classification criteria set out in the code'. Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), 74.

103 I Graham, *Submission CI 2507*.

104 Some submissions noted this as a benefit of keeping the more detailed elements of the classification process, such as the classification guidelines, separate from primary legislation: See MLCS Management, *Submission CI 1241*; Interactive Games and Entertainment Association, *Submission CI 1101*.

9.105 This would better facilitate periodic review of the classification guidelines while also providing for parliamentary scrutiny and the legislative instrument's disallowance.[105] The classification guidelines should be reviewed in consultation with key industry stakeholders including providing for the input of state and territory governments and the public, and in light of relevant research.

9.106 For easy reference of classifiers and consumers alike, the statutory classification criteria should be made available in one consolidated document published by the Regulator.

Industry codes

9.107 Industry codes could explain elements of the statutory classification criteria or provide additional guidance on the application of the criteria by citing industry-relevant examples. This may include guidance on considering audience and context relevant to 'niche' content, such as arts programs or content intended for particular communities such as indigenous television programming. Alternatively, the computer games industry might expand on the examples provided in the statutory classification criteria to explain how interactivity might affect impact. Some industry codes might find it useful to provide illustrative examples of 'mild coarse language' or 'sexual activity that is mild and discreetly implied' to better demonstrate to classifiers the type of content that might meet these tests.

9.108 The ALRC considers that detail in industry codes should not be interpretative or introduce new criteria or alter limits on the content permitted at different categories. Nothing in industry codes that elaborates on the classification decision-making process should be inconsistent with the statutory classification criteria.

9.109 The ALRC notes that subscription television uses the Guidelines for the Classification of Films and Computer Games to classify films and drama programs without further elaboration in their codes. Likewise, industry assessors that make classification recommendations for television series, computer games and additional content in films and content assessors that assess online content, all currently apply the Guidelines for the Classification of Films and Computer Games. This would indicate that the current guidelines are a practical and useful source of guidance that can be ably applied by classifiers and assessors dealing with many different types of media content. The ALRC therefore suggests that the level of detail and composition of the recommended media content classification guidelines should parallel the existing Guidelines for the Classification of Films and Computer Games.

Recommendation 9–3 The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions be made applying these criteria.

105 See *Legislative Instruments Act 2003* (Cth) pt 5.

Research

9.110 The ALRC recommends that a function of the Regulator should be research activity, similar to the range conducted or commissioned by the former Office of Film and Literature Classification, the ACMA and broadcasters currently, that supports the maintenance of an effective classification scheme.

9.111 Research activities should develop a broader evidence-base to inform the development of classification policy, legislation and decision-making tools that continue to meet the needs of consumers but also responds to industry developments—new technologies and forms of media content. The Regulator should also make research findings available to the public to inform them on the operation and effectiveness of the classification scheme.

9.112 There were mixed views about research focused on community standards, as initially proposed by the ALRC. Some submissions supported such research,[106] while others opposed it because community standards are 'contentious, nebulous and mutable'.[107] There was also concern about how findings may be used, for example, that it could 'have the effect of setting an 'official' community standard by which all media content is measured';[108] or that it would be used to ban content even if it would otherwise only be available to adults.[109]

9.113 Another submission expressed the view that community standards research would not necessarily address matters such as the possibility of expanding classifiable elements and the bias towards offensive content 'inherent in the current regime'.[110]

9.114 The ALRC considers that research—whether it be on community standards or otherwise—should be tailored for the purpose and might involve commissioning academic or sociological research and seeking input from classification experts. In some instances it may involve attitudinal surveys, focus groups, community assessment panels, literature reviews, data collation and reviews of complaints. Research might be instigated at the Board's request or where opportunities arise to partner with, or complement research conducted by others in the field.[111]

9.115 Recognising that young people are now not just consumers of media content, but actively involved in its production and dissemination, research should involve eliciting the views of children. This would be one way to take up the ACCG suggestion that,

---

106 Foxtel, *Submission CI 2497;* Advertising Standards Bureau, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; R Harvey, *Submission CI 2467*.

107 A Hightower, *Submission CI 2511*; L Mancell, *Submission CI 2492*; J Denham, *Submission CI 2464*.

108 National Association for the Visual Arts, *Submission CI 2471*.

109 J Trevaskis, *Submission CI 2493*; Lin, *Submission CI 2476*.

110 S Ailwood and B Arnold, *Submission CI 2156*.

111 For example, the Advertising Standards Bureau, *Submission CI 2487* has conducted extensive community standards research that might usefully inform classification and media content policy and regulation.

> consideration be given to how the new classification system could better enhance the capacity of children to make informed decisions about the media they use and incorporate their views in the design of the new classification tools.[112]

9.116 The ALRC considers that there may be value in consulting children directly about some classification matters rather than only referring to adult views about what may or may not be appropriate for them. For example, older children that select content for themselves could be involved in 'testing' changes to classification categories/criteria if these are contemplated in future.

Recommendation 9–4 The Regulator's functions should include conducting or commissioning a range of research activities that consider matters such as:

(a) community standards in relation to media content;

(b) awareness of classification information;

(c) adequacy of classification categories, the classifiable elements and the impact test;

(d) content permitted in different classification categories; or

(e) alignment of classification decisions with the views of the public.

112 Australian Children's Commissioners and Guardians, *Submission CI 2499*.

10. Restricting Access to Adult Content

Contents

Summary 229
Restricting access to adult content 230
The restrict access obligation 230
What is 'adult' content? 233
Scope of the obligation 234
How to identify 'adult content' 235
Who must restrict access? 236
Restrict access notices 237
Should all adult content be classified? 238
Reasonable steps to restrict access 243
Industry codes or legislation? 243
Restricting access offline 244
Restricting access online 245
Restrictions on broadcasting 253
Removing mandatory restrictions on MA 15+ content 254
Young people and cyber-safety 256

Summary

10.1 In this chapter, the ALRC recommends that content providers should take reasonable steps to restrict access to adult content they distribute to the Australian public. This is consistent with the principle that children should be protected from material likely to harm or disturb them.

10.2 'Adult content' is media content that has been classified R 18+ or X 18+ and media content that would be likely to be classified R 18+ or X 18+. These classifications are high thresholds, but when the thresholds are met, the content should be restricted to adults—whether the content is a feature film, a film clip, a computer game, a magazine, a website, or any other type of media content distributed to the public. Although restricting access to this content presents difficulties online, those who provide this content should have some obligation to try to warn potential viewers and help prevent minors from accessing it, irrespective of the platform used to deliver the content.

10.3 The steps content providers should be expected to take might vary, perhaps depending on the type of content provider and the platform or delivery method. The chapter reviews various methods of restricting access, including prohibitions on sale

and hire to minors, parental locks on televisions and media devices, internet filters, warning messages and online age verification systems.

10.4 Some of these methods may only be suitable for some content providers. Simple prohibitions on sale and distribution, drawing upon common age-verification methods, will often work offline, and may be enforced. However, such methods are more problematic online.

10.5 Protecting minors from adult content relies heavily on parental supervision and the effective use of PC-based filters and parental locks. Promoting the use of these tools may be one important way that content providers can comply with their statutory obligation to take reasonable steps to restrict access to adult content.

10.6 The ALRC recommends that methods of restricting access to online and offline content should be set out in industry codes and Regulator standards, enforced by the Regulator.

Restricting access to adult content

The restrict access obligation

10.7 The ALRC recommends that the Classification of Media Content Act (the new Act) should provide that content providers should take reasonable steps to restrict access to adult content that is sold, screened, provided online, or otherwise distributed to the Australian public. This requirement should apply to all adult media content, both online and offline—not just films, television programs and computer games, but also websites, magazines, music, artworks, advertising, user-generated content and other media content. The Australian community may not expect formal advisory classification information for this content but, in the ALRC's view, content providers should take reasonable steps to restrict access, so that the content may only be accessed by adults who choose to view the content.

10.8 What these reasonable steps might be for different types of content provider is discussed later in this chapter. For some, this may mean promoting the use and understanding of voluntary parental locks and PC-based filters. The ALRC does not propose that all providers of adult content be required to verify the age of people who access their content.

10.9 Under Australia's current classification laws, certain adult content—where legal to distribute at all—must not be sold or distributed to minors. Films classified R 18+ must not be sold or hired to minors.[1] Publications classified Category 1 Restricted and Category 2 Restricted may also only be sold to adults, and some only in adult premises such as sex shops.[2] Even some books, such as the Bret Easton Ellis novel *American*

---

1 Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 9(2). There are similar provisions in other state and territory classification enforcement legislation.

2 Ibid s 21, 24(2); *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 48, 51; *Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)* s 15; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 27, 29; *Classification of Publications, Films and Computer Games Act 1985* (NT) ss 56(1), 60.

Psycho, have been given a restricted classification and may only be sold in a sealed wrapper and to adults.[3] Online content hosted in Australia that has been classified R 18+, or is likely to be classified R 18+, should only be accessible behind a restricted access system.[4] Films classified X 18+ are illegal in most of Australia, but where they may be legally sold in the ACT and the NT, they may not be sold to minors.[5] Online X 18+ content is prohibited under the *Broadcasting Services Act 1992* (Cth) (the *Broadcasting Services Act*), and subject to take-down notices if hosted in Australia.[6] The URLs of X 18+ content hosted outside Australia may be sent to providers of voluntary internet filters.[7]

10.10 Drawing upon these existing restrictions and applying them to the internet age, the ALRC, in the Discussion Paper, proposed that the new Act provide that access to all R 18+ and X 18+ media content, online and offline, should be restricted to adults.[8] Many stakeholders supported these proposals.[9] Kate Gilroy from Watch on Censorship, for example, stated that distributors 'should maintain their responsibility to ensure age appropriate restrictions'.[10] Telstra also supported the proposal, provided the obligation would not be placed on those who are 'mere conduits' for the content, such as internet service providers (ISPs).[11] As discussed in Chapter 5, the ALRC agrees that internet intermediaries should be not be required to restrict access to adult content.

10.11 Others were critical of the proposals, some assuming that this would mean an expansion of the existing restricted access system obligations in the *Broadcasting Services Act*.[12] Some stakeholders stressed that restricted access systems could be easily circumvented. Civil Liberties Australia said that a 'barely competent teenager could easily work around even the most complex restrictions':

> Unless the ALRC can actually propose a practical means of internet restriction that isn't trivially bypassed and does not suffer from under or over blocking, it seems dangerous to make proposals suggesting that such things can simply be legislated into existence.[13]

---

3 *American Psycho* was classified Restricted Category 1 in 1991.

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

5 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) s 23(5); *Classification of Publications, Films and Computer Games Act 1985* (NT) s 50(1).

6 *Broadcasting Services Act 1992* (Cth) sch 7 cls 20, 21, 47.

7 Ibid sch 5; Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008).

8 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposals 8–1 and 8–2.

9 Eg, Free TV Australia, *Submission CI 2519*; FamilyVoice Australia, *Submission CI 2509*; Arts Law Centre of Australia, *Submission CI 2490*; Foxtel, *Submission CI 2497*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

10 Watch On Censorship, *Submission CI 2472*.

11 Telstra, *Submission CI 2469*.

12 See *Broadcasting Services Act 1992* (Cth) sch 7 cls 20 and *Restricted Access System Declaration 2007* (Cth).

13 Civil Liberties Australia, *Submission CI 2466*.

10.12 Another stakeholder stressed that even those restricted access systems that require credit or debit card details do not work, because many minors can get access to credit and debit cards.[14] Such restricted access systems, the ALRC was told, also discriminate against adults who do not possess credit cards, and compromise people's privacy.[15] Google submitted that 'age-based restrictions are very difficult to enforce in any robust way' and they 'give rise to very real privacy considerations':

> [W]e are concerned that the proposed age-based restrictions on adult content would be unworkable in practice.[16]

10.13 The Internet Industry Association (IIA) said it would be 'prohibitively costly for a provider of an online service to obtain evidence of the age of each individual customer', but it supported 'a requirement that the provider publish a 'click-through' acknowledgement that the viewer is 18 years old or older'.[17]

10.14 In the ALRC's view, the ability to circumvent access restrictions does not mean that content providers should not take reasonable steps to restrict access. That a law may not perfectly achieve its desired outcome does not mean the law serves no purpose. In any event, the ALRC does not propose that restricted access systems should be used by all providers of adult content. Furthermore, these access restrictions are also intended to apply offline. The restrictions should, for example, operate effectively in cinemas and retail outlets.

10.15 Content providers outside Australia may be unlikely to comply with Australian obligations to restrict access to adult content. As one person noted, much adult content is hosted in countries that 'simply don't care about Australian content standards—if they're even aware that they exist'.[18] However, many content providers will comply with the law—particularly Australian media organisations, broadcasters, cinemas, retail outlets and others. This will mean access restrictions are in place on the platforms from which large proportions of the Australian public access media content.

10.16 Compliance by media providers with a large reach in Australia is likely to mean that large volumes of media content delivered to Australians will come with appropriate warnings and other means to help prevent minors from accessing content that is not suitable for them. Content providers may highlight these protections to promote their services. That others may not comply does not suggest access restrictions should be abandoned entirely.

10.17 The ALRC agrees that restricting access should not be prohibitively costly or burdensome. Nor should the law unnecessarily compromise people's privacy. If the obligation to restrict access is made more reasonable—that is, easier to comply with—and perhaps further simplified for providers of non-commercial content, then the

---

14 I Graham, *Submission CI 2507*.
15 Ibid; See also Google, *Submission CI 2512*.
16 Google, *Submission CI 2512*.
17 Internet Industry Association, *Submission CI 2528*.
18 A Hightower, *Submission CI 2511*.

ALRC recommends that the new Act should provide for such an obligation. Methods of restricting access are discussed later in this chapter.

What is 'adult' content?

10.18 Adult content, in this Report, refers to media content that has been classified R 18+ or X 18+, and to unclassified media content that, if it were classified, would be likely to be classified R 18+ or X 18+. These are the strictly 'adults only' classifications in Australia's current classification scheme.

10.19 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;
- Drug use is permitted;
- Nudity is permitted.[19]

10.20 This is a high threshold. Less than 5% of films classified by the Classification Board between 2005–06 and 2010–11 were classified R 18+.[20]

10.21 The X 18+ classification, on the other hand, is an adults-only classification for content with 'real depictions of actual sexual intercourse and other sexual activity between consenting adults'.[21] Classification guidelines state:

> No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers.
>
> Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted.
>
> As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age or over to be portrayed as minors.[22]

---

19 *Guidelines for the Classification of Films and Computer Games* (Cth). See also the criteria for restricted publications in the *Guidelines for the Classification of Publications 2005* (Cth).

20 See annual reports of the Classification Board, 2005–06 to 2010–11.

21 *Guidelines for the Classification of Films and Computer Games* (Cth). Currently, only films may be classified X 18+. In Ch 9, the ALRC recommends that any media content—including computer games, magazines and websites, rather than only films—may be classified X 18+, though this does not mean they should be required to be classified.

22 Ibid.

10.22 This chapter does not review the scope of the R 18+ and X 18+ classification categories, but focuses on the legal architecture of a classification scheme, and suggests reforms consistent with the principle that some content should not be accessed by minors. However, recommendations in other chapters of this Report will require some review of the adult classification categories.[23]

Scope of the obligation

Likely classification

10.23 Under the new scheme, the obligation to take reasonable steps to restrict access applies to content that includes unclassified content that is 'likely' to be R 18+ or X 18+. Some stakeholders expressed concern about such a provision referring to the 'likely' classification of content.[24] For reasons discussed later in this chapter and in Chapter 6, the volume of media content now available suggests it is impractical and prohibitively costly to require all adult content to be classified. Restrictions must therefore be imposed on unclassified content that can be grouped in some other way. The classification that a piece of content would be 'likely' to receive, if it were classified, is itself a useful way to group or categorise content. This also has the benefit of treating classified and unclassified adult content alike, for the purpose of imposing access restrictions.

Non-commercial adult content

10.24 Should there be an exception for distributing non-commercial adult content? In Chapter 6, the ALRC proposes that obligations to classify content should only apply to content made and distributed on a commercial basis. However, in the ALRC's view, the obligation to take reasonable steps to restrict access to adult content should not be limited in this way. It is not only high-impact commercial content that adults should be warned about, and minors protected from, but all high-impact content. Accordingly, the ALRC recommends that access to adult content should be restricted, whether or not the content is produced on a commercial basis.

10.25 Methods of restricting access should, however, be appropriate to and adjusted for different types of content provider. Some will be able to do more than others. These methods are discussed later in this chapter.

Australian audience

10.26 The importance of warning people about adult content, and protecting minors from this content, suggests that the obligation to take reasonable steps to restrict access should not be limited to content likely to have a 'significant Australian audience'.[25] Even small Australian audiences should be given this warning. For example, a film that

---

23 Ch 11 discusses the scope of the existing RC classification, and proposes that the Australian Government should consider whether some content that may now be RC should instead be classified R 18+ or X 18+. The need for research into community standards is also discussed in Ch 9.

24 Foxtel, *Submission CI 2497*; Classification Board, *Submission CI 2485*.

25 In Ch 6, the ALRC recommends that the obligation to classify certain content should only apply to content with a significant Australian audience.

will only be screened once to a niche audience may not need to be classified, but if the film has high-level violence and is likely to be R 18+, the audience should be warned beforehand, and minors should not be admitted to the cinema.

10.27 However, the new Act should focus on the distribution of adult content to the Australian public, rather than with possession or the distribution to persons outside Australia. The obligation to restrict access to adult content should therefore be confined to content that will have some Australian audience, even if this is only a small audience.

Exemptions

10.28 In Chapter 6, the ALRC recommends certain exemptions from laws mandating that some content must be classified. Should there be similar exemptions from laws that provide that adult content should be restricted to adults?

10.29 With regard to content in art galleries and cultural institutions, one stakeholder 'strongly' objected to a new obligation 'to guess whether artworks are "likely to be R 18+" and if they guess so, restrict access to adults'.

> What, if any, serious problem currently exists, and what, if any, legitimate public purpose is achieved by, among other things, preventing parents from taking, eg, their teenage sons and daughters, to see an art exhibition that includes so-called 'content' that may be likely to be classified R 18+.[26]

10.30 The ALRC notes that one of the matters that must now be taken into account when classifying content is 'the literary, artistic or educational merit (if any)' of the content being classified.[27] However, minors are now prohibited from buying films, computer games and publications that would be classified R 18+ and X 18+, and it is an offence to admit a minor to a film classified R 18+, whether or not the minor is accompanied by a parent or guardian.[28] These classification categories are designed specifically to capture content that is only for adults. If they capture content that should not be restricted to adults, then the categories should be reviewed.

10.31 The ALRC does not recommend that galleries and other cultural institutions be made exempt from the requirement to take reasonable steps to restrict access to adult content, and notes that some galleries and institutions may already take such steps voluntarily. In fact, any exemptions from this obligation should be limited carefully. Some exemptions may, however, be appropriate for R 18+ news footage.

How to identify 'adult content'

10.32 Ideally, content providers should somehow assess whether content is likely to be adult content before they distribute it. However this will often be impractical or impossible for online content providers that deal with large quantities of content, much of which is dynamic and user-generated. Requiring 'pre-assessment' would be almost

---

26 I Graham, *Submission CI 2507*.

27 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 11.

28 Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 9, 12, 24, 30, 32.

as onerous as requiring the content to be classified, which, as discussed below, is impractical and prohibitively costly, particularly if only trained Australian assessors are qualified to make such assessments.

10.33 The ALRC does not propose that all content providers should be required to pre-assess content to determine whether it is likely to be adult content. Instead, the obligation to take reasonable steps to restrict access to adult content should include an obligation to take reasonable steps to *identify* adult content. It may be reasonable to expect some content providers, such as magazine publishers and retail outlets, to identify adult content before it is published or sold. For others, such as platforms that host millions of hours of user-generated content, it may only be reasonable to expect them to have in place processes to readily identify adult content after it has been published. Major content providers, for example, might have mechanisms that allow users to 'flag' content as adult or 'inappropriate'.

10.34 Content providers who specialise in distributing adult content should find it straightforward to identify this content. Others may choose to have their content classified, to determine whether access should be restricted.

Who must restrict access?

10.35 The ALRC recommends that the obligation to take reasonable steps to restrict access should be placed primarily on 'content providers', including retailers of adult products, publishers and distributors of adult films and magazines, and online content platforms that provide adult content such as pornography.[29] Content providers will usually be best placed to take steps such as providing warnings with their content, placing their content in plastic wrappers, and checking their customers' age in cinemas and retail outlets. However, this obligation to restrict access should generally not apply to persons uploading content, other than on a commercial basis, to a website owned and managed by others.

10.36 In Chapter 5, the ALRC recommends that obligations to take reasonable steps to restrict access to adult content online should apply to any content with an appropriate Australian link, including content hosted in Australia, controlled by an Australian content provider, or directed to an Australian audience.[30]

10.37 The ALRC does not recommend that ISPs and other internet intermediaries should be required to restrict access to adult content that is provided by others. However, this does not mean that ISPs should have no obligations with respect to this content. ISPs should, for example, continue to provide and promote internet 'family friendly' filters, as this is currently provided for under the *Internet Industry Code of Practice*.[31]

---

29 See Ch 5.

30 Rec 5–9.

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

Restrict access notices

10.38 The ALRC considers that if the Regulator, perhaps after receiving a complaint, considers that a piece of content is adult content, the Regulator should be able to issue a notice to the content provider requiring it to take reasonable steps to restrict access to the content. This notice might be called a 'restrict access notice'.

10.39 The new Act should not provide an offence for simply publishing adult 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 access notice. Such notices might be issued in respect of a specified piece of content, or a general class of content. Content providers may provide reasons why they believe the content is not adult content. The Act should provide for criminal offences and civil penalties for failing to comply with these notices.

10.40 The Act might also provide for criminal offences and civil penalties for failing to take reasonable steps to restrict access to this content, where the content provider is reckless as to whether the content is adult content. In deciding whether to issue this notice, the Regulator should have regard to relevant enforcement guidelines.[32] Naturally, these guidelines should encourage the Regulator to focus attention on the most serious content, and the content likely to have the largest Australian audience.

Recommendation 10–1 The Classification of Media Content Act should provide that content providers should take reasonable steps to restrict access to adult content that is sold, screened, provided online or otherwise distributed to the Australian public. Adult content is:

(a) content that has been classified R 18+ or X 18+; or

(b) unclassified content that, if classified, would be likely to be classified R 18+ or X 18+.

The Classification of Media Content Act should not mandate that all adult content must be classified.

Recommendation 10–2 The Classification of Media Content Act should provide the Regulator with the power to issue 'restrict access notices' to providers of adult content. For the purpose of issuing these notices, the Regulator should be empowered to determine whether the content is adult content.

32 See Ch 16.

Should all adult content be classified?

10.41 In Chapter 6, the ALRC argued that, under the new scheme, only a limited range of content should be required to be formally classified.[33] However, the need for classification may appear more pressing when dealing with content that may harm or distress children. In the ALRC's view, requiring all adult content to be formally classified by Australian classifiers is not the solution to this problem. Current laws that provide that some adult content must be classified on some platforms before being sold in some jurisdictions (for example, pornography on DVDs in the ACT and NT) should be replaced with media-neutral laws that mandate access restrictions on all adult content distributed in Australia. The new Act should not, however, provide that this content must be classified.

10.42 In the Discussion Paper, the ALRC presented a different view with respect to X 18+ content, and proposed that, if the sale of some X 18+ content were made legal in Australia, the content should be required to be classified.[34] Even if it is unlikely that most adult content will be classified, the ALRC argued, by insisting that it should be, the law makes clear Australia's standard on what may be acceptable to display in sexually explicit content. Although some submissions supported the proposal,[35] many were critical, some suggesting that requiring distributors to have this content classified is absurd. For example, one person submitted that the vast majority of this content would be online content originating overseas:

> Almost none of the millions of providers of this content will even attempt to have the material classified. As the providers are outside Australian jurisdiction, the law cannot be enforced. A law that cannot be enforced is a thoroughly bad law and only serves to bring the law into disrepute.[36]

10.43 Civil Liberties Australia argued that this proposal would mean that Australia is enacting legislation that 'has no teeth, cannot be enforced in any practical sense, and will be ignored by consumers and producers alike'.[37] The Australian Communications and Media Authority (the ACMA) also submitted that enacting a law

> where it is acknowledged that it cannot be complied with, or effectively enforced, is likely to lead to a low regard for such a law and, as a consequence, a significantly diminished culture of compliance. This would significantly undermine the law's overall purpose.[38]

---

33 Classified essentially means classified by the Classification Board or an authorised industry classifier, applying statutory classification criteria.

34 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–4.

35 See, eg, Arts Law Centre of Australia, *Submission CI 2490*; Interactive Games and Entertainment Association, *Submission CI 2470*; D Mitchell, *Submission CI 2461*.

36 J Denham, *Submission CI 2464*.

37 Civil Liberties Australia, *Submission CI 2466*.

38 Australian Communications and Media Authority, *Submission CI 2489*.

10.44 One person said that a law requiring Australian adult websites to be classified would 'make for a nice law' that

> will sit on the books and be admired as some kind of moral victory, but in reality it won't make a shred of difference to how things work on the internet. Any Australian website that is still hosted here (and there are very few of them anyway) will simply shift offshore to the US where freedom of speech is guaranteed in the constitution.[39]

10.45 Many providers of adult content, particularly those outside Australia, are highly unlikely to 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 are unlikely to comply with even more stringent and costly laws.

10.46 Requiring Australian classifiers to watch and classify all R 18+ and X 18+ content is not an effective or viable means of regulating adult content. Existing laws in the ACT and the NT that provide that pornography may be sold if classified by the Classification Board cannot be practically applied online. It is not feasible to require all pornography available in Australia to be watched and evaluated by Australian classifiers. There is a vast quantity of this content, and much of it is dynamic, widely dispersed, and user-generated. The pre-classification model of content regulation is not suited to the regulation of pornography, particularly online pornography—and as argued throughout this Report, regulating content sold on some platforms, but not others, is fast becoming unworkable. The ALRC considers that there should not be one set of laws for pornography on the internet, and another for pornography on DVDs and magazines.

10.47 In the ALRC's view, if reasonable steps are taken to restrict access to adult content, there is no need to impose an obligation that the content also be classified. Imposing a classification requirement that will be widely ignored, and would in any event have a very limited effect on content hosted outside Australia, may lower respect for the law, and waste limited regulatory resources. This Report emphasises the importance of an effective and pragmatic regulatory response to adult content that accounts for the realities of the existing media environment.

10.48 It might be argued that classifying all pornography will help prevent the distribution of Prohibited content, much of which is sexually explicit. If publishers of adult content 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 Prohibited content. However, in the ALRC's view, laws designed to stop the distribution of Prohibited content should target the Prohibited content itself, rather than X 18+ content.[40]

10.49 Some providers of X 18+ content, on some platforms (principally DVDs), continue to have their content classified before offering it for sale in the ACT and parts of the NT, despite the fact that the same type of content is widely available online and

---

39 Confidential, *Submission CI 2496*.

40 Prohibited content is discussed in Chs 11 and 12.

illegally sold, often unclassified, in the Australian states. Publishers of some adult magazines also comply with requirements to have their content classified. Under the scheme recommended in this Report, providers of this content should be free to classify their material voluntarily, using either the Classification Board or authorised industry classifiers.[41]

If X 18+ content must be classified, who should classify it?

10.50 The ALRC considers that X 18+ content should generally not be required to be classified, but regulation should instead focus on protecting minors from this content, and on ensuring that all Australians are equipped to avoid this content if they choose to. However, if the Australian Government determines that this content must be classified, then the ALRC suggests that authorised industry classifiers should be able to classify this content, rather than only the Classification Board.[42] This idea was broadly supported by a number of stakeholders.[43]

10.51 Some stakeholders argued that only the Classification Board should classify this content. FamilyVoice Australia, for example, said the pornography industry did not comply with existing laws and had proved itself untrustworthy.

> This is illustrated by the failure by distributors of pornographic magazines and films to comply with call-in notices and the number of breaches of serial classifications … [It] is naive to propose that the pornography industry could be trusted to appropriately classify its own product.[44]

10.52 The volume of this content alone suggests it is not possible for the Classification Board to classify all pornography on the internet, even if content providers were likely to submit it to the Board and pay for it to be classified. Any significant increase in the amount of X 18+ content going to the Classification Board would also mean Board members would have to spend a disturbingly large percentage of their working days watching pornography. This would not only be a health concern for Board members, but would also make it difficult to maintain a Board that was broadly representative of the Australian people.

10.53 However, industry classification would not mean that the adult industry will be self-regulated. As proposed in Chapter 7, industry decisions would be monitored and audited by the Regulator and reviewed by the Board. Industry classifiers would be trained, and have to be authorised by the Regulator. Additionally, classifiers who wrongly classify sexually explicit content could have their authorisations revoked and other sanctions could apply.

---

41 Ch 7 recommends the introduction of authorised industry classifiers.

42 Industry classifiers are discussed in Ch 7.

43 See I Graham, *Submission CI 2507*; J Trevaskis, *Submission CI 2493*; Arts Law Centre of Australia, *Submission CI 2490*; Classification Board, *Submission CI 2485*; Interactive Games and Entertainment Association, *Submission CI 2470*; in response to the question 'Should the new Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier?': Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 7–1.

44 FamilyVoice Australia, *Submission CI 2509*.

Should the sale and distribution of X 18+ content be prohibited entirely?

10.54 The sale and distribution of X 18+ films is currently illegal in most of Australia.[45] Only in the ACT and the NT may X 18+ films be legally sold to adults. X 18+ content is also 'prohibited content' under the *Broadcasting Services Act*.[46] Sexually explicit publications, however, may be sold in most of Australia.

10.55 Sexually explicit material is widely available and viewed by a large number of Australians. In 2001–02, research involving 20,000 Australians reportedly found that 25% had watched an adult film in the past 12 months.[47] The proliferation of adult and specialist sex retail shops indicates there is considerable demand for sexually explicit content. There is also a vast amount of pornography available on the internet.

10.56 Many stakeholders called for the legalisation of the sale and distribution of X 18+ content, some arguing that the existing prohibitions were ineffective and widely ignored.[48] Some argued that prohibiting the distribution of pornography conflicts with the principle that Australians 'should be able to read, hear, see and participate in media of their choice'.[49] For example, one person said the ALRC should recommend that X 18+ material should be lawfully available in all states and territories because most of the content would not be RC and this 'would allow better regulation and reduced costs in law enforcement'.[50]

10.57 Others, however, such as FamilyVoice Australia, called for 'a comprehensive ban on the production, sale or exhibition of X 18+ films', in part because this content was said to play a role in the premature sexualisation and sexual abuse of children, particularly Indigenous children.[51]

> The ACT government inherited permissive legislation on X 18+ films when it attained self-government. Sadly it has not followed the lead set by all six States in prohibiting the production and sale of X 18+ films. This has meant that despite State bans on the sale of X 18+ films anyone in Australia can purchase X 18+ films by mail order from the ACT. The Commonwealth, which retains ultimate responsibility under the territories power, ought to act to remedy this problem.[52]

---

45 Eg, in NSW, 'A person must not sell or publicly exhibit a film classified RC or X 18+': *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 6.

46 *Broadcasting Services Act 1992* (Cth) sch 7 cl 20.

47 Eros Association, *Submission CI 1856*.

48 Eg, A Hightower, *Submission CI 2511*; Confidential, *Submission CI 2496*; Civil Liberties Australia, *Submission CI 2466*; Eros Association, *Submission CI 1856*. Some submissions that argued the scope of the RC classification was too broad also suggested that sexually explicit adult content should not be prohibited: see Ch 11.

49 Eg, A Hightower, *Submission CI 2511*; J Trevaskis, *Submission CI 2493*. A similar principle is also currently enshrined in the National Classification Code.

50 D Henselin, *Submission CI 2473*.

51 FamilyVoice Australia, *Submission CI 2509*.

52 Ibid.

10.58 Likewise, the Senate Legal and Constitutional Affairs Committee recently recommended that 'the exhibition, sale, possession and supply of X 18+ films should be prohibited in all Australian jurisdictions'.[53]

10.59 The ALRC recognises that there are strongly held views on the nature of sexually explicit material.[54] Gareth Griffith's 2003 briefing paper, *X Rated Films and the Regulation of Sexually Explicit Material*, reviews the history of regulating pornography in Australia, and the arguments about whether the distribution of this content should be legal. The paper begins with a useful overview of the two broad views in debates about pornography:

> For some, such material is exploitative, demeaning and degrading of participants and viewers alike; they argue its harmful effects, for individuals, families and the community at large, are apparent enough, even if these effects cannot be established with scientific certainty. From this perspective, sexually explicit material should be regulated out of existence.
>
> Others are less censorious, perhaps sharing certain residual concerns about high levels of exposure to sexually explicit material, especially where the young are involved, yet protective of the right of adults to read, see and hear what they want. For them, the purpose of regulation is not to prohibit sexually explicit material, but to ensure that certain conditions as to content, production and distribution are enforced, in particular that the product on offer is non-violent in content, that it is produced by fully consenting adults and that its mode of distribution facilitates informed choice and minimises any risk to children.[55]

10.60 Mr Griffith's paper notes the longstanding complaint that prohibitions on the sale of X 18+ films in the states are widely ignored and rarely enforced, and canvasses the possibility of NSW adopting a licensing scheme:

> Whether a licensing scheme would prove as effective in Sydney as in the less complex market place of Canberra, where the sale of X films is restricted to designated non-residential areas, is open to debate. What can be said, based on evidence from the ACT, is that the adult film industry in Australia is a lawful, mainstream enterprise, with a vested interest in maintaining the legitimacy and effectiveness of any regulatory scheme that permits it legal operation.[56]

10.61 However, licensing schemes and classification requirements appear somewhat anachronistic in light of the volume of this content that is now available in most Australian homes through the internet. Unless ISPs are required to block pornography, prohibitions on the sale of pornography in retail outlets may be largely symbolic, and have little practical effect.

10.62 The ALRC therefore considers that it is most appropriate and more effective to focus regulatory efforts on restricting the access of minors to this content, by encouraging parental supervision, by promoting—and requiring content providers to

---

53 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 13.

54 See K Albury, C Lumby and A McKee, *The Porn Report* (2008); and M Tankard Reist and A Bray (eds), *Big Porn inc.: Exposing the Harms of the Global Pornography Industry* (2011).

55 G Griffith, *X Rated Films and the Regulation of Sexually Explicit Material* (2002), 1.

56 Ibid, 57.

promote—the use and understanding of parental locks, internet filters, and other devices, and requiring content providers to take other reasonable steps to restrict access to the content. This is a more achievable regulatory outcome than the formal classification of all pornography, and providers of adult content may be more likely to comply with an obligation to take reasonable steps to restrict access, than with laws that entirely prohibit the distribution of their content.

Reasonable steps to restrict access

10.63 This section provides an overview of some of the key methods of restricting access, online and offline, to adult content.[57] While the new Act should provide for essential requirements for restricting access, the various 'reasonable steps' that different types of content provider might be expected to take should be prescribed in industry codes, approved and enforced by the Regulator, and in standards, issued and enforced by the Regulator.

10.64 These codes and declarations might be developed for different types of content, content providers and industries, but could include:

- how and where to advertise, package and display hardcopy adult content;
- the promotion of parental locks and user-based computer filters;
- how to confirm the age of persons accessing adult content online; and
- how to provide warnings online.

Industry codes or legislation?

10.65 The ALRC recommends that methods of restricting access to adult content should be set out in industry codes, rather than in the new Act. One stakeholder expressed concern that providing for access restrictions in industry codes may mean the codes serve the interests of industry, and not the Australian people:

> Whereas people can attempt to influence the law, there may be little or no means of influencing industry participants. The process of public debate is far better developed in the political sphere than in the commercial sphere.[58]

10.66 However, most stakeholders who addressed this point agreed that industry codes were the appropriate mechanism.[59] 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. Free TV Australia submitted that industry codes are the appropriate mechanism for restricting access to adult media content:

---

57 As noted above, in this chapter, 'adult content' is media content that has been classified R 18+ or X 18+, and unclassified media content that, if it were classified, would be likely to be classified R 18+ or X 18+.

58 J Trevaskis, *Submission CI 2493*.

59 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2497*; National Association for the Visual Arts, *Submission CI 2471*; Telstra, *Submission CI 2469*.

> Such a system has worked effectively in the commercial television free-to-air industry. The inclusion of such matters in industry codes means that each industry can apply the relevant high level principles in a way that is practical, effective and commercially viable.

10.67 Accordingly, the ALRC recommends that methods of restricting access are best placed in industry codes, approved and enforced by the Regulator, and standards, issued and enforced by the Regulator. These should be regularly reviewed and updated to account for developments in technology.[60]

Restricting access offline

10.68 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. For example, in NSW, a publication classified Category 2 Restricted must not be:

> (a) displayed except in a restricted publications area, or
>
> (b) delivered to a person who has not made a direct request for the publication, or
>
> (c) delivered to a person unless it is contained in a package made of opaque material, or
>
> (d) published unless it displays the determined markings.[61]

10.69 Further, at each entrance to the premises of a 'restricted publications area', there must be prominently displayed a notice that reads:

> RESTRICTED PUBLICATIONS AREA—PERSONS UNDER 18 MAY NOT ENTER. MEMBERS OF THE PUBLIC ARE WARNED THAT SOME MATERIAL DISPLAYED IN THIS AREA MAY CAUSE OFFENCE.[62]

10.70 In submissions to this Inquiry, some stakeholders 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'.[63] Civil Liberties Australia, for example, submitted that it 'is hardly clear that this should be a pressing concern', considering '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.[64]

10.71 The Pirate Party Australia submitted that:

> 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.[65]

---

60 Industry codes are discussed more fully in Ch 13.
61 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 21(1).
62 Ibid s 49. (Upper case in original.)
63 A Hightower and Others, *Submission CI 2159*.
64 Civil Liberties Australia, *Submission CI 1143*.
65 Pirate Party Australia, *Submission CI 1588*.

10.72 Others submitted that greater restrictions should be imposed. The child protection association, Bravehearts, argued that restricted offline material, such as sexually explicit magazines and DVDs, should be 'out of sight and out of reach of children'.[66] 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.[67]

10.73 Another stakeholder 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'.[68]

10.74 ACP Magazines submitted that 'access restrictions should appropriately recognise the context in which consumers view and purchase magazines' and that this

> is more likely to be achieved through a consultative process that involves relevant industry participants throughout the magazine supply chain than through the imposition of a broad, statutory regime.[69]

10.75 In the ALRC's view, existing state prohibitions on the sale of R 18+ films and restricted magazines to minors are adequate. The new scheme should provide for similar restrictions, although some details should be in industry codes or Regulator standards, rather than the new Act.

10.76 However, restricting access to sexually explicit adult content offline may be achieved more consistently and effectively under the scheme recommended in this Report. The rules regarding where it may be sold and how it should be packaged and displayed should be simplified and uniform. Rather than focusing on whether magazines are properly classified or not, Regulatory activity should instead address community concerns about children's access to this content.

Restricting access online

10.77 Many stakeholders suggested that restricting access online is very costly and almost impossible in practice. 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.[70]

10.78 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

---

66 Bravehearts Inc, *Submission CI 1175*.
67 Media Standards Australia Inc, *Submission CI 1104*.
68 NSW Council of Churches, *Submission CI 2162*.
69 ACP Magazines, *Submission CI 2520*.
70 Civil Liberties Australia, *Submission CI 1143*.

access to content, offensive or not, through firewalls, passwords, blacklists or any other means'.[71]

10.79 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 and peer-to-peer networks. 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'.[72]

10.80 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.[73]

Parental supervision

10.81 The importance of parental supervision in protecting children from adult content online was stressed in many submissions to this Inquiry. In response to the question, 'What are the most effective methods of controlling access to online content?',[74] many people essentially replied: education and parental supervision. One person stated 'I think that monitoring all media available on the internet is impossible and that providing guidelines for parents would be an easier way to help prevent minors accessing disturbing media'.[75] Another said: 'Education and parental supervision. Put the computer in the family room. Enable the existing parental access system in your devices'.[76] 'It comes down to parental supervision,' another person submitted:

> If a child was to use a computer to search for pornographic or unacceptable material then it is, and always will be, up to the parents to supervise and prevent this from happening. And many advances in technology have made it easy for parents to limit and restrict what their children view on the internet.[77]

10.82 Another stakeholder said that attempting to classify and restrict the internet is 'a colossal waste of time and the onus should be on parents, teachers and child carers to provide the supervision necessary to prevent their children accessing such content'.[78] FamilyVoice Australia said that 'parents are primarily responsible for monitoring their

---

71 Australian Independent Record Labels Association, *Submission CI 2058*.
72 The Australian Recording Industry Association Ltd and Australian Music Retailers' Association, *Submission CI 1237*.
73 Double Loop, *Submission CI 1124*.
74 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Issues Paper 40 (2011), Question 12.
75 N Smyth, *Submission CI 772*.
76 K Nicholson, *Submission CI 260*.
77 V MacDonald, *Submission CI 889*.
78 N Zeitoune, *Submission CI 1566*.

children's use of media', but emphasised that parents are 'entitled to expect appropriate help from the broader society, including the legal system'.[79]

10.83 The notion that parents play a vital role in protecting their children from harmful online content has been echoed overseas. The United Kingdom's 2008 Byron Review investigated the impact of new technologies on children in response to growing concern about internet and computer game use. The review recognised that 'it is very difficult for national Governments to reduce the availability of harmful and inappropriate material' and emphasised that parents play a 'key role in managing children's access to such material'.[80] Additionally, the review recommended that parents should encourage children to develop 'the confidence and skills to navigate these new media waters safely', much as parents aid children to learn skills for safety in the offline environment, such as how to cross the road.[81]

10.84 For many, the difficulties of successfully controlling online content at the content provider end mean that it is necessary to shift at least part of the responsibility to protect minors to parents and guardians who are at the 'receiving end' of media content.[82]

10.85 Peter Coroneos, former CEO of the Internet Industry Association, has advocated 'industry facilitated user empowerment':

> This term recognises that end-users are ultimately in the best position, given the nature of the internet, to control what content they are able to access online. However, the internet industry does not abrogate all responsibility here—there are things that can be done to enhance the ability of end-users to assume control, specifically through the provision of information and tools to end-users.[83]

10.86 The ALRC also envisages an important role for content providers in helping users—and parents and guardians in particular—to understand and use the tools that can enable them to better control the media content that comes into their homes.

Education and cyber-safety

10.87 Many stakeholders observed that the education of parents and consumers is one of the most important means of regulating access to online content. Some have spoken of a 'generational digital divide' between parents and their children, which may limit some parents' ability to use tools such as parental locks and internet filters.[84]

10.88 Many submissions focused on education of parents as a key priority, both in terms of 'educating parents and guardians about how to use parental locks and restricted access systems',[85] and also more generalised education as to the 'dangers and

---

79 FamilyVoice Australia, *Submission CI 2509*.
80 T Byron, *Safer Children in a Digital World: The Report of the Byron Review (UK)* (2008), 5.
81 Ibid, 4, 5.
82 P Hettich, 'YouTube to be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet' (2008) 82 *St John's Law Review* 1447, 1483.
83 P Coroneos, 'Internet Content Control in Australia: Attempting the Impossible?' (2000) 23(1) *University of New South Wales Law Journal* 238.
84 T Byron, *Safer Children in a Digital World: The Report of the Byron Review (UK)* (2008), 7.
85 Interactive Games and Entertainment Association, *Submission CI 1101*.

potential consequences of online activities'.[86] 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.[87]

10.89 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'.[88] Likewise, 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.[89]

10.90 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'.[90]

ISP-level filters

10.91 A number of ISPs offer an internet service filtered at the ISP level. End users do not need to install additional software on their personal computers. Though some ISP-level filters offer a single 'clean-feed', which screens the same content for all users, many allow users to tailor the level of filtering based on content categories.

10.92 Index-based filtering and analysis-based filtering are the two primary technologies.[91] Index-based filtering operates from a categorised index of URLs that is created either manually, through human searches and analysis of content, or through analysis-based filtering. Filtering can be based on 'white lists'—exclusively permitting specific content while blocking all other content; or 'blacklists'—exclusively denying specific content while permitting all other content.[92]

10.93 Index-based filtering is often used in conjunction with analysis-based filtering, which employs key word, image analysis, file type, link analysis, reputation, and deep

---

86 National Civic Council, *Submission CI 2226*.
87 Australian Mobile Telecommunications Association, *Submission CI 1190*.
88 NSW Council of Churches, *Submission CI 2162*.
89 Bravehearts Inc, *Submission CI 1175*.
90 SBS, *Submission CI 1833*.
91 Australian Communications and Media Authority, *Closed Environment Testing of IP-Level Internet Content Filtering* (2008), 12–14.
92 Ibid, 13.

packet inspection criteria to analyse content offline or in real-time.[93] Improvements in filtering technology have been widely documented.[94]

10.94 Although generally considered to be more difficult to circumvent than PC-based filters, ISP-level filters remain relatively easy for tech-savvy users to circumvent.[95]

Home filters and parental locks

10.95 PC-based content filters rely on software installed on a user's personal computer. PC-based content filters employ technology similar to that used by ISP-level filters, often utilizing a combination of index- and analysis-based filtering methods. Many allow for content tracking and reporting, and allow users to tailor the content filtered across multiple categories for several different users.[96]

10.96 In 2007, the Australian Government announced the 'NetAlert' program, which offered free PC-based filters to Australian families. The program was discontinued in 2009, but PC-based filters are still widely available in Australia. The IIA Code of Practice requires that ISPs provide an optional content filter to users.[97]

10.97 Many submitted that filtering software and parental locks were the best means of controlling minor's access to adult 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.[98]

10.98 Another stakeholder commented that 'optional filters on client-side computers are a more efficient way of controlling online access, without blocking any adult's right to view what they wish to'.[99] 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.[100]

---

93 Ibid, 14.

94 See, eg, European Union Safer Internet Plus Programme, *Safer Internet: Test and benchmark of products and services to voluntarily filter Internet content for children between 6 and 16 years*, Synthesis Report (2008).

95 See Enex Test Lab, *ISP Content Filtering Pilot Report* (October 2009). See also G Urbas and T Kelly, *Submission CI 1151*.

96 Australian Communications and Media Authority, *Filtering Software* <www.acma.gov.au/WEB /STANDARD/pc=PC_90167> at 30 January 2012.

97 Internet Industry Association, *Internet Industry Code of Practice: Content Services Code for Industry Co-regulation in the Area of Content Services* (2008) cl 19. Filters must be provided free of charge or sold on a cost-recovery basis. Eight filters are currently approved by the IIA, with prices ranging from free to $70 per year: Internet Industry Association, *Family Friendly Filters 2011* <http://www.iia.net.au> at 30 January 2012.

98 G Urbas and T Kelly, *Submission CI 1151*.

99 S Gillespie, *Submission CI 191*.

100 The Arts Law Centre of Australia, *Submission CI 1299*.

10.99 Parental locks may also be used to block certain television content. Since February 2011, all televisions sold in Australia must have parental lock capabilities.[101] 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.[102]

10.100 The ALRC considers that content providers should have an obligation to take steps to restrict access to adult content. Content providers will usually not be in the business of providing parental lock technology or internet filters. However, content providers should have a role in the promotion of the use of parental locks and internet filters. If such technology is the best way to prevent minors from accessing adult content, then providers of adult content—particularly commercial providers—should have a responsibility to promote the use of these tools. For some content providers, promoting these tools may be a reasonable step to restricting access to adult content. Whether this will be sufficient for any particular content provider may depend, in part, on how widely the technologies are in fact understood and used in the Australian community.

Regulator notices to providers of filters

10.101 Currently, upon receipt of a complaint about certain higher-level online content hosted outside Australia (essentially, RC and X 18+ content, and MA 15+ and R 18+ content not behind a restricted access system), and after investigating that complaint, the ACMA is required to notify providers of family friendly filters, so that the content is added to the list of URLs that may be filtered.[103]

10.102 In the ALRC's view, there is no need for a Regulator to notify filter providers of MA 15+, R 18+ and X 18+ online content. There are many highly sophisticated commercial internet filters that index, and allow users to block, millions of URLs and other digital content from their home computers. Such filters do not rely on a regulator's lists of a few thousand URLs that have been the subject of complaints. Maintaining such lists appears to be a costly and unnecessary regulatory activity that should be abandoned.

10.103 The ALRC suggests that the new Act should not require the Regulator to notify internet filter providers about adult content.

Restricted access systems

10.104 Restricted access systems or access control systems have been used to help prevent minors from accessing certain content online, essentially by seeking to verify

---

101 *Broadcasting Services Act 1992* (Cth) s 130B; *Broadcasting and Datacasting Services (Parental Lock) Technical Standard 2010* (Cth).

102 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.

103 *Broadcasting Services Act 1992* (Cth) sch 5 s 40.

the age of persons trying to access content. Although they may be a suitable means of restricting access for some content providers, others should not be required to use such systems.

10.105 Schedule 7 of the *Broadcasting Services Act* provides that certain content online must only be provided behind a restricted access system.[104] Under the *Restricted Access System Declaration 2007* (Cth), for R 18+ content, an access-control system must:

- require an application for access to the content; and
- 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.[105]

10.106 Under the *Broadcasting Services Act*, X 18+ content, and what is currently Category 1 and Category 2 Restricted content, is prohibited whether or not it is subject to a restricted access system.

10.107 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'.[106]

10.108 Many stakeholders and comments on the ALRC's online forum about this topic were strongly critical of restricted access systems. The NSW Council for Civil Liberties has also said that methods of restricted access systems—PINs, passwords, etc—are 'ineffective, intrusive and encourage identity theft'.[107] Such systems were said to be a considerable burden on content providers, particularly non-commercial content providers. If content providers chose to take down their content entirely, rather than go to the expense of setting up an age-verification system, the law would effectively censor this content.

---

104 Ibid sch 7 cl 14.

105 Australian Communications and Media Authority, *Explanatory Statement, Restricted Access Systems Declaration 2007*.

106 Telstra, *Submission CI 1184*.

107 New South Wales Council for Civil Liberties, *Submission on the ACMA Restricted Access System Declaration* (2007), 3.

10.109 The IIA described the *Restricted Access System Declaration* as 'unworkable to the extent that it requires an online service provider to obtain evidence that a customer is 18':

> In contrast, currently under the IIA's industry code, use of a credit card is regarded as sufficient evidence that a customer is over 18 years of age. This is the case, notwithstanding that it is impossible for online service providers to know whether the card provided is a debit or a credit card and/or whether the person holding the card is in fact 18 years or older. Indeed, it would be prohibitively costly for a provider of an online service to obtain evidence of the age of each individual customer. … Consequently, in our view, the requirements set out in the RAS should be replaced with a requirement that the provider publish a 'click-through' acknowledgement that the viewer is 18 years or older.[108]

10.110 In the ALRC's view, it is not a strong criticism of restricted access systems that some minors—particularly older teens—can get around the systems, or that the systems do not operate perfectly. Like restrictions on the sale of liquor and cigarettes, online age verification systems may provide a useful warning and prevent many minors from accessing the content, even if the systems are not impenetrable.

10.111 Although this Inquiry does not review the merits of such technologies in detail, the ALRC shares many of the concerns raised about online age-verification systems, particularly those concerns about privacy and the cost burdens they may place on non-commercial content providers.

10.112 It may be unreasonable and ineffective to require all providers of online adult content to verify the age of persons who attempt to access their content. By recommending a platform-neutral law that requires content providers to take reasonable steps to restrict access to adult content, the ALRC does not suggest that content providers must use age-verification tools—particularly if the cost of such tools is out of proportion to their effectiveness. However, such tools may be useful and appropriate for some content providers.

Warnings

10.113 Adults and minors who do not wish to view adult content may be assisted by suitable warnings—perhaps on a website or at the start of an online film clip. The effectiveness of warnings about online content are also limited by the fact that, as one person wrote on the ALRC's online forum, a website 'isn't like a building, with a nice front door for the public to come through. Every page is likely to be directly accessible'.[109] Furthermore, such warnings may not deter, much less prevent, persons from accessing content that they would like to access. However, warnings may serve a useful function for those who do not wish to see the content, and for parents and guardians who supervise children's access to the internet.

---

108 Internet Industry Association, *Submission CI 2528*.

109 Australian Law Reform Commission, *Classification Discussion Forum* <www.alrc.gov.au/public-forum/classification-forum> at 15 December 2011.

Restrictions on broadcasting

10.114 Sometimes content not suitable for minors is prohibited on a specific platform, in part because minors are thought to have more ready access to that platform. For example, the *Broadcasting Services Act* prohibits commercial free to air television from broadcasting R 18+ content at any time of the day.[110] Subscription broadcast television channels are also prohibited from broadcasting R 18+ content.[111] Subscription narrowcast television channels may broadcast R 18+ content, if the content is restricted to people with 'appropriate disabling devices'.[112] X 18+ films, of course, may not be broadcast even in the ACT and NT, where they are largely legal to sell.[113]

10.115 Platform-neutral media regulation may suggest that, in time, these laws should also be reconsidered. However, few stakeholders commented on these specific prohibitions, and in the ALRC's view, such laws should not be relaxed without research into the availability, use and community understanding of parental locks.

10.116 As noted in Chapter 8, the European Union's Audio-visual Media Services Directive, which extends regulation of television broadcasting to online and other forms of audiovisual media, distinguishes between linear and non-linear services. On linear services, member States must ensure that broadcasters do not include programs which 'might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence'.[114] It remains to be seen whether this distinction between linear and non-linear services will continue to be relevant.

Recommendation 10–3 The Classification of Media Content Act should provide that the reasonable steps that content providers must take to restrict access to adult content may be set out in:

(a) industry codes, approved and enforced by the Regulator; and

(b) standards, issued and enforced by the Regulator.

These codes and declarations may be developed for different types of content, content providers and industries, but could include:

110 *Broadcasting Services Act 1992* (Cth) sch 2 cls 7(1)(ga), 9(1)(ga), 11(3)(b).

111 Ibid sch 2 cls 10(g).

112 ASTRA, *Codes of Practice 2007: Subscription Narrowcast Television* (2007), Code 3 'Classification and Placement of Programming' cl 3.4. 'Material classified R 18+ can only be broadcast by a subscription narrowcasting service, and only where access to that material is restricted': ASTRA Subscription Television Australia, *Submission CI 1223*.

113 *Broadcasting Services Act 1992* (Cth) sch 2 cls 7(1)(g), 9(1)(g), 10(f), 11(3)(a).

114 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) ('AVMS Directive') art 27(1).

(a) how and where to advertise, package and display hardcopy adult content;

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

(c) how to confirm the age of persons accessing adult content online; and

(d) how to provide warnings online.

Removing mandatory restrictions on MA 15+ content

10.117 The ALRC recommends 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 commercial free-to-air television after 9pm, but may be shown on subscription television at any time;[115]
- MA 15+ films and computer games may not be sold or hired to persons under 15, unless the minor is accompanied by a parent or guardian;[116]
- MA 15+ content online and hosted in Australia must generally be subject to a restricted access system if it is provided by a commercial or mobile premium service;[117] 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).[118]

10.118 With respect to MA 15+ material, the Guidelines for the Classification of Films and Computer Games state the following:

> - The impact of material classified MA 15+ should be no higher than strong.
> - Material classified MA 15+ is considered unsuitable for persons under 15 years of age. It is a legally restricted category.
> - The treatment of strong themes should be justified by context.
> - Violence should be justified by context.
> - Sexual violence may be implied, if justified by context.
> - Sexual activity may be implied.
> - Strong coarse language may be used.

---

115 *Broadcasting Services Act 1992* (Cth) s 123(3A).

116 Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 9(4), 30(2); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 20(5), 42(2).

117 *Broadcasting Services Act 1992* (Cth) sch 7 s 20.

118 Eg, *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 13(1); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 14(1).

- Aggressive or very strong coarse language should be infrequent.
- Drug use should be justified by context.
- Nudity should be justified by context.[119]

10.119 Preventing persons under the age of 15 from accessing MA 15+ films and computer games is problematic offline and near impossible online. The existing laws that endeavour to restrict online access to MA 15+ content are widely seen as ineffective and unenforceable.[120] The classification symbols and warnings may serve a useful purpose as consumer advice, but arguably there is little or no further practical benefit in legal access restrictions for this content, particularly online. Few countries impose mandatory access restrictions on content at the MA 15+ level.

10.120 The ALRC's proposal to remove mandatory access restrictions on MA 15+ media content[121] received broad support.[122] However, some were opposed to the proposal. The Classification Board stressed that the impact of MA 15+ content is strong and not suitable for persons under 15 years of age:

> How is the proposed change to remove mandatory access restrictions to MA 15+ content reconciled under the Guiding Principle of 'Children should be protected from material likely to harm or disturb them?', and would this meet community expectations?[123]

10.121 FamilyVoice Australia said that such a change would be a 'significant reduction in the protection of children aged less than 15 from unsuitable material':

> The current National Classification Scheme recognises that there is a development in children's capacity to appropriately deal with exposure to media content with elements such as sex, violence, drug use and adult themes. … Removing these legal restrictions would mean that children of any age could legally be sold videos or computer games classified MA15+ without any parental involvement.[124]

10.122 The Australian Children's Commissioners and Guardians (ACCG) was also 'concerned that the impact of content classified within the current MA 15+ guidelines may warrant legal restrictions on access'. The ACCG also submitted that the R 18+ classification is a high threshold, and there is 'a considerable amount of content with strong themes not appropriate for children in categories below the R 18+ classification'. Voluntary restrictions are 'potentially unrealistic and unworkable in the long term', and if mandatory access restrictions on MA 15+ content are removed, then

---

119 *Guidelines for the Classification of Films and Computer Games* (Cth).

120 Eg, I Graham, *Submission CI 1244*.

121 Proposed in the Discussion Paper: Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 8–3.

122 Eg, Motion Picture Distributors Association of Australia, *Submission CI 2513*; National Association of Cinema Operators - Australasia, *Submission CI 2514*; Google, *Submission CI 2512*; Arts Law Centre of Australia, *Submission CI 2490*; Foxtel, *Submission CI 2497*; J Denham, *Submission CI 2464*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; D Henselin, *Submission CI 2473*.

123 Classification Board, *Submission CI 2485*.

124 FamilyVoice Australia, *Submission CI 2509*.

the classification guidelines should be reviewed, so that some content now classified MA 15+ would instead be classified R 18+.[125]

10.123 Stakeholders held differing views on whether the effectiveness of restricting access on one platform should affect whether access should be restricted on other platforms. The Motion Picture Distributors Association of Australia submitted that 'restrictions which are unenforceable in other environments should not be imposed on cinema management and staff'.[126] On the other hand, it was argued that the ineffectiveness of restrictions online does not justify removing access restrictions that work in 'cinemas and shops in the streets who can see their customers and estimate the age of unaccompanied children'.[127]

10.124 The ALRC's recommendation on this point does not imply that MA 15+ content is suitable for persons under 15. In fact, in the ALRC's view, some content providers should continue to refuse to sell these films and computer games to young unaccompanied minors, even if they are not required by law to do so. Voluntary restrictions on MA 15+ content may be set out in industry codes of practice. There are also arguments for imposing time-zone restrictions on the delivery of MA 15+ content.[128]

10.125 It might also be noted that if it is too difficult or costly for content providers to take steps to restrict access to strong content to persons over the age of 15, but it is possible to take steps to restrict access to persons over 18, then perhaps rather than remove restrictions entirely from MA 15+ content, the content should be restricted to persons over 18. This would involve reviewing classification criteria to consider whether some content that would now be MA 15+ should instead be R 18+.

Recommendation 10–4 The Classification of Media Content Act should not require access restrictions on MA 15+ media content. Voluntary access restrictions on MA 15+ content should be developed under industry codes, for example, for cinemas and retail outlets.

Young people and cyber-safety

10.126 There will always be challenges in protecting children from material likely to harm or disturb them, particularly in the online environment. The nature of the risks is varied and changeable, and classifying content or restricting access can never be the only response to these challenges. As the Joint Select Committee on Cyber-Safety observed in its interim report, *High-Wire Act: Cyber-Safety and the Young*:

> The benefits of online applications for young people in our society are accompanied by exposure to a range of potential dangers. Some of the most obvious include cyber-

125 Australian Children's Commissioners and Guardians, *Submission CI 2499*.
126 Motion Picture Distributors Association of Australia, *Submission CI 2513*.
127 I Graham, *Submission CI 2507*.
128 Time-zone restrictions are discussed in Ch 8.

> bullying, access to or accessing illegal and prohibited material, online abuse, inappropriate social and health environments, identity theft, and breaches of privacy.[129]

10.127 A recent survey was conducted of 400 young Australians and their families, *AU Kids Online*.[130] This was conducted in parallel with a survey of 25 European nations, carried out by *EU Kids Online.* The Australian study found that Australian children aged 9–16 are very active users of the internet, with more children in the Australian survey going online at school than the EU average (96% : 63%), at home (96% : 87%), and when 'out and about' (31% : 9%). The study found that they were almost four times more likely than the EU average to be accessing the internet from a handheld device (46% : 12%).

10.128 The risks that were identified by the Australian 11–16 year olds surveyed included: exposure to sexual images online (encountered by 28%); bullying on the internet (13%); receiving sexual messages, or 'sexting' (15%); and seeing 'harmful' user-generated content (34%)—the latter included hate messages, self-harm, drug experiences, 'ways to be very thin' and suicide sites.[131]

10.129 The likelihood of viewing sexual images online varied substantially by age. While 27% of both boys and girls aged 9–12 had seen sexual images in the last 12 months, and 16% had seen them on websites, 58% of boys aged 13–16 had seen sexual images and 45% had viewed them online, while 61% of girls aged 13–16 had seen sexual images and 39% had viewed them online. The likelihood of seeing images of people having sex, as compared to viewing nudity, was five times greater for those aged 15–16 as compared to those aged 11–12.

10.130 The survey found that 70% of Australian parents engaged in active mediation strategies concerning their children's internet use that ranged from talking to children about their internet use, setting rules for internet use, and blocking or filtering websites on the home computer. For Australian children, the primary source of internet safety advice was teachers (83% of those surveyed), then parents (75%), then peers (32%).

10.131 Such findings draw attention to the multi-faceted nature of risk and cyber-safety issues for children online, and the need for responses that incorporate public education and support for parents and guardians. In this respect, initiatives such as the ACMA's *Cybersmart* program play an important role in informing, educating and empowering parents, children and teachers as key parts of a successful cyber-safety strategy.[132]

---

129 Parliament of Australia, Joint Select Committee on Cyber-Safety, *High-Wire Act: Cyber-Safety and the Young*, Interim Report, June 2011, 6.

130 L Green, D Brady, K Olafsson, J Hartley, C Lumby, *Risks and Safety for Australian Children on the Internet*, ARC Centre of Excellence for Creative Industries and Innovation (2011). See also L Green and Others, *Submission CI 2522*.

131 Ibid, 9.

132 Australian Communications and Media Authority, *About Cybersmart*, <http://www.cybersmart.gov.au/About.aspx> at 22 February 2012. See also Department of the Prime Minister and Cabinet, *Connecting with Confidence: Optimising Australia's Digital Future: Public Discussion Paper* (2011).

10.132 Research that actively engages young people as well as organisations addressing their health and well-being, such as that being undertaken through the Young and Well Cooperative Research Centre, will also continue to play a key role in addressing these ongoing issues relating to young people and convergent media.[133]

133 Young and Well Cooperative Research Centre <http://www.yawcrc.org.au/about> at 22 February 2011.

11. The Scope of Prohibited Content

Contents

Summary 259
Overview of the RC category 260
The current scope of RC content 262
- Certain matters presented in an offensive way—Code item 1(a) 262
- Offensive depictions or descriptions of children—Code item 1(b) 264
- Promoting, inciting or instructing in crime—Code item 1(c) 265
- Advocating a terrorist act—Act s 9A 267
- Computer games that are unsuitable for minors 268

Renaming the RC category 268
Reforming the scope of Prohibited content 269
- Community standards 270
- Prohibited and 'illegal' content 272
- Content depicting sexual fetishes 275
- Content promoting, inciting or instructing in crime 276
- Detailed instruction in drug use 278
- A narrower Prohibited category 279

Pilot study into community attitudes to higher-level media content 279

Summary

11.1 This chapter discusses the scope of the current Refused Classification (RC) category and the legislative framework defining RC content. Under the current framework, RC content is essentially banned, and its sale and distribution is prohibited by Commonwealth, state and territory enforcement legislation. The ALRC recommends that, under the Classification of Media Content Act, the RC category should be named 'Prohibited' to better reflect the nature of the category.

11.2 The RC category has been criticised for being overly broad in various ways, including by covering content that depicts or describes particular sexual fetishes, which are legal between consenting adults, or instructs in matters of crime or violence.

11.3 The ALRC recommends that the Classification of Media Content Act should frame the 'Prohibited' category more narrowly than the current 'Refused Classification' category. In particular, the Australian Government should review current prohibitions in relation to:

- the depiction of sexual fetishes in films; and
- 'detailed instruction in the use of proscribed drugs'.

The Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'.

Overview of the RC category

Legal basis

11.4 The RC classification category is the highest classification that can be given to media content in Australia.[1] The framework under which content may be classified as RC contains three elements: the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*); the National Classification Code (the Code); and the *Guidelines for the Classification of Publications* and *Guidelines for the Classification of Films and Computer Games* (together referred to as the Guidelines).

Classification Act

11.5 The *Classification Act* provides that publications, films or computer games that advocate the doing of a terrorist act must be classified RC. However, in all other cases, publications, films and computer games are to be classified in accordance with the Code and the Guidelines.[2]

Classification Code

11.6 The Code provides that publications, films and computer games are to be classified according to separate tables set out in relation to publications, films and computer games respectively.[3] These tables are prescriptive.[4]

11.7 Item 1 within each table describes content that is to be classified RC. The description of RC content is identical in all relevant respects.[5] 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 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[6] (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).

11.8 The main difference between types of media content that may be classified RC is that computer games determined to be unsuitable for a minor to see or play are to be

---

1 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7.
2 *Classification (Publications, Films and Computer Games) Regulations 2005* (Cth) ss 9, 9A.
3 *National Classification Code 2005* (Cth) cls 1–4.
4 *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31, [43].
5 However, note that the table relating to publications also includes descriptions.
6 The Code as originally enacted referred to a 'child under 16'.

classified RC because there is currently no R 18+ classification for computer games.[7] However, on 15 February 2012 the Australian Government introduced a Bill[8] to amend the *Classification Act* to introduce an R 18+ classification category for computer games (along with necessary consequential amendments to the *Broadcasting Services Act 1992* (Cth)).[9]

Classification guidelines

11.9 With respect to the RC classification, the *Guidelines for the Classification of Films and Computer Games* provide that:

> Films that exceed the R 18+ and X 18+ classification categories will be Refused Classification. Computer games that exceed the MA 15+ classification category will be Refused Classification.
>
> 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.
>
> 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.

---

7 *National Classification Code 2005* (Cth) cl 4(1)(d). See Chs 2, 9.

8 Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 (Cth).

9 See also Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 (Cth).

11.10 The *Guidelines for the Classification of Publications* contain similar provisions, with a few significant differences, which are highlighted where relevant.

The current scope of RC content

11.11 Some examples of RC content are discussed below. Given that content classified RC results in that content being banned for sale or distribution in Australia, it is perhaps unsurprising that a number of RC classification decisions have been tested in litigation.

Certain matters presented in an offensive way—Code item 1(a)

11.12 The idea of certain content being 'offensive' to community standards underpins some of the rationale for the RC classification, with its origins in the reform of Australian censorship laws undertaken in the 1970s. For example, item 1(a) of the Code tables refers to content that offends against the standards of morality, decency and propriety generally accepted by reasonable adults; and item 1(b) refers to content causing offence to a reasonable adult. Further, some parts of the Guidelines also refer to offensiveness.

11.13 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 [that] 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 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.[10]

Fetish activity

11.14 The *Guidelines for the Classification of Films and Computer Games* specifically provide that 'gratuitous, exploitative or offensive depictions of sexual activity accompanied by fetishes or practices which are offensive or abhorrent'[11] are to be classified RC.

11.15 These Guidelines also provide that the X 18+ classification for films cannot accommodate fetishes such as body piercing; application of substances such as candle wax; 'golden showers'; bondage; spanking; or fisting.

11.16 The listing of these fetishes first appeared in the *Guidelines for the Classification of Films and Videotapes* in 2000. Before then, guidelines expressly provided that the X 18+ classification could accommodate 'real depictions of sexual intercourse and other sexual activity between consenting adults, including mild

10 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [59].
11 *Guidelines for the Classification of Films and Computer Games* (Cth).

fetishes'.[12] However, no depiction of 'offensive fetishes' was permitted.[13] The guidelines at that time defined 'fetish' as:

> An object, an action, or a non-sexual part of the body which gives sexual gratification. Fetishes range from mild to offensive. An example of a **mild fetish** is rubber wear. **Offensive fetishes** include abhorrent phenomena such as coprophilia.[14]

11.17 At that time, films and videos that contained elements beyond those permitted in the X 18+ classification—for example, offensive fetishes—were to be classified RC.[15]

11.18 The inclusion of the above-mentioned six fetishes in the *Guidelines for the Classification of Films and Videotapes*, as well as other amendments, including changing the definition of 'fetish' so only the first sentence above remained, served to 'further restrict the content of the material permitted in the X classification'.[16]

11.19 This change arose in the context of the Australian Government's proposal for the abolition of the X 18+ classification and for the establishment of a new classification category, NVE (non-violent erotica), and the Government's eventual decision to 'retain the X classification for sexually explicit videos but with a more restricted content'.[17] Since the listing of the fetishes in the relevant Guidelines, adult entertainment films depicting sexual activity between consenting adults have been classified RC for containing live portrayals of such fetishes.[18]

11.20 If a fetish is not given as an example in the Guidelines, 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.[19]

11.21 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. Only publications which describe and depict fetishes where it is apparent that there is no consent or where there is physical harm, or which contain exploitative descriptions or depictions of sexual activity accompanied by fetishes that are revolting or abhorrent, would constitute RC content.

---

12 Office of Film and Literature Classification, *Guidelines for the Classification of Films and Videotapes (Amendment No. 2)* (1999).

13 Ibid.

14 Ibid.

15 Ibid.

16 Explanatory Note, Commonwealth of Australia Gazette, *Guidelines for the Classification of Films and Videotapes (Amendment No 3)*, 6 September 2000, No GN 35, 2417.

17 Supplementary Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 1999 (Cth), 1.

18 Eg, Classification Board, *Decision on Elexis Unleashed Vol 2* (2011) was refused classification because of depictions of the application of candle wax. Another example is Classification Board, *Decision on Rough Sex 2* (2011) refused classification because it depicted bondage and asphyxiation.

19 Eg, Classification Board, *Decision on Abstrakte Dimensionen* (2011); Classification Board, *Decision on ACMA 2011000017 Item 1* (2011). The text that was the subject of the latter decision had appeared on a website and so was classified as a film. The fetishes depicted or described were urolagnia, erotic asphyxiation, masochism, sadism, coprophilia and forced paraphilic infantilism.

Offensive depictions or descriptions of children—Code item 1(b)

11.22 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 Code tables and in other parts of the Code.[20] The phrase has been subject to judicial consideration in respect of the X 18+ category for films.[21]

Child sexual abuse

11.23 The Guidelines provide that publications, films and computer games are to be classified RC if they contain

> 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.[22]

11.24 The use of the term 'child sexual abuse', rather than 'child pornography', may recognise that, as one commentator observed, 'it is generally accepted that children are harmed whenever child pornography is created, disseminated and viewed'.[23] The Internet Watch Foundation has explained:

> The IWF uses the term **child sexual abuse** content to accurately reflect the gravity of the images we deal with. Please note that **child 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**.[24]

11.25 As discussed in more detail below, the relevant terms used in the *Criminal Code* (Cth) are 'child pornography material' and 'child abuse material'.[25] The ALRC also uses 'child sexual abuse content' as a generic term in this Report.

Sexual activity involving minors

11.26 Any representation of persons less than 18 years of age involved in consensual sexual activity could potentially be classified RC, even though they may be legally permitted to consent to sexual activity. For example, 'sexting' content[26] could fall

---

20 *National Classification Code 2005* (Cth) cls 2, 2(a), 3(2)(a).

21 *Adultshop.Com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31. The Federal Court has 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'. *Adultshop.Com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752, [170].

22 Classification Board, *Decision on ACMA 2011001035 Item 3* (2011) confirmed that 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.

23 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.

24 Internet Watch Foundation, *Remit, Vision and Mission* <http://www.iwf.org.uk/about-iwf/remit-vision-and-mission> at 11 August 2011.

25 *Criminal Code* (Cth) s 473.1.

26 'Sexting' refers to 'sending sexually explicit or sexually suggestive text messages' and 'the electronic transfer of nude and semi-nude images via mobile phone'. See K Albury, N Funnell and E Noonan, 'The

within the bounds of the RC classification category—even where those involved are over the age of consent, but under 18 years of age. One submission to this Inquiry stated:

> Sexting is another example where laws designed to pick up one group of people (users of child pornography) are inadvertently picking up private individuals who should not be expected to know better. That is, it is unreasonable that the law even has reach into such distribution.[27]

11.27 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 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.[28]

11.28 The *Guidelines for the Classification of Publications* also refer to 'sexualised nudity', which includes 'poses, props, text and backgrounds that are sexually suggestive'.

Promoting, inciting or instructing in crime—Code item 1(c)

11.29 This category of RC 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)—on which item 1(c) of the Code was based—indicates that the original expression was 'promotes, incites or *encourages terrorism*'.[29] 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.[30]

11.30 Judicial consideration of this content has focused on matters of crime. The Federal Court of Australia has expressly rejected the contention that the crime must be a serious one.[31] Merkel J observed that 'what may be a less or more serious crime may often be a matter in the mind of the beholder'.[32] The phrase 'matters of violence' in item 1(c) of the tables in the Code has not been subject to detailed judicial interpretation.

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.

27 J Trevaskis, *Submission CI 2493*.

28 Classification Review Board, *Decision on Holy Virgins* (2008), 5. This is not the only such case. For example 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.

29 *Classification of Publications Ordinance 1983* (ACT) s 19(4)(b) (emphasis added).

30 Classification of Publications (Amendment) Ordinance 1989 (ACT) cl 4(d); Explanatory Statement, Classification of Publications (Amendment) Ordinance 1989 (ACT) 2.

31 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1997) 145 ALR 464, 478.

32 Ibid, 478.

Content instructing how to commit crime

11.31 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 crime can be committed,[33] and, secondly, there must be 'some element of encouraging or exhorting the commission of crime'.[34] An objective test is used to determine whether the second element is met.[35] Accordingly, the actual intent of the author or publisher is not relevant.[36] 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.[37]

11.32 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'.[38] The decision was confirmed by the Classification Review Board.[39] 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.[40]

11.33 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.[41] 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)', among other things.[42]

Drug use

11.34 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

---

33 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225, 239, 242, 257.

34 Ibid, 242.

35 Ibid, 239, 242, 257.

36 Ibid, 242.

37 Ibid, 240, 241–242, 256–257.

38 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.

39 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.

40 *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.

41 Preface to *The Peaceful Pill Handbook* cited in Classification Review Board, *Decision on The Peaceful Pill Handbook* (2007), [5].

42 Ibid, [1].

RC. The Classification Board has classified online content as RC because the text constituted detailed instruction in 'recreational' drug use and promoted such drug use.[43]

Advocating a terrorist act—Act s 9A

11.35 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 had 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,[44] but the application was dismissed.[45] While judgment was reserved in this case, the Australian Government released a discussion paper about material that advocates terrorist acts.[46] 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.[47]

11.36 The Australian Government had hoped that agreement could be achieved through the Standing Committee of Attorneys-General (SCAG) to amend the Code and Guidelines in this respect.[48] However, the required unanimous support was not forthcoming,[49] so the Parliament of Australia amended the *Classification Act* by inserting s 9A,[50] which provides that a publication, film or computer game that advocates the doing of a terrorist act must be classified RC.

11.37 The Act adopted the same use of the terms 'advocates' and 'terrorist act' that are used in the *Criminal Code*.[51] The Classification Board has classified some online content as RC on the basis of s 9A of the *Classification Act*.[52]

---

43 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.

44 Classification Review Board, *Decision on Defence of the Muslim Lands* (2006); Classification Review Board, *Decision on Join the Caravan* (2006).

45 *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108. In doing so the Federal Court expressly rejected the argument that the words 'promote' and 'incite' contain a requirement to look to the effect or likely effect of the action: *NSW Council for Civil Liberties Inc v Classification Review Board* (2007) 159 FCR 108, [67].

46 D Hume and G Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381, 393.

47 Australian Government Attorney-General's Department, *Material That Advocates Terrorist Acts: Discussion Paper* (2007), 1.

48 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 August 2007, 18 (P Ruddock—Attorney-General), 18.

49 Ibid, 18–19.

50 *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).

51 Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 (Cth), 2–3.

Computer games that are unsuitable for minors

11.38 At the time of writing, there is no R 18+ classification category for computer games and computer game content that is unsuitable for a minor to see or play must be classified RC. Accordingly, the *Guidelines for the Classification of Films and Computer Games* state that computer games that 'exceed the MA 15+ classification category will be [RC]'.[53]

11.39 In March 2011, the Classification Review Board classified the computer game *Mortal Kombat* as RC, on the basis of the violence it contained.[54] The Classification Board also classified the game *The Witcher 2: Assassins of Kings* as RC because it 'contains sexual activity related to incentives and rewards'.[55]

11.40 However, if the Australian Parliament passes the Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 then there will be an R 18+ category for computer games from 1 January 2013.

Renaming the RC category

11.41 The category name 'Refused Classification' is problematic for two reasons. First, the plain meaning of the term is confusing because content that is 'Refused Classification' has, in fact, received a classification. That is, the term is open to misunderstanding because it does not make it clear that the content has been subject to a classification decision-making process. This may give the erroneous impression that, for example, RC content is 'material that the Classification Board is incapable of classifying'.[56]

11.42 Secondly, the term does not make clear the important implications of content being classified as RC—that is, the content is effectively banned and may not be sold, screened, provided online or otherwise distributed.

11.43 The RC category should be named to better reflect its nature. In the ALRC's view, referring to 'Prohibited' content would be more appropriate, reflecting the fact that the distribution of the content is prohibited.

11.44 Schedules 5 and 7 of the *Broadcasting Services Act 1992* already use the terms 'prohibited content' and 'potentially prohibited content' to refer to categories of online content that include, but are broader than, the RC category. This includes, for example, content that has been classified MA 15+, access to which is not subject to a 'restricted access system'.[57] The legislative framework for the new National Classification Scheme would replace these schedules, removing any confusion between these terms and a new 'Prohibited' classification for content.

---

52 Eg, 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.

53 *Guidelines for the Classification of Films and Computer Games* (Cth).

54 Classification Review Board, *Decision on Mortal Kombat* (2011), 6.

55 Classification Board, *Decision on The Witcher 2 Assassins of Kings* (2011), 1.

56 R Harvey, *Submission CI 2467*.

57 *Broadcasting Services Act 1992* (Cth) sch 7, cl 20.

Recommendation 11–1 Under the Classification of Media Content Act, the 'Refused Classification' category of content should be named 'Prohibited'.

Reforming the scope of Prohibited content

11.45 The SCAG meeting, in December 2010, agreed that the review of the National Classification Scheme to be conducted by the ALRC should include review of the scope of the RC category for publications, films and computer games.[58]

11.46 A diverse range of views about the desirable scope of the RC category have been provided in submissions and consultations. While some stakeholders and individuals considered that the current scope of what is prohibited is appropriate,[59] others considered that it should be broadened,[60] narrowed,[61] or that RC should not exist as a classification category at all.[62] Text analysis of the many submissions received to the Issues Paper suggested that the majority of respondents who commented on the scope of the RC category considered it to be too broad—at least for the purpose of prohibiting online content.[63]

11.47 Some stakeholders argued for the continuing relevance of an RC category.[64] For example, the Uniting Church in Australia's Justice and International Mission Unit stated that it 'supports the existing definition of RC as adequately setting boundaries around what content should be entirely prohibited online'.[65] Another submission stated:

> It is essential that the government support the efforts of parents in setting boundaries and to protect children by restricting certain inappropriate material to mature audiences, or to adults over the age of eighteen, and in more extreme cases, to refuse classification.[66]

58 Standing Committee of Attorneys-General, *Communiqué 10 December 2010*, 2.

59 Eg, Communications Law Centre, *Submission CI 2484*; National Civic Council, *Submission CI 2226*; NSW Council of Churches, *Submission CI 2162*; Australian Christian Lobby, *Submission CI 2024*; Uniting Church in Australia, *Submission CI 1245*; Australian Council on Children and the Media, *Submission CI 1236*; Bravehearts Inc, *Submission CI 1175*; Australian Family Association of WA, *Submission CI 918*.

60 Collective Shout, *Submission CI 2477*; Family Council of Victoria Inc, *Submission CI 1139*.

61 Eg, T McGannon, *Submission CI 2359*; J McHugh, *Submission CI 2038*; N Leverett, *Submission CI 203*.

62 Eg, R Williams, *Submission CI 2515*; J Trevaskis, *Submission CI 2493*; L Mancell, *Submission CI 2492*.

63 Australian Law Reform Commission, *Responses to ALRC National Classification Scheme Review Issues Paper (IP40) - Graphical Representation of Submissions* (2011) <http://www.alrc.gov.au/publications/responses-IP40> at 26 January 2012.

64 Eg, T Brown, *Submission CI 2498*; Communications Law Centre, *Submission CI 2484*; C Roper, *Submission CI 2475*.

65 Uniting Church in Australia, *Submission CI 1245*.

66 T Brown, *Submission CI 2498*.

11.48 Other stakeholders called for the scope of the RC category to be extended so that it includes X 18+ content,[67] or in order to reverse the SCAG ministers' decision to make the R 18+ classification category available for computer games.[68]

11.49 Many submissions criticised the breadth of the current scope of the RC classification category.[69] These criticisms, which are discussed below, included concern about the use of community standards and 'offensiveness' in defining RC content; and that the RC category covers content that:

- is legal to possess but illegal to distribute, as well as different content which is illegal to possess and illegal to distribute;
- depicts or describes particular sexual fetishes which are legal between consenting adults;
- 'promotes, incites or instructs in matters of crime or violence'; and
- provides detailed instruction in the use of proscribed drugs.

Community standards

11.50 In the course of the Inquiry, a range of views were expressed about using 'community standards' in deciding whether media content should be prohibited.

11.51 The Communications Law Centre submitted that the criteria for RC should 'continue to reference both community standards and offensiveness'.[70] The Centre stated:

> The terms of the RC classification are, rightly, broad because particular terms cannot hope to cover all the various types of content which exist and will exist in the future. It is up to the Classification Board and the Classification Review Board as independent boards which represent the community to apply the terms and concepts used in the RC classification in accordance with the then community standards, which change over time.[71]

11.52 While some stakeholders advocated the continued relevance of standards based on 'public decency',[72] others were concerned about the subjective nature of determining a 'community standard'.[73] It was noted that standards will vary across

---

67 Collective Shout, *Submission CI 2477*; Hon Nick Goiran MLC, *Submission CI 1004*; Family Council of Victoria Inc, *Submission CI 1139*.

68 L D, *Submission CI 2454*.

69 A Hightower and Others, *Submission CI 2159*; K Weatherall, *Submission CI 2155*; Pirate Party Australia, *Submission CI 1588*; The Arts Law Centre of Australia, *Submission CI 1299*; I Graham, *Submission CI 1244*; N Suzor, *Submission CI 1233*; Civil Liberties Australia, *Submission CI 1143*; Interactive Games and Entertainment Association, *Submission CI 1101*.

70 Communications Law Centre, *Submission CI 2484*.

71 Communications Law Centre, *Submission CI 1230*.

72 Eg, Australian Council on Children and the Media, *Submission CI 1236*; Communications Law Centre, *Submission CI 1230*.

73 Eg, The Arts Law Centre of Australia, *Submission CI 1299*; G Urbas and T Kelly, *Submission CI 1151*.

communities,[74] including online communities,[75] and are likely to change over time.[76] 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.[77]

11.53 Some respondents submitted that the current standards that are determined to be reflective of the community may be unduly narrow.[78] For example, Pirate Party Australia submitted that '[t]he current scope of RC does not reflect the attitudes and morals of today's society'.[79] 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.[80]

11.54 Rebecca Randall, who had conducted research with five young BDSM practitioners in Brisbane, called for this aspect of the RC category to be revised, because:

> [t]his morality system is excluding a culture within the Australian population, with inadequate justification. BDSM practitioners do not subject non consenting individuals to their practices. If it is between consenting adults, what does it matter whether or not the majority find it abhorrent?[81]

11.55 Some submissions questioned the propriety of media content being 'banned' because a majority determines it to be offensive.[82] One respondent submitted that 'community standards' is a 'pretty way of saying the tyranny of the majority'.[83] Another noted:

> Few people who *would be* offended by RC ... material are ever actually offended by it—because they wouldn't seek it out in the first place and they don't accidentally encounter it. It is really just a case of one person who is offended by something attempting to impose his or her values on another person. This cannot be justified in a free society.[84]

---

74 Eg, The Arts Law Centre of Australia, *Submission CI 1299*; G Urbas and T Kelly, *Submission CI 1151*.
75 Google, *Submission CI 2336*.
76 Eg, N Suzor, *Submission CI 1233*; G Urbas and T Kelly, *Submission CI 1151*.
77 The Arts Law Centre of Australia, *Submission CI 1299*.
78 Eg, Pirate Party Australia, *Submission CI 1588*; MLCS Management, *Submission CI 1241*; N Suzor, *Submission CI 1233*.
79 Pirate Party Australia, *Submission CI 1588*.
80 Ibid.
81 R Randall, *Submission CI 2462*.
82 Eg, Ibid; New South Wales Council for Civil Liberties, *Submission CI 2120*; N Suzor, *Submission CI 1233*.
83 L Mancell, *Submission CI 2492*.
84 J Trevaskis, *Submission CI 2493*.

11.56 A number of respondents argued that to warrant prohibition online, or an RC classification, content should be capable of causing harm.[85] For example, the NSW Council for Civil Liberties Inc submitted that only where 'serious harm is to be prevented is curbing liberty acceptable'.[86]

11.57 In this context, Electronic Frontiers Australia suggested that prohibitions on the production or possession of child sexual abuse content 'reflects the harm inflicted on an innocent person in its production'.[87] Similarly, another respondent observed that depictions of sexual abuse and assault 'aren't illegal because they are offensive or fail to meet community standards; they are illegal because they cause harm to the victims'.[88]

11.58 The notion of 'community standards' has underpinned the Australian classification scheme for many years, and is also a relevant object of the *Broadcasting Services Act* framework.[89] With respect to the current classification cooperative scheme, it is important to note that the community standards criterion does not exist in a vacuum but, rather, must be read in light of the principles in cl 1 of the Code. The ALRC sees no reason to abandon the notion of community standards at this time and has identified 'community standards' as a guiding principle for reform of the classification scheme. Specifically, the ALRC proposes 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.[90]

11.59 The argument that 'community standards' should be abandoned as a relevant concept in classification would require, at the very least, strong evidence of significant changes in community attitudes over time. This Inquiry has not identified any empirical evidence of such a shift.

Prohibited and 'illegal' content

11.60 Another significant criticism of the scope of the RC category focuses on the fact that RC encompasses both content which is illegal to possess (such as 'child pornography material' and 'child abuse material') and content which is not illegal, but is seen to offend community standards.[91]

11.61 Some who commented on the distinction between 'illegal' and offensive content called for the RC category to cover illegal content only, or alternatively, be abolished altogether.[92] It was suggested, for example, that:

---

85 Eg, New South Wales Council for Civil Liberties, *Submission CI 2120*; G Urbas and T Kelly, *Submission CI 1151*; Civil Liberties Australia, *Submission CI 1143*.

86 New South Wales Council for Civil Liberties, *Submission CI 2120*.

87 Electronic Frontiers Australia, *Submission CI 2194*.

88 L Mancell, *Submission CI 2492*.

89 See Ch 4.

90 See Ch 4, Principle 2.

91 Eg, L Green and Others, *Submission CI 2522*; Eros Association, *Submission CI 1856*; Pirate Party Australia, *Submission CI 1588*; N Suzor, *Submission CI 1233*; Civil Liberties Australia, *Submission CI 1143*.

92 J Trevaskis, *Submission CI 2493*; Civil Liberties Australia, *Submission CI 1143*.

> this review is a good opportunity to separate classification from censorship, and so abandon the RC classification and have such [illegal] content dealt with by the criminal justice system.[93]

11.62 Dr Nicolas Suzor submitted that only material that is 'illegal to possess should be entirely prohibited online'.[94] Other respondents considered that the content which should be entirely prohibited is that which is 'illegal to create or possess'—with child sexual abuse content being given as a common example.[95]

> The only content that should be entirely prohibited online is that which required the commission of certain illegal acts to produce, such as child abuse material, and does not have any artistic, literary, academic, historic or newsworthiness value.[96]

11.63 The most obvious example of 'illegal' content is child sexual abuse content. All Australian jurisdictions provide for offences in relation to the making, distribution or possession of child sexual abuse content, with some differences in terminology and approach.[97]

11.64 The *Criminal Code* definitions of both 'child pornography material' and 'child abuse material':

- include 'material in any form, or combination of forms, capable of constituting a communication';
- encompass depictions or descriptions of persons who are, or appear to be, under 18 years of age; and
- contain a requirement that the relevant material convey the particular content the subject of each definition 'in a way that reasonable persons would regard as being, in all the circumstances, offensive'.[98]

11.65 'Child pornography material' is defined broadly and relates to the portrayal of:

- sexual poses or sexual activity where the child is the one engaged (actual or implied) in that pose or activity—regardless of whether they are in the presence of other persons;
- the child in the presence of a person who is engaged (actual or implied) in a sexual pose or sexual activity; or
- other content—namely specific parts or areas of the child's body—in a context which the dominant characteristic of the portrayal is for a sexual purpose.[99]

---

93 R Williams, *Submission CI 2515*. See also J Trevaskis, *Submission CI 2493*.
94 N Suzor, *Submission CI 1233*.
95 Eg, Google, *Submission CI 2336*; A Hightower and Others, *Submission CI 2159*; I Graham, *Submission CI 1244*.
96 A Hightower and Others, *Submission CI 2159*.
97 See G Griffith and K Simon, *Child Pornography Law* (2008), prepared for NSW Parliamentary Library Research Service 27, 35–36.
98 *Criminal Code* (Cth) s 473.1.
99 Ibid s 473.1.

11.66 The focus of 'child abuse material' is the portrayal of the child as a victim (whether actual or implied) of torture, cruelty or physical abuse.[100]

11.67 Briefly, the *Criminal Code* criminalises the distribution of 'child pornography material' or 'child abuse material' by transmitting that content by post;[101] and creates broader offences of accessing, transmitting, distributing, promoting, or soliciting 'child pornography material' or 'child abuse material' using a carriage service;[102] and of producing or possessing 'child pornography material' or 'child abuse material' with intent to transmit it using a carriage service.[103] Offences also apply to internet service providers or content hosts who are aware that their service is being used to access 'child pornography material' or 'child abuse material' and who do not report this to the Australian Federal Police within a reasonable time.[104]

11.68 The *Criminal Code* also creates offences for Australians or residents of Australia, who produce, obtain, possess, distribute, or facilitate the production or distribution of 'child pornography material' or 'child abuse material' outside of Australia;[105] and the *Customs Act 1901* (Cth) and relevant regulations provide offences for the import or export of 'child pornography material' or 'child abuse material'.[106]

11.69 Some stakeholders commented that, because this kind of 'illegal' content is already subject to criminal law enforcement, there may be no need to target it through the classification scheme.[107] MLCS Management, for example, 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 [national classification scheme] 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.[108]

11.70 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'.[109] Civil Liberties Australia submitted

---

100 Ibid s 473.1.

101 See Ibid ss 471.16; 471.17; 471.19; 471.20.

102 Ibid, ss 474.19 (child pornography material); 474.22 (child abuse material).

103 Ibid, ss 472.20 (child pornography material); 474.23 (child abuse material).

104 Ibid, s 474.25.

105 Ibid, ss 273.5 (child pornography material); 273.6 (child abuse material).

106 See *Customs Act 1901* (Cth) s 233BAB; *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A(1A)(b); *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(2)(b). The latter two provisions use identical wording to item 1(b) of the Classification Code tables rather than the terms 'child pornography material' or 'child abuse material'.

107 Watch On Censorship, *Submission CI 2472*; Electronic Frontiers Australia, *Submission CI 2194*; Civil Liberties Australia, *Submission CI 1143*.

108 MLCS Management, *Submission CI 1241*.

109 A Hightower and Others, *Submission CI 2159*. Some stakeholders called for appropriate resourcing of the enforcement of such criminal laws: eg, Electronic Frontiers Australia, *Submission CI 2194*; Artsource, *Submission CI 1880*.

that 'what material is deemed illegal should be well defined, well understood, and sensible. There must be real, provable harm'.[110]

11.71 Dr Lyria Bennett Moses, from the Faculty of Law of the University of New South Wales, noted that the RC category contains two types of content: (a) 'content that has been internationally condemned, most obviously child pornography'; and (b) content that cannot be sold in Australia, but can be possessed legally. Dr Bennett Moses submitted that, by giving separate labels to these two categories of content, 'censorship regulations can be better targeted'.[111]

11.72 That is, in the case of child pornography, prohibition is based on different goals and purposes than in the case of some other RC material, as the content is 'rightly treated as falling outside even a broad notion of freedom of speech' and may warrant a different regulatory response.[112] Bennett Moses argues that the community 'expects an active police response ... including the prosecution of those responsible' for the production of such material.[113] Further, 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.[114]

11.73 For some purposes, the distinction between content that is illegal to possess and content for which it is prohibited to sell and distribute may be significant—including in relation to enforcement. In the context of this Inquiry, however, there is no reason to recommend either that the new Classification of Media Content Act should restrict the Prohibited category to 'illegal' content; or that prohibitions on the sale and distribution of such content should be left to the operation of general criminal law.

11.74 Such changes would mark a radical departure from existing classification arrangements for which detailed justification would be required. In the ALRC's view, the community expects that some media content will be classified as Prohibited even where that same content is not illegal to possess or create—for example, content depicting extreme sexual violence. This view receives some support from the results of the ALRC's pilot study on community attitudes to higher level media content (discussed below).

Content depicting sexual fetishes

11.75 A distinction may also be drawn between content depicting legal conduct and content depicting actual acts which are illegal. The Eros Foundation, for example, stated that 'depictions of legal sex acts between consenting adults should never be subject to censorship or bans'.[115] Such acts were contrasted with 'depictions of real murder, rape and serious assault; child sex abuse; bestiality', which should be

110 Civil Liberties Australia, *Submission CI 1143*.
111 L Bennett Moses, *Submission CI 2126*.
112 Ibid.
113 Ibid.
114 Ibid.
115 Eros Association, *Submission CI 1856*.

prohibited.[116] This raises specific issues surrounding the depiction of sexual fetishes. Such acts, where consensual, are often legal.

11.76 As discussed above, the *Guidelines for the Classification of Films and Computer Games* provide that some specific fetishes, for example, 'bondage' and 'spanking' are not permitted in the X 18+ classification. The *Guidelines for the Classification of Publications* differ, in providing that 'descriptions and depictions of stronger fetishes may be permitted'—arguably including fetishes effectively prohibited under the Films and Computer Games Guidelines.

11.77 The ALRC considers that this is an area where the Government could consider narrowing the scope of the RC classification category. Prior to 2000, the X 18+ classification category for films accommodated 'mild fetishes'. It may be that Australians are open to the X 18+ classification category accommodating 'mild fetishes'. The results of the ALRC's pilot study on community attitudes to higher level media content are not incompatible with such a suggestion.

11.78 In any case, it is not clear why the *Guidelines for the Classification of Films and Computer Games* refers to the particular fetishes that it does, and not others that are arguably more 'revolting or abhorrent', in terms of the Code criterion. There is no apparent application of any harm principle that might, for example, allow a distinction to be made between 'spanking' and more extreme forms of sadomasochism. Questions may also be raised about consistency with international classification practices.

11.79 The ALRC recommends that the Australian Government should review current prohibitions in relation to the depiction of sexual fetishes in films.

Content promoting, inciting or instructing in crime

11.80 A number of submissions were critical of the current provisions of item 1(c) of the Code, requiring content that 'promotes, incites or instructs in matters of crime or violence' to be classified RC.[117] Clearly, there is an 'extraordinary range of activities'[118] that is proscribed by the criminal law and the content that may come within this item of the Code is 'potentially extremely broad'.[119]

11.81 Stakeholders noted that this criterion of the RC category has been used to make 'highly publicly controversial RC decisions', including the decisions with respect to *Rabelais*, *The Peaceful Pill Handbook*,[120] and on a computer game entitled *Marc*

116 At least, where not part of an educational or news report: Ibid.
117 Eg, K Weatherall, *Submission CI 2155*; I Graham, *Submission CI 1244*; National Drug Research Institute, *Submission CI 1186*.
118 K Weatherall, *Submission CI 2155*.
119 Ibid.
120 Google 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, but was banned in Australia: Google, *Submission CI 2336*.

Ecko's Getting Up: Contents Under Pressure—which had elements promoting graffiti.[121]

11.82 Google stated that prohibition of 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' is inappropriate.[122]

11.83 While some stakeholders were critical of the prohibition of media content concerning euthanasia,[123] others considered that media content which promotes or provides instruction in suicide should be prohibited.[124] 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.[125]

11.84 The Uniting Church also submitted that material instructing in criminal acts of graffiti, the safe use of illicit drugs, suicide, or euthanasia 'is more likely to result in harm within the community than good'.[126]

11.85 In the ALRC's view, the breadth of the current criterion prohibiting content that 'promotes, incites or instructs in matters of crime' is unjustifiable. Again, the results of the ALRC's pilot study on community attitudes to higher level media content are not incompatible with such a suggestion. Participants registered a low level of offence to content depicting graffiti activity and did not consider that such content should be banned.[127]

11.86 The ALRC recommends that the Australian Government should consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'. The category of 'serious crime' might be defined, for example, by reference to maximum penalty levels provided by the *Criminal Code* (and state and territory criminal law).[128]

---

121 I Graham, *Submission CI 1244*. See Classification Review Board, *Decision on Marc Ecko's Getting Up: Contents Under Pressure* (2006).

122 Google, *Submission CI 2336*.

123 Eg, T Namow, *Submission CI 2459*; Eros Association, *Submission CI 1856*.

124 Eg, Collective Shout, *Submission CI 2477*; Hunter Institute of Mental Health, *Submission CI 2136*; Australian Christian Lobby, *Submission CI 2024*.

125 Hunter Institute of Mental Health, *Submission CI 2136*.

126 Uniting Church in Australia, *Submission CI 2504*.

127 Urbis Pty Ltd, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission—Final Report* (2011), prepared for the Australian Law Reform Commission, iii.

128 Eg, the *Criminal Code* defines a 'serious offence', for the purposes of provisions dealing with telecommunications offences and serious computer offences, as an 'offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for life; or for a period of 5 or more years: *Criminal Code* (Cth) ss 473.1, 477.1(9).

Detailed instruction in drug use

11.87 The depiction of drug use may lead to content being classified RC under criteria set out in the Code and Guidelines.

11.88 Item 1(a) of the Code provides that publications, films or computer games that

> depict, express or otherwise deal with matters of ... drug misuse or addiction ... in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified.

As mentioned, item 1(c) of the Code also provides that publications, films or computer games will be RC if they 'promote ... or instruct in matters of crime'.

11.89 The Guidelines provide that publications, films or computer games will be RC if they include or contain 'detailed instruction in the use of proscribed drugs'. The *Guidelines for the Classification of Films and Computer Games* also refer to '[m]aterial promoting or encouraging proscribed drug use'.

11.90 A number of stakeholders commented on the classification criteria relating to drug use.[129] The National Drug Research Institute 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'.[130]

11.91 The Institute 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.[131]

11.92 Depiction of drug misuse or addiction is generally not considered as so offensive as to justify banning the content. Content involving drug use constituted, together with graffiti, the content which registered the lowest levels of offence in the ALRC's pilot study on community attitudes to higher level media content.[132]

11.93 Rather, debate focuses on whether content that instructs in drug use should be prohibited under the 'promotes, incites or instructs in matters of crime' criterion of the Code. As discussed above, the ALRC recommends that the Australian Government considering narrowing this criterion to matters of serious crime, which would exclude most drug use offences.[133]

11.94 In addition, it may not be justified to include specific reference to 'detailed instruction in the use of proscribed drugs' in classification criteria. The ALRC

---

129 Eg, Google, *Submission CI 2336*; National Drug Research Institute, *Submission CI 1186*; M Lindfield, *Submission CI 2164*.

130 National Drug Research Institute, *Submission CI 1186*.

131 Ibid.

132 Urbis Pty Ltd, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission—Final Report* (2011), prepared for the Australian Law Reform Commission, iii.

133 Eg, in NSW, the offence of self-administering a prohibited drug is punishable by imprisonment for a maximum term of two years: *Drug Misuse and Trafficking Act 1985* (NSW) ss 12, 21.

recommends that the Australian Government should review current prohibitions in relation to the 'detailed instruction in the use of proscribed drugs'.

A narrower Prohibited category

11.95 The ALRC recommends that, under the Classification of Media Content Act, the Prohibited category should be framed more narrowly than the current RC category. As discussed, the ALRC has suggested three aspects of current classification criteria that the Australian Government should consider changing in the new Act.

11.96 In making this recommendation, the ALRC took into account concerns expressed in submissions and consultations about the broad scope of the RC category and the practical difficulties in applying RC criteria. The ALRC's recommendations are also consistent with the results of the ALRC's pilot study on community attitudes to higher level media content, which is discussed in more detail below.

11.97 The aim of the ALRC's pilot study was to test a methodology for determining community attitudes to the current higher level classification categories. It was not a comprehensive review of relevant community standards. The Australian Government's conclusions on the scope of the Prohibited category in the new Act should be informed by further research into community standards.

Recommendation 11–2 The Classification of Media Content Act should frame the 'Prohibited' category more narrowly than the current 'Refused Classification' category. In particular, the Australian Government should review current prohibitions in relation to:

(a) the depiction of sexual fetishes in films; and

(b) 'detailed instruction in the use of proscribed drugs'.

The Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'.

Pilot study into community attitudes to higher-level media content

11.98 In order to better inform itself about community standards relevant to classification, the ALRC commissioned Urbis Pty Ltd to conduct a series of forums to assess community attitudes to content that falls within higher-level classification categories. This involved recruiting participants for a one-day forum where they would view and respond to content that ranged from MA 15+ to RC.

11.99 The final report, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission*, can be accessed from the ALRC website.

11.100 This pilot study was qualitative in nature, involving consultations with a total of 58 participants across four forums, conducted over October–November 2011.

11.101 Two forums involved community participants and two involved stakeholder representatives and others with an interest in the classification field. The community group (CG) forums involved 30 participants, while the reference group (RG) forums involved 28 participants.

11.102 Participants were recruited from across Australia, with a sampling methodology used for the community groups to ensure their representativeness of the broader community. The final sample of 40 community participants who formed the basis of the final 30 participants (two CGs of 15) were selected from more than 1,000 applicants, who responded to newspaper advertisements throughout Australia, as well as notification through the web or social media. Selection criteria included demographic characteristics (gender, age, parental status), occupation, representation of all States and Territories, metropolitan, regional and rural representation, and attitudinal indicators nominated by applicants.

11.103 The 28 RG participants were recruited by the ALRC on the basis of people who were representative of a community group or advocacy organisation, people who have publicly engaged with classification issues, people representing a relevant industry sector, or having established experience or academic expertise in matters related to media classification and media audiences.

11.104 Each forum took place over one full day at the Australian Government Attorney-General's Department Classification Branch in Sydney, with participants from outside of Sydney being flown in for the day. A full list of the RG participants, as well as demographic information on the CG participants, is available in the consultant's final report.

11.105 Participants were informed prior to involvement in the groups about the confronting and possibly offensive nature of the material that would be shown and that it would include RC material. Counsellors provided a briefing to participants before the event and at its conclusion. Participants were also advised about the availability of post-forum counselling services available to them.

11.106 Although the forums involved the screening of RC material, it was decided to exclude material that may have generated the highest levels of risk, such as child abuse material or abhorrent content. Given the risks associated with showing people higher-level media content of types that they may never previously have seen—particularly in the RC category—the consultants felt the need for some caution in exposure to material that would be potentially at the highest levels of offence or impact.

11.107 Material from across the classification categories and across media platforms (films, television programs, computer games and online content) was shown to participants, who responded using coloured cards or 'traffic lights' to indicate offence, in addition to completing a survey instrument and engaging in small group discussions of the content. Participants were also asked whether the discussion had caused them to change their opinions on banning or restricting the material both which were recorded on the survey questionnaire.

11.108 The findings from the two CG forums were compared to the findings from the two RG forums in order to obtain an assessment of how closely evaluations of content correlated within the framework of the prototype methodology.

11.109 The primary aim of this study was to develop and test a prototype methodology to determine broader community standards with regards to classifiable media content, including films, computer games, television programs and online content. The view was taken that findings from public submissions commenting on the National Classification Scheme would be usefully augmented by an empirical study that engaged a broad cross-section of the community with actual relevant content across classification categories (themes; sex; nudity; violence; drug use; coarse language) and across media platforms.

11.110 The study was not an assessment of classification decisions made by the Classification Board or any other entity. Participants were not provided with information on classification guidelines in advance as the intention was not to 'test' material against classification criteria.[134] Rather, the purpose of the study was to gauge responses to particular items of content in terms of offence and potential impact.

11.111 Some of the key findings arising out of the pilot study were:

- ***Responses between the community groups and the reference groups were broadly comparable***. There was a high degree of consistency between the opinions of CG and RG participants in relation to the degree of offence taken to the material found to be most offensive and least offensive, as well as considerable agreement about whether particular material should be banned or restricted. This was despite the RG being comprised of people, who in a number of cases, were selected on the basis of known strong views on the current classification scheme, in contrast to the more randomised selection of community participants.
- ***The content that registered the highest levels of offence included both scripted drama and material involving actual criminal activity.*** The two items of content that registered the highest level of offence with both CG and RG participants were a scene from the film *A Serbian Film* and a recorded online solicitation of a child for apparently sexual purposes.
- ***The content that registered the lowest levels of offence included material involving drug use and graffiti.*** Both the CG and the RG viewed the items of content depicting drug use (both fictional and real) to be the least offensive and impactful. There was also a view among both CG and RG participants that material depicting graffiti activity was low impact, and should not be banned.
- ***Most of the screened violent material from computer games was not considered to be offensive.*** In three of the four items of violent and/or sexual

134 As in the case community assessment panels which are sometimes used by the Attorney-General's Department to test whether Classification Board decisions are consistent with community standards.

computer game material screened, a majority of both CG and RG participants found the material not to be offensive.

- ***Responses to explicit sex and fetish material were broadly similar between the two groups, and varied according to the nature of the material.*** Both CG and the RG participants had varying responses to the explicit sex and fetish material that was shown based on the item in question, but their responses to each item were broadly similar. In particular, the greatest level of offense was registered towards material where some degree of coercion may have been implied.
- ***A majority of participants in both groups found terrorism material offensive.*** A majority of both CG and the RG participants found material promoting acts of terrorism to be offensive, although opinions varied as to whether it should therefore be banned.

11.112 A detailed analysis of the findings is provided in the consultant's final report. This also includes information about the content that was viewed and the methodology that was used in the pilot study. It may provide the basis for ongoing research into community attitudes to higher-level media content—including research that may be conducted or commissioned by the new Regulator.[135]

135 See Ch 14.

12. Prohibiting Content

Contents

Summary 283
The obligation 284
How to identify Prohibited content 284
Who is the subject of the obligation? 286
Classifying before enforcement 287
Prohibitions offline 289
Distributing and broadcasting 289
Importing and exporting 290
Prohibitions online 290
Take-down notices 291
Notifying law enforcement agencies 291
Family friendly filters 292
ISP-level filtering 293
International cooperation 298

Summary

12.1 This chapter is about prohibitions on the distribution of Prohibited content. 'Prohibited' is the term that the ALRC recommends should replace the existing 'Refused Classification' (RC) category to describe content that is essentially 'banned' in Australia. The scope of this category is discussed in Chapter 11.

12.2 Although media regulation in Australia has seen a significant shift from censorship to classification, there remains content that is illegal to distribute. The new National Classification Scheme should continue to provide for the identification of this content, and allow for various means of prohibiting its distribution.

12.3 The ALRC recommends that the Classification of Media Content Act should provide that content providers must not sell, screen, provide online, or otherwise distribute Prohibited content. Content providers will therefore need to identify, or take reasonable steps to identify, Prohibited content.

12.4 This chapter also discusses when Prohibited content should be classified for the purpose of enforcing these prohibitions. The ALRC recommends that, generally, the content should be classified by the Classification Board before the Regulator or other law enforcement body takes enforcement action. However, the Classification of Media Content Act should enable the Regulator to notify Australian or international law enforcement agencies or bodies about Prohibited content without having the content first classified by the Classification Board.

12.5 Finally, the chapter outlines the main methods of restricting access to Prohibited content, namely: prohibitions on sale and distribution; prohibitions on import and export; prohibitions on publication online; and voluntary and mandatory internet filtering. The Classification of Media Content Act, or industry codes made under it, should provide for similar methods of prohibiting the distribution of Prohibited content.

The obligation

12.6 The ALRC recommends that the Classification of Media Content Act should provide that content providers must not sell, screen, provide online, or otherwise distribute Prohibited content. Prohibited content here refers to:

(a) content that has been classified Prohibited; or

(b) unclassified content that, if classified, would be likely to be classified Prohibited.

12.7 Under the *Broadcasting Services Act 1992* (Cth), 'prohibited content' has a much broader meaning, and captures X 18+ content, Category 1 and 2 Restricted content, and R 18+ and MA 15+ content that has not been properly restricted. The need for a single definition of Prohibited content that excludes content classified, or likely to be classified, MA 15+, R 18+ or X 18+, is discussed in Chapter 11.

12.8 Some elements of the obligation not to distribute Prohibited content are similar to the obligation to take reasonable steps to restrict access to adult content, discussed in Chapter 10. As with the latter obligation, the obligation not to distribute Prohibited content should apply to both commercial and non-commercial content. Also, although there are exemptions from classification requirements in other classification categories, there should not be similar exemptions from the obligation not to distribute Prohibited content.

12.9 The obligation not to distribute Prohibited content applies to unclassified content that is 'likely' to be Prohibited. While some stakeholders have expressed concern about provisions referring to the 'likely' classification of content,[1] similar language is used in the *Broadcasting Services Act*.[2] In the ALRC's view, the obligation not to distribute certain content should extend to unclassified content that is likely to be Prohibited, otherwise the obligation would only apply to the relatively small proportion of total media content that in practice is actually classified. As Prohibited content is to be illegal to distribute, there must be provision for enforcement of guidelines.

How to identify Prohibited content

12.10 Ideally, content providers should assess whether content is likely to be Prohibited before they distribute it. In light of the serious nature of this content, many

1 Eg, Foxtel, *Submission CI 2497*; Classification Board, *Submission CI 2485*.
2 *Broadcasting Services Act 1992* (Cth) sch 7 cl 21(1)(b).

content providers may even choose to have their content classified before distributing it, to determine whether it is Prohibited.[3]

12.11 However, this may be impractical or impossible for online content providers that deal with large quantities of content, much of which is dynamic and user-generated. Requiring 'pre-assessment' would be almost as onerous as requiring all content that 'may' be Prohibited to be classified, which the ALRC has concluded is impractical and prohibitively costly.

12.12 In the ALRC Discussion Paper, it was proposed that the Classification of Media Content Act should provide that all media content that may be RC must be classified by the Classification Board.[4] While some stakeholders supported this,[5] others were critical of the proposal. Some raised concerns about the huge quantity of media content that 'may' be RC.[6] One stakeholder submitted that it is

> impossible for anyone to know what would in fact be 'RC' under current broad and vague criteria; and the result is likely to be unnecessary self-censorship due to fear of being prosecuted for failure to have material classified.[7]

12.13 A number of stakeholders expressed the view that this sort of classification obligation would impose a considerable burden on content providers, many of whom will be unwilling or unable to comply.[8] Some expressed particular concern about the burden on non-commercial content providers, including individuals.[9] Google stated that, in light of the volume of online content,

> content platforms have no practical means of determining whether content is or is likely to be … RC in advance of the content being uploaded. … The only feasible approach to regulating this content is for content platforms to rely on users to notify them of content that may fall foul of the site's standards in order that this content can be reviewed and removed if considered appropriate.[10]

12.14 The Interactive Games and Entertainment Association submitted that it was critical that the new scheme clearly address the issue of intermediaries providing large quantities of content and the steps that must be taken to avoid liability for inadvertently providing Prohibited content:

---

3 In which case they could have the content classified by an accredited industry classifier, the Classification Board or using an authorised classification instrument. See Ch 7.

4 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposals 6–5 and 7–1(c).

5 Eg, FamilyVoice Australia, *Submission CI 2509*; Communications Law Centre, *Submission CI 2484*; N Goiran, *Submission CI 2482*; Collective Shout, *Submission CI 2477*; D Henselin, *Submission CI 2473*; Telstra, *Submission CI 2469*; R Harvey, *Submission CI 2467*; D Mitchell, *Submission CI 2461*; M Smith, *Submission CI 2456*; L D, *Submission CI 2454*.

6 I Graham, *Submission CI 2507*; J Denham, *Submission CI 2464*.

7 I Graham, *Submission CI 2507*.

8 Eg, Google, *Submission CI 2512*; J Trevaskis, *Submission CI 2493*; Australian Communications and Media Authority, *Submission CI 2489*; Interactive Games and Entertainment Association, *Submission CI 2470*.

9 A Hightower, *Submission CI 2511*; I Graham, *Submission CI 2507*; J Denham, *Submission CI 2464*.

10 Google, *Submission CI 2512*.

> While the actual steps might be set out in industry codes, the Classification of Media Content Act should not be silent on the issue.[11]

12.15 Others said it would be difficult or impractical to enforce such laws.[12] For example, the Australian Communications and Media Authority (the ACMA) stated it 'is likely to lead to a low regard for such a law and, as a consequence, a significantly diminished culture of compliance'.[13]

12.16 The ALRC agrees that it is unreasonable to expect content providers to have all of their content that 'may be' Prohibited classified before they distribute it. As discussed in Chapter 10 with respect to adult content, the effective regulation of media content online cannot rely on pre-screening or pre-classification. Such a model would not account for the sheer quantity of media content that is now available online, and in particular, the dynamic nature of online content and the volume of user-generated content.

12.17 Instead, the obligation not to distribute Prohibited content should require content providers to take reasonable steps to identify Prohibited content. Major content providers, for example, might have mechanisms that allow users to flag particular content to the owners of the site.

Who is the subject of the obligation?

12.18 The obligation not to distribute Prohibited content applies to a broader range of persons than the other statutory obligations discussed in this Report. In Chapter 5, the ALRC recommends that obligations in relation to Prohibited content should apply to content providers and internet intermediaries, including application service providers, host providers and internet access providers.[14] In the ALRC's view, obligations in relation to Prohibited content should—considering the serious nature of the content—be broad in application and apply to all content providers, commercial and non-commercial, and to internet intermediaries who do not otherwise have obligations to classify or restrict access to content.

12.19 As explained in Chapter 5, where Prohibited content is uploaded onto a website by an individual, that individual may commit an offence under the Classification of Media Content Act. The website owner would be under an obligation to take down the content when notified by the Regulator. Other internet intermediaries may have obligations to respond to notices from the Regulator with respect to the content. In the future, an internet service provider (ISP) may have an obligation to filter the content, particularly where the website owner is located overseas.

12.20 The obligation not to distribute Prohibited content would also apply to distributors in the 'offline' world, including broadcasters, retailers, and magazine and DVD distributors.

---

11 Interactive Games and Entertainment Association, *Submission CI 2470*.

12 Google, *Submission CI 2512*; Australian Communications and Media Authority, *Submission CI 2489*; J Denham, *Submission CI 2464*.

13 Australian Communications and Media Authority, *Submission CI 2489*.

14 Rec 5–7.

Recommendation 12–1 The Classification of Media Content Act should provide that content providers must not sell, screen, provide online, or otherwise distribute Prohibited content, that is:

(a) content that has been classified Prohibited; or

(b) unclassified content that, if classified, would be likely to be classified Prohibited.

Classifying before enforcement

12.21 The ALRC recommends that the Classification of Media Content Act should provide that content must be classified Prohibited by the Classification Board before a person is:

(a) charged with an offence under the Act that relates to Prohibited content; and

(b) issued a notice requiring the person to stop distributing the Prohibited content, for example by taking it down from the internet.

12.22 This provision would apply to Prohibited media content distributed on any platform or device, including offences for distributing hardcopy Prohibited content.

12.23 Similar requirements proposed in the Discussion Paper[15] were supported by a number of stakeholders.[16] Telstra said it favoured 'all measures that improve the transparency and accountability of this process'.[17] The New South Wales Council for Civil Liberties 'applauded' the proposal, because to 'provide otherwise is, in effect, to permit retrospective criminalisation'.[18] The Council also considered it important 'that law enforcement officers are not involved in decisions about what is to be censored'.[19]

12.24 The Victorian Government commented that, currently, 'enforcement bodies are required to request classification decisions (or proof of classification in the form of evidentiary certificates) for materials to establish breaches'.[20]

12.25 The main concern raised in submissions was that the proposal may unwittingly have a negative impact on the law enforcement response to child sexual abuse content.

---

15 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–6.

16 Eg, FamilyVoice Australia, *Submission CI 2509*; Collective Shout, *Submission CI 2477*; D Henselin, *Submission CI 2473*; National Association for the Visual Arts, *Submission CI 2471*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

17 Telstra, *Submission CI 2469*.

18 New South Wales Council for Civil Liberties, *Submission CI 2481*. See also R Harvey, *Submission CI 2467*.

19 New South Wales Council for Civil Liberties, *Submission CI 2481*.

20 Victorian Government, *Submission CI 2526*.

Some submissions raised a concern that the proposal could hamper enforcement, if the Classification Board could not classify the content promptly.[21]

12.26 The Justice and International Mission Unit of the Uniting Church in Australia also submitted that the 'dynamic nature' of online content had to be factored into the process.[22] This Unit of the Uniting Church was concerned that there may be 'a significant delay' in being able to deal with 'child sexual abuse material' if all RC content could only be classified by the Classification Board, as child sexual abuse images are now typically hosted for a matter of days.[23] It submitted that if the Classification Board was not resourced to classify child sexual abuse content in under a day, then 'other regulatory bodies and their officers, such as the ACMA, should be permitted to classify child sexual abuse material'.[24]

12.27 Civil Liberties Australia stated that, before content is added to any proposed list of content that must be filtered at the ISP-level,

> there needs to be an additional step requiring Australian law enforcement to exhaust all steps to have the content destroyed by at least contacting the hosting company or local law enforcement in the event Australia is not the country of origin.[25]

12.28 The Hon Nick Goiran MLC submitted that it is 'important that in the interim period of applying for a classification that the Regulator have power to prevent further distribution of material which is likely to be classified RC'.[26]

12.29 While the ACMA was of the view that classification by the Classification Board would be time-critical, it submitted that the proposal

> could work, provided that the dynamic nature of such content is taken into account (for example by capturing a copy of the content and identifying its source as soon as possible) and that such classifications could be done quickly (ideally within two business days) and not involve too much by way of double handling by the regulator and Classification Board.[27]

12.30 It was submitted that the Regulator or other law enforcement agency should be empowered to take certain action in the interim period.[28] The ACMA stated that it was appropriate to have provision for 'interim take-down notices' to be issued by qualified staff for 'potential prohibited content' to avoid problems if there is delay in the Classification Board's classification.[29]

---

21 Uniting Church in Australia, *Submission CI 2504*; Australian Communications and Media Authority, *Submission CI 2489*.
22 Uniting Church in Australia, *Submission CI 2504*. See also, Australian Communications and Media Authority, *Submission CI 2489*.
23 Uniting Church in Australia, *Submission CI 2504*.
24 Ibid.
25 Civil Liberties Australia, *Submission CI 2466*.
26 N Goiran, *Submission CI 2482*.
27 Australian Communications and Media Authority, *Submission CI 2489*.
28 Ibid; N Goiran, *Submission CI 2482*.
29 Australian Communications and Media Authority, *Submission CI 2489*.

12.31 If the Australian Government were to implement a mandatory ISP-level filtering scheme, as has been proposed, then content should also generally be classified Prohibited before ISPs are required to block or filter it. The ALRC made a similar proposal in the Discussion Paper.[30] Proposed accountability and transparency measures, outlined later in this chapter, also provide for the classification of some content before being added to the proposed list of content that must be filtered.

Recommendation 12–2 The Classification of Media Content Act should provide that content must be classified Prohibited by the Classification Board before a person is:

(a) charged with an offence under the Act that relates to Prohibited content; and

(b) issued a notice requiring the person to stop distributing the Prohibited content, for example by taking it down from the internet.

Recommendation 12–3 The Classification of Media Content Act should enable the Regulator to notify Australian or international law enforcement agencies or bodies about Prohibited content without having the content first classified by the Classification Board.

Prohibitions offline

12.32 The balance of this chapter outlines the existing mechanisms for preventing the distribution of RC content—first 'offline' and then 'online'. The Classification of Media Content Act should provide for similar methods for preventing the distribution of Prohibited content. The methods of preventing distribution offline are less contested than the methods used to control online Prohibited content.

Distributing and broadcasting

12.33 State and territory enforcement legislation proscribes certain dealings with RC content—such as selling, publicly exhibiting or possessing with an intention to sell. The ALRC recommends that the Classification of Media Content Act likewise prohibit the sale, distribution and exhibition of Prohibited content. The Classification of Media Content Act should, however, clarify that this also applies to online Prohibited content.

12.34 Similarly, the *Broadcasting Services Act* provides that the codes developed by television industry groups encompass such matters as 'preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast'.[31] As stated above, the ALRC recommends that the Classification of Media Content Act should provide that content providers must not screen Prohibited content (whether so classified or likely to be so classified).

30 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 6–6.

31 *Broadcasting Services Act 1992* (Cth) s 123(2)(a).

12.35 In Western Australia and prescribed areas of the Northern Territory, it is illegal to possess RC content.[32] The ALRC makes no recommendation about the possession of Prohibited content.

Importing and exporting

12.36 Customs regulations currently prohibit the importation and exportation of 'objectionable goods'.[33] The Australian Customs and Border Protection Service (Customs) is empowered to identify and confiscate such objectionable goods at Australia's borders.

12.37 While the provisions relating to 'objectionable goods' do not explicitly refer to RC content, the Australian Government's intention was to align the scope of 'objectionable goods' with the RC category.[34] Customs has advised that if the scope of the RC category were changed, 'equivalent amendments are required to the [import regulations] to ensure that the controls at the border are consistent with the domestic controls'.[35]

12.38 The ALRC agrees that if the Australian Government narrows the scope of the new Prohibited classification category, as is recommended in Chapter 11, then it should also review the scope of 'objectionable goods' under the import and export regulations.

Prohibitions online

12.39 This section outlines the existing methods employed to address RC content online. The Classification of Media Content Act should provide for similar methods of stopping the distribution of Prohibited content.

12.40 The ACMA is required to investigate complaints made about online content defined as 'prohibited content' under the *Broadcasting Services Act*. As has been explained, the definition of 'prohibited content' in the *Broadcasting Services Act* captures a wider range of content than RC—although RC content is certainly captured.[36] The ACMA may also choose to investigate a matter on its own initiative.[37]

---

32 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 102, 103; *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) ss 62, 81, 89. State and territory offences under the classification cooperative scheme more generally are discussed in Ch 16.

33 *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A; *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3.

34 Explanatory Statement, Customs (Prohibited Imports) Amendment Regulations 2007 (No 5) (Cth), 1; Explanatory Statement, Customs (Prohibited Exports) Amendment Regulations 2007 (No 4) (Cth), 1; Explanatory Statement, Customs (Prohibited Exports) Regulations (Amendment) 1997 (Cth), 1; Explanatory Statement, Customs (Prohibited Imports) Regulations (Amendment) 1995 (Cth), 1.

35 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.

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

37 Ibid sch 5 cl 27; sch 7 cl 44.

12.41 The ACMA's trained content assessors then investigate the complaint. The action that the ACMA must then take depends, among other things, on whether the content is hosted in Australia.

Take-down notices

12.42 Currently, if the ACMA assesses that content is substantially likely to be 'potential prohibited content' and the content is hosted by a 'hosting service',[38] or provided by way of a 'live content service',[39] or by a 'links service'[40] with the appropriate Australian connection, then the ACMA must:

- issue an interim notice directing that certain steps be taken (broadly, that the content be taken down or removed); and
- apply to the Classification Board for classification of the content.[41]

12.43 The content must generally be taken down by 6 pm the next business day.[42] If the content is then classified RC, the ACMA issues a final take-down notice.[43] The requirement to comply with these interim and final take-down notices constitute 'designated content/hosting service provider rules',[44] so non-compliance may result in the commission of an offence[45] or the contravention of a civil penalty provision.[46]

12.44 The notice and take-down scheme has significantly reduced the amount of child sexual abuse online content hosted in Australia.[47] The ACMA reports that it has received '100% industry compliance' with its actions to remove such content.[48]

12.45 However, as the Internet Industry Association (IIA) has explained, for 'both technical and legal reasons, take-down notices can only apply in relation to content hosted in Australia'.[49]

Notifying law enforcement agencies

12.46 The ACMA has obligations in respect of 'sufficiently serious' online content, which has been the subject of complaint, regardless of whether the content is hosted in Australia or overseas. The ACMA considers the following online content 'sufficiently serious':

---

38 Defined in Ibid sch 7 cl 4.
39 Defined in Ibid sch 7 cl 2.
40 Defined in Ibid sch 7 cl 2.
41 Ibid sch 7 cl 47(2), 56(2), cl 62(2).
42 Ibid sch 7 cl 53(1), 60(1), 68(1).
43 Ibid sch 7 cl 47(1), 56(1), 62(1).
44 Ibid sch 7 cl 53(6), 60(4), 68(6).
45 Ibid sch 7 cl 106.
46 Ibid sch 7 cl 107.
47 W Wei, *Online Child Sexual Abuse Content: The Development of a Comprehensive, Transferable International Internet Notice and Takedown System* (2011), 81.
48 Australian Communications and Media Authority, *The ACMA Hotline—Combating Online Child Sexual Abuse* <http://www.acma.gov.au/WEB/STANDARD/pc=PC_90103> at 23 August 2011.
49 Internet Industry Association, *Guide for Internet Users: Information about Online Content* (Updated 2011), 8.

- 'child abuse material';
- content that advocates the doing of a terrorist act; and
- content that promotes or incites crime or violence.[50]

12.47 This content 'mirrors' some of the content currently within the scope of the RC classification category. Some of this content comes within the ambit of some offences in the *Criminal Code* (Cth), so may be broadly understood as 'illegal content'.

12.48 The ACMA is obliged to refer online content that it considers to be 'sufficiently serious' to a member of an Australian police force or, where there is an arrangement in place with the chief of an Australian police force that the ACMA may notify the content to another person or body, to that other person or body.[51]

12.49 There is a Memorandum of Understanding in place between the ACMA and Commonwealth, state and territory police forces to ensure the swift reporting of such content[52] and associated information sharing.[53]

12.50 The ACMA has an arrangement with the Australian Federal Police (AFP) that online child abuse material that is hosted by a country which has membership with the International Association of Internet Hotlines (INHOPE) may be referred directly to INHOPE.[54] If the relevant jurisdiction is not an INHOPE member, then the ACMA refers the content to enforcement agencies such as the AFP[55] who in turn will liaise with international law enforcement agencies such as INTERPOL.

12.51 The ACMA refers online content that advocates the doing of a terrorist act to the AFP.[56]

Family friendly filters

12.52 If the ACMA is satisfied that content hosted outside Australia is prohibited content or potential prohibited content, as defined in the *Broadcasting Services Act*, the ACMA must, among other things,

> notify the content to internet service providers so that the internet service providers can deal with the content in accordance with procedures specified in an industry code or industry standard.[57]

---

50 Australian Communications and Media Authority, *Regulating Online Content: The ACMA's Role* (2011), 3.

51 *Broadcasting Services Act 1992* (Cth) sch 5 cl 40(1)(a) (content hosted offshore); sch 7 cl 69(1) (Australian-hosted content).

52 Australian Communications and Media Authority, *Regulating Online Content: The ACMA's Role* (2011), 3.

53 W Wei, *Online Child Sexual Abuse Content: The Development of a Comprehensive, Transferable International Internet Notice and Takedown System* (2011), 47.

54 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.

55 Australian Communications and Media Authority, *Regulating Online Content: The ACMA's Role* (2011), 3.

56 Ibid, 3.

57 *Broadcasting Services Act 1992* (Cth) sch 5 cl 2(b).

12.53 The ACMA notifies filter software makers or suppliers accredited by the IIA in accordance with the industry code in place under sch 5 of the *Broadcasting Services Act*.[58] To be designated an 'IIA Family Friendly Filter', the IIA must be satisfied that the internet filtering product or service meets certain requirements.[59]

12.54 The ACMA informs the filter software providers of the URLs that are to be excluded or 'blocked'. This list is known as the 'ACMA blacklist'.[60] The makers or suppliers of the 'Family Friendly' filtering products or services have agreed to give effect to the ACMA's notifications by updating their products or services. The ACMA regularly reviews the URLs on its blacklist, and provides filter providers with revised lists.

12.55 Australian-based ISPs then make these 'Family Friendly' filters available to their customers free of charge or on a cost recovery basis.[61] Australian internet users have a choice as to whether or not they opt to use these filters.[62] If an Australian internet user has opted to use one of these filters, the blocking then occurs at the user's end—namely on the user's computer—rather than at a network level.

12.56 Schedules 5 and 7 of the *Broadcasting Services Act* are silent about whether the ACMA may also notify 'Family Friendly' filter software makers and providers of URLs which have been determined to contain child sexual abuse content by overseas organisations such as the Internet Watch Foundation, INTERPOL, and the National Center for Missing and Exploited Children—that is, online content that may not have been the subject of complaint under the *Broadcasting Services Act* framework. These overseas organisations, and the criteria used to determine whether content should be included on their lists, are discussed in a later section of this chapter.

ISP-level filtering

12.57 The Australian Government has proposed a scheme for mandatory filtering of certain online content by ISPs. Voluntary filtering is also being undertaken by some Australian ISPs. A number of stakeholders commented on ISP-level filtering.

Mandatory filtering

12.58 In December 2009, the Australian Government announced that it planned to introduce legislative amendments to the *Broadcasting Services Act* to require all ISPs in Australia to filter or 'block' RC content hosted on overseas servers. The 'RC Content List' is to comprise:

---

58 Ibid, sch 5 cl 40.

59 Internet Industry Association, *Internet Industry Codes of Practice: Codes for Industry Co-regulation in Areas of Internet and Mobile Content* (2005), 23.

60 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.

61 Internet Industry Association, *Internet Industry Codes of Practice: Codes for Industry Co-regulation in Areas of Internet and Mobile Content* (2005), 21.

62 Internet Industry Association, *Guide for Internet Users: Information about Online Content* (Updated 2011), 4.

- overseas-hosted online content which has been subject to complaint to the ACMA and which is being classified, or has been classified as RC, by the Classification Board using the classification scheme criteria; and
- international lists of overseas-hosted child sexual abuse material from 'highly-reputable' overseas agencies—following the ACMA's detailed 'assessment of the rigour and accountability of classification processes used by these agencies'.[63]

12.59 The scheme is intended to help reduce the risk of inadvertent exposure to RC content, particularly by children, and reduce the current inconsistency between the treatment of RC content that is hosted in Australia (which is subject to the notice and take-down scheme) and that hosted overseas.[64]

12.60 The Government announced nine measures to increase accountability and transparency in relation to the scheme.[65] These include measures to ensure some content must be classified by the Classification Board before the content is added to the 'RC Content List', and that aggrieved persons may seek review of these decisions.[66] It was also proposed that the ACMA would regularly publish an up-to-date, high-level breakdown of the list by category, and that an independent expert would undertake an annual review of the processes.[67]

12.61 An exemption is being considered for popular overseas sites with high traffic, such as YouTube, if the owners of the sites implement their own systems either to take down RC content or to block Australian access.[68]

12.62 A number of stakeholders expressed views on mandatory ISP-level filtering, with some supporting the policy,[69] and others expressing opposition.[70] Supporting mandatory filtering, the Communications Law Centre submitted that:

> A list of all material that has been refused classification should be published, with broad category descriptors explaining why the media content has been refused

---

63 S Conroy (Minister for Broadband, Communications and the Digital Economy), 'Measures to Improve Safety of the Internet for Families' (Press Release, 15 December 2009).

64 Department of Broadband, Communications and the Digital Economy, *ISP Filtering—Frequently Asked Questions* <www.dbcde.gov.au/funding_and_programs/cybersafety_plan/internet_service_provider_isp_filtering/isp_filtering_live_pilot/isp_filtering_-_frequently_asked_questions> at 16 February 2012.

65 Department of Broadband, Communications and the Digital Economy, *Outcome of Public Consultation on Measures to Increase Accountability and Transparency for Refused Classification Material* (2010).

66 Ibid, Measures 1 and 5.

67 Ibid, Measures 4 and 7.

68 Department of Broadband, Communications and the Digital Economy, *ISP Filtering—Frequently Asked Questions* <www.dbcde.gov.au/funding_and_programs/cybersafety_plan/internet_service_provider_isp_filtering/isp_filtering_live_pilot/isp_filtering_-_frequently_asked_questions> at 16 February 2012.

69 Eg, FamilyVoice Australia, *Submission CI 2509*; Australian Christian Lobby, *Submission CI 2500*; Communications Law Centre, *Submission CI 2484*; Bravehearts Inc, *Submission CI 1175*.

70 A Hightower, *Submission CI 2511*; I Graham, *Submission CI 2507*; Confidential, *Submission CI 2503*; Confidential, *Submission CI 2496*; Arts Law Centre of Australia, *Submission CI 2490*; National Association for the Visual Arts, *Submission CI 2471*; R Harvey, *Submission CI 2467*; D Mitchell, *Submission CI 2461*.

> classification (eg 'sexual violence'). Such media content should be compulsorily filtered at the ISP level.[71]

12.63 The Australian Christian Lobby likewise said that, 'despite the limitations and challenges of ISP filtering, there are a range of studies demonstrating that it would be an effective way of filtering Refused Classification material'.[72]

12.64 Among the reasons that were given for opposing mandatory ISP-level filtering were concerns about:

- there being very little child sexual abuse content on the web, because this content is more prevalent in peer-to-peer file sharing and virtual private networks, which will not be filtered;[73]
- the filter not being effective because it can be by-passed;[74]
- the potential cost of the scheme given these limitations;[75]
- the filter may be giving a false sense of protection to households;[76]
- the filter being counterproductive in terms of finding and prosecuting those distributing and/or accessing child sexual abuse content;[77]
- a government list of websites to be filtered being secret,[78] open to abuse[79] (including 'scope creep'—more categories of content being added over time), and infringing freedom of speech;[80] and
- the potential for over-blocking (that is, content being filtered that should not be filtered, such as creative/artistic works and information).[81]

Identifying content to be blocked

12.65 If ISPs were required mandatorily to filter all Prohibited or RC content, it is likely that certain content would have to be prioritised—and perhaps only a subcategory of Prohibited content would in fact be filtered. For example, the ACMA has recently reported that, of the 1,957 items of prohibited or potentially prohibited

---

71 Communications Law Centre, *Submission CI 2484*.
72 Australian Christian Lobby, *Submission CI 2500*.
73 Eg, L Mancell, *Submission CI 2492*; R Harvey, *Submission CI 2467*; Civil Liberties Australia, *Submission CI 2466*; D Mitchell, *Submission CI 2461*.
74 Eg, Confidential, *Submission CI 2503*; A Ameri, *Submission CI 2491*; Civil Liberties Australia, *Submission CI 2466*; J Denham, *Submission CI 2464*; Electronic Frontier Foundation, *Submission CI 1174*.
75 Eg, A Ameri, *Submission CI 2491*; D Mitchell, *Submission CI 2461*; Electronic Frontier Foundation, *Submission CI 1174*.
76 Eg, L Mancell, *Submission CI 2492*; K Weatherall, *Submission CI 2155*.
77 Eg, Confidential, *Submission CI 2503*.
78 Eg, A Hightower, *Submission CI 2511*; I Graham, *Submission CI 2507*.
79 Eg, Confidential, *Submission CI 2503*; Confidential, *Submission CI 2496*; R Harvey, *Submission CI 2467*; Civil Liberties Australia, *Submission CI 2466*; J Denham, *Submission CI 2464*.
80 Eg, Lin, *Submission CI 2476*; Electronic Frontier Foundation, *Submission CI 1174*.
81 Eg, Arts Law Centre of Australia, *Submission CI 2490*; National Association for the Visual Arts, *Submission CI 2471*; K Weatherall, *Submission CI 2155*.

content it identified in 2010–11, 1,054 items were determined to be offensive depictions of children, whereas only 68 items depicting a sexual fetish were determined to be RC content.[82]

12.66 In the Discussion Paper, the ALRC proposed 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, the ALRC stated, could then be added to any blacklist of content that must be filtered at the ISP level, should such a policy be implemented.[83]

12.67 Some submissions supported the proposal.[84] For example, Telstra stated that it would be a 'feasible and practical' approach to implement and could 'usefully form one element of a multi-faceted approach to this issue'.[85] However, others expressed concern that this would narrow the scope of what must be filtered. The Australian Council on Children and the Media, for example, said that 'any material that is judged to be RC should be on the blacklist', and particularly noted material 'that incites or instructs in matters of crime or violence (especially terrorism)'.[86] Similarly, Collective Shout submitted that the RC classification should be broadened to include 'any depiction of actual sex' and material that 'promotes, encourages or instructs in methods of suicide'.[87]

12.68 In contrast, Civil Liberties Australia, stated that:

> If the ALRC were prepared to suggest that the only content that could not be contained in the other classification categories is real depictions of actual child sexual abuse or actual sexual violence, then that would be a very strong step forward.[88]

12.69 Some submissions queried the distinction between 'actual' abuse and simulations of abuse. For example, Amy Hightower argued that, while the definition of 'child pornography material' in the *Criminal Code* (Cth)

> clearly captures abhorrent 'real' child sexual abuse material as intended, it also captures material which does not actually involve children at all, including cartoons, textual works or material where all involved parties are demonstrably over the age of eighteen. There is no legal distinction drawn between 'real' and 'fictional' abuse; to draw such a distinction would presumably require altering the *Criminal Code*.[89]

---

82 Australian Communications and Media Authority, *Annual Report 2010–11* (2011), 112–113.

83 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 10–1.

84 Eg, Uniting Church in Australia, *Submission CI 2504*; Arts Law Centre of Australia, *Submission CI 2490*; Telstra, *Submission CI 2469*.

85 Telstra, *Submission CI 2469*.

86 Australian Council on Children and the Media, *Submission CI 2495*.

87 Collective Shout, *Submission CI 2477*.

88 Civil Liberties Australia, *Submission CI 2466*.

89 A Hightower, *Submission CI 2511*.

12.70 The Justice and International Mission Unit of the Uniting Church submitted that it would like the proposal to be broadened to include simulated depictions of actual child sexual abuse.[90] Others also called for a clear definition of 'actual sexual violence'.[91]

12.71 Given the volume of Prohibited content on the internet, if ISPs were required mandatorily to filter Prohibited content, the Regulator may recommend that particular subcategories of Prohibited content will be prioritised. The selection of such subcategories should be carefully assessed. The ALRC notes in particular the community concerns about actual child sexual abuse and non-consensual sexual violence. In defining such a subcategory, the Regulator might also have regard to the types of content that are now the focus of international efforts to curb the distribution of child abuse material. The subcategory of 'sufficiently serious content', discussed above, might also be useful for this purpose.

Voluntary filtering

12.72 In early July 2010, the Australian Government announced that some Australian ISPs have agreed voluntarily to block, at the ISP level, a list of child abuse URLs.[92] The IIA then announced that it would develop a voluntary industry code for ISPs to block 'child pornography' websites.[93] On 27 June 2011, the IIA released the framework that would underpin its voluntary code.[94] A key feature of the voluntary scheme is that it uses INTERPOL's list rather than a list maintained by the ACMA, or any other organisation. The criteria for inclusion in the INTERPOL list are stricter than the definition of child pornography material under Australian criminal legislation.[95]

12.73 To join the IIA's voluntary code of practice, an ISP expresses interest in participation to the AFP and indicates that they have, or are preparing, their technical infrastructure to implement blocking of the list. The AFP then issues a 'request' to that ISP pursuant to s 313 of the *Telecommunications Act 1997* (Cth). This statutory provision outlines the obligations of 'carriers' and 'carriage service providers' to do their best to prevent relevant telecommunications networks and facilities from being used in, or in relation to, the commission of Commonwealth, state or territory offences and to give officers and authorities of the Commonwealth and of the states and territories such help as is reasonably necessary for the purpose of enforcing the criminal law, amongst other things. Section 313(5) of the *Telecommunications Act* provides complying ISPs with a 'safe harbour' or 'immunity' from civil litigation for

---

90 Uniting Church in Australia, *Submission CI 2504*.

91 A Hightower, *Submission CI 2511*; L Bennett Moses, *Submission CI 2468*.

92 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).

93 Internet Industry Association, 'IIA to Develop New ISP Code to Tackle Child Pornography' (Press Release, 12 July 2010).

94 Internet Industry Association, 'Internet Industry Moves on Blocking Child Pornography' (Press Release, 27 June 2011).

95 *Debates*, Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, 2 November 2011, (Australian Federal Police answer to Question 25 on notice).

any 'act done or omitted in good faith' in performance of the duty that had been imposed on.

12.74 As of November 2011, the AFP had issued five s 313 requests to Australian ISPs,[96] which suggests that there are five Australian ISPs which are voluntarily filtering the INTERPOL blocklist at the ISP-level. There is no requirement for the ISPs to report their statistics, but for the period 1 July–15 October 2011, Telstra reported that there had been in excess of 84,000 redirections via its network.[97]

International cooperation

12.75 Alongside efforts to identify effective filtering strategies in Australia, there are international schemes which are working towards limiting the distribution of child sexual abuse content on the internet. There are four international schemes with this objective. International cooperation is vital to efforts to stop the distribution of child abuse material.

Internet Watch Foundation

12.76 The Internet Watch Foundation (IWF) is the national 'notice and take-down' body within the United Kingdom.[98] It operates an international blocklist of URLs which depict images of 'actual sexual abuse' or advertisements for and links to such content.[99] The URLs are assessed by the IWF Board in accordance with the UK Sentencing Guidelines Council criteria. Only those images assessed to be at a level 1 and above according to the criteria are considered for inclusion on the URL list, with level 1 being for images depicting persons below the age of 18 in erotic poses with no sexual activity.[100] The list contains approximately 500 URLs at any one time, is updated twice a day to ensure the entries are live, and is periodically audited by independent experts.[101] The list is designed to block specific URLs only, rather than whole domains.[102] The IWF also operates an appeals process by which any party with a legitimate association with the content, a victim, hosting company, publisher or internet consumer can appeal the placement of a particular URL on the list.[103]

INTERPOL

12.77 The international police organisation, INTERPOL, of which Australia is a member, also compiles a 'worst-of' list of domains distributing child sexual abuse

---

96 Ibid.

97 *Debates*, Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, 18 October 2011, 94 (N Gaughan).

98 Internet Watch Foundation, *IWF Facilitation of the Blocking Initiative* <www.iwf.org.uk/services/blocking> at 16 February 2012.

99 Ibid.

100 Internet Watch Foundation, *Assessment Levels* <www.iwf.org.uk/hotline/assessment-levels> at 16 February 2012.

101 Internet Watch Foundation, *IWF Facilitation of the Blocking Initiative* <www.iwf.org.uk/services/blocking> at 16 February 2012.

102 Ibid.

103 Internet Watch Foundation, *Content Assessment Appeal Process* <www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process> at 16 February 2012.

material online.[104] The INTERPOL list contains domains found to be distributing 'child sexual abuse material'[105] which have been verified by INTERPOL and at least one other partner law enforcement agency.[106] Domains on the 'worst-of' list contain images of severe abuse of real children who are, or appear to be, younger than 13 years.[107] The list includes whole domains, if any part is found to contain child sexual abuse material.[108] This is because INTERPOL has determined that child sexual abuse material is not normally co-hosted with legal material but rather resides on specific domains created for the sole purpose of distributing the files.[109]

12.78 According to the AFP, the domains included in the INTERPOL list are updated approximately once per week, and although the total number of domains on the list varies with each update, by way of example the 25 October 2011 list contained 409 domains.[110] As stated earlier, the INTERPOL list is currently being used as the basis for the IIA's voluntary code in relation to ISP-level filtering.[111]

INHOPE

12.79 INHOPE is a worldwide network of internet hotlines which coordinates the investigation of internet content suspected to be illegal, including child sexual abuse content, and the reporting of illegal content to relevant law enforcement agencies and ISPs.[112] The INHOPE network includes 41 internet hotlines in 36 countries worldwide, including Australia.[113]

12.80 In 2010, INHOPE hotlines received 24,047 reports of potentially illegal child sexual abuse material, including 21,949 unique URLs.[114]

National Center for Missing and Exploited Children

12.81 The National Center for Missing and Exploited Children (NCMEC) is a private, not-for-profit organisation which was established by the US Congress in 1984 to reduce the incidence of missing children and child sexual exploitation.[115] Since 2007,

---

104 INTERPOL, *Access Blocking: Introduction* <http://www.interpol.int/Crime-areas/Crimes-against-children/Access-blocking/Introduction> at 16 February 2012.

105 INTERPOL, like IWF, uses the term 'child sexual abuse material' rather than child pornography: for an outline of their definition of 'child sexual abuse material' see: INTERPOL, *Access Blocking: Criteria for Inclusion in the 'Worst of'-List* <http://www.interpol.int/Crime-areas/Crimes-against-children/Access-blocking/Criteria-for-inclusion-in-the-Worst-of-list> at 16 February 2012.

106 Ibid.

107 Ibid.

108 Internet Industry Association, 'Internet Industry Moves on Blocking Child Pornography' (Press Release, 27 June 2011).

109 Ibid.

110 *Debates*, Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, 2 November 2011, (Australian Federal Police answer to Question 25 on notice).

111 Internet Industry Association, 'Internet Industry Moves on Blocking Child Pornography' (Press Release, 27 June 2011).

112 International Association of Internet Hotlines, *Annual Report 2010* (2010), 5.

113 International Association of Internet Hotlines, *About INHOPE* <www.inhope.org/gns/about-us/about-inhope.aspx> at 16 February 2012.

114 International Association of Internet Hotlines, *Annual Report 2010* (2010), 16.

115 National Center for Missing and Exploited Children, *Mission and History* <www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=4362> at 16 February 2012.

the NCMEC has coordinated an URL list of online 'child pornography' based on complaints made by the public to their 'CyberTipline'.[116] All reports to the CyberTipline are investigated by the NCMEC which then adds the 'worst of the worst' material—material containing images of real pre-pubescent children being sexually abused—onto a URL list.[117] The list is updated daily and made available to participating 'electronic service providers' and international law enforcement agencies, including the AFP.[118]

116 National Center for Missing and Exploited Children, *News and Events: Trend Micro Becomes the First Internet Security Company to Partner with the National Center for Missing and Exploited Children to Remove Child Pornography from the Internet* <www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4253> at 16 February 2012.

117 Ibid.

118 Ibid.

Part 3

Administering and Enforcing the New Scheme

13. Codes and Co-regulation

Contents

Summary 303
Regulatory forms 304
Self-regulation 304
Quasi-regulation 304
Co-regulation 305
Direct government regulation 305
Factors in determining regulatory form 305
Existing industry codes 306
Codes and classification 307
Codes and co-regulation 308
Industry codes and the new scheme 310
Content of industry classification codes 311
Approval of codes 313
Mandatory and voluntary codes 315
Self-regulatory codes 318

Summary

13.1 In this chapter, the ALRC recommends that the Classification of Media Content Act provide for the development and operation of industry classification codes, consistent with statutory obligations to classify and restrict access to media content and with statutory classification categories and criteria.

13.2 The intention is that industry codes may deal with a range of classification-related matters that are too detailed or media-specific to be included in legislation, introducing additional flexibility to the regulatory scheme while meeting underlying policy goals.

13.3 Industry codes might include provisions relating to, for example, methods of restricting access to certain content, the use of classification markings, methods of classifying media content, including through the engagement of authorised industry classifiers, and guidance on the application of statutory classification obligations and criteria to media content covered by the code.

13.4 The chapter examines the possible processes for the development of industry classification codes, and recommends mechanisms for the approval and enforcement of codes by the new Regulator. The ALRC also recommends that the Act should enable the Regulator to enforce compliance with an industry classification code, where the

provisions relate to media content that must be classified or to which access must be restricted.

Regulatory forms

13.5 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

13.6 Self-regulation is generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement.

13.7 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.

13.8 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.

13.9 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 to take the video down, or age-restrict it.[3]

Quasi-regulation

13.10 Quasi-regulation describes those arrangements where government influences businesses to comply, but which do not form part of explicit government regulation.

13.11 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

---

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*.

entered into against the background of the Australian Government's proposed system for mandatory internet service provider level filtering of URLs.[4]

13.12 Arguably, the AANA self-regulatory system for advertising might equally be characterised as quasi-regulation. This is because governments may have regulated this area if a self-regulatory regime did not exist—and may regulate in the future if this regime does not demonstrate its responsiveness to community expectations.[5]

Co-regulation

13.13 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.

13.14 Regulation of radio and television content is co-regulatory. Various industry groups have developed codes under the *Broadcasting Services Act 1992* (Cth). 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

13.15 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

13.16 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; or 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]

13.17 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-

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).

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.

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]

13.18 In the communications and media context, the ACMA has identified 10 '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]

13.19 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]

Existing industry codes

13.20 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]

13.21 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;

---

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).

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.

- 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;
- 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]

Codes and classification

13.22 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. These codes are discussed briefly below, with reference to their relationship to the classification requirements of the *Classification Act*.

13.23 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]

13.24 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]

13.25 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 power to make an industry standard if there are no industry codes or if an industry code is deficient.[18]

13.26 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

---

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 16.
18 *Broadcasting Services Act 1992* (Cth) sch 7 cls 91–94.

intention that industry codes provide that content be assessed according to *Classification Act* categories and criteria; and definitions of 'prohibited content' and 'potential prohibited content' in sch 7 reflect *Classification Act* categories.

13.27 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.

13.28 Commercial television and subscription television codes of practice are less constrained by classification legislation.[20] However, 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.[21]

13.29 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.[22]

13.30 There are, however, no statutory requirements relating to the content of the code's classification provisions. This reflects that the ABC and SBS are public broadcasters subject to special governance and accountability arrangements.[23] 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;[24] and the SBS Television Classification Code states that it is 'based on' the Classification Board's Classification Guidelines.[25]

Codes and co-regulation

13.31 In the Discussion Paper, the ALRC proposed that the Classification of Media Content Act should provide for the development of 'industry classification codes of

---

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 For example, the *Broadcasting Services Act* permits commercial broadcast and subscription television industries to develop, in consultation with the ACMA, codes of practice that relate to 'preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry', 'methods of ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority' and 'methods of classifying programs that reflect community standards': Ibid s 123.

21 Ibid s 123.

22 *Australian Broadcasting Corporation Act 1983* (Cth) s 8(e)(i); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(j).

23 See, *Australian Broadcasting Corporation Act 1983* (Cth) pt II; *Special Broadcasting Service Act 1991* (Cth) pt 2.

24 Australian Broadcasting Corporation, *Editorial Policies: Television Program Classification—Associated Standard*, 1.

25 Special Broadcasting Service, *Codes of Practice 2006: 4. Television Classification Code*, [4.1].

practice by sections of industry involved in the production and distribution of media content'.[26]

13.32 Stakeholders expressed a range of opinions on the desirability of codes as part of a new classification scheme. Codes received broad support from industry stakeholders in particular,[27] in part due to generally positive experiences of television and online codes under the *Broadcasting Services Act*. Telstra, for example, stated that:

> The use of industry codes allows for the incorporation of technical expertise and detail in the implementation of classification processes, whilst avoiding the inflexibility that would result from an attempt to impose this level of detail through direct regulation.[28]

13.33 Free TV Australia (Free TV) also supported the ALRC's proposals concerning codes. It stated that this aspect of the proposed new classification scheme 'essentially expands the co-regulatory system that currently applies to commercial free-to-air television broadcasters to other sectors', which it considered to be 'working well'.[29]

13.34 Foxtel agreed that any new Act should 'confirm the role of co-regulation as a central tenet' of the classification framework, including

> provisions facilitating the development of industry codes of practice and industry complaints-handling, and the accreditation of industry classifiers. Where the new Act provides statutory criteria for matters such as classification categories and access restrictions, it should also provide, as proposed by the ALRC, for industry-specific guidance on these matters to be given in industry codes of practice.[30]

13.35 In contrast, some stakeholders expressed concern about co-regulatory approaches to classification, including in relation to existing television classification codes.[31] The Australian Council on Children and the Media (ACCM) referred to the complexity and 'tendency to liberalise' of commercial broadcasting codes:

> Overall our experience of industry codes is that they operate mostly as public relations for the industry in question. They make it look like they are doing something, but in fact their main function is to make the industry look better. Industries do not voluntarily stop doing things they otherwise want to do—especially things that make

---

26 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 11–1.

27 For example, Free TV Australia, *Submission CI 2519*; Motion Picture Distributors Association of Australia, *Submission CI 2513*; Foxtel, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*. Other stakeholders who expressed support for codes included Arts Law Centre of Australia, *Submission CI 2490*; Collective Shout, *Submission CI 2477*.

28 Telstra, *Submission CI 2469*.

29 Free TV Australia, *Submission CI 2519*. In this context, while there were 2816 complaints made under the Commercial Television Industry Code of Practice in the 2010–11 financial year, only 11% of these complaints concerned classification of content: Free TV Australia, *Commercial Television Industry Code of Practice: Annual Code Complaints Report 2010-11*.

30 Foxtel, *Submission CI 2487*.

31 I Graham, *Submission CI 2507*; Australian Council on Children and the Media, *Submission CI 2495*; Commissioner for Children and Young People Western Australia, *Submission CI 2480*; Lin, *Submission CI 2476*.

> them money … If limits are needed on industry in the public interest, those limits should be imposed by public institutions.[32]

13.36 The Commissioner for Children and Young People (WA) expressed concern about a classification scheme incorporating a co-regulatory approach, including because 'industry codes of practice and self-regulation currently in place, for example, in advertising and print media, are not sufficient to ensure the safety, protection and wellbeing of children and young people'.[33]

Industry codes and the new scheme

13.37 The *Classification Act* provides a model for the classification of publications, films and computer games based on direct regulation and legislative rules, with classification decisions made by an independent statutory body, the Classification Board. The *Broadcasting Services Act* provides a co-regulatory approach under which rules are developed by industry in codes, subject to some legislative requirements, and industry classifies content.[34] Elements of both approaches are incorporated in the ALRC's recommended National Classification Scheme.

13.38 In the ALRC's view, there is a strong community expectation that government will ensure that at least some media content is assessed according to statutory classification criteria before being made available, and that access to at least some media content should be restricted by law.

13.39 On the other hand, conditions for self- or co-regulation exist in some areas, including where there are market incentives for content providers to voluntarily classify material themselves because distributors and consumers of some products want and expect advice about content.

13.40 In this context, the reforms recommended by the ALRC should be seen as introducing more regulation into some areas and reducing regulation in others. The ALRC's scheme combines elements of direct regulation, co-regulation and self-regulation. For example, the ALRC recommends retaining mandatory classification by the Classification Board of some media content, as determined by the Regulator (direct regulation).

13.41 Much other content would be subject to industry classification, sometimes under codes developed by industry. The use of codes would introduce some elements of co-regulation not previously present in regulating publications, films and computer games. However, because industry codes under the Classification of Media Content Act would have to be consistent with statutory obligations to classify and restrict access to some content, and statutory classification criteria, the code process may be characterised as closer to direct regulation than pure co-regulation. That is, industry would only be free to develop its own rules within the constraints of the legislative requirements.

---

32 Australian Council on Children and the Media, *Submission CI 2495*.
33 Commissioner for Children and Young People Western Australia, *Submission CI 2480*.
34 *Broadcasting Services Act 1992* (Cth) s 123.

13.42 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 recommends that some content no longer be subject to any classification obligations—notably computer games likely to be classified lower than MA 15+.

13.43 Stakeholders generally endorsed the proposed role of industry codes, where industry is able to develop codes to support statutory provisions, and administer those codes under the oversight of the Regulator. Such an approach 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]

Content of industry classification codes

13.44 In the Discussion Paper, the ALRC proposed that industry classification codes may include provisions that deal with a range of matters, including guidance on the application of statutory classification obligations and criteria to different kinds of media content; methods of classifying and marking media content; methods of restricting access to certain content; the provision of consumer advice; and complaint handling.

13.45 The non-exhaustive list of topics that might be covered by codes was based on proposed statutory obligations, in respect to which guidance or clarification might be provided in industry codes, and on provisions of sch 7 of the *Broadcasting Services Act*. While sch 7 also provides a separate list of matters that *must* be dealt with in industry codes,[36] this may not be necessary under the Classification of Media Content Act because—unlike under the *Broadcasting Services Act*—there would be overarching statutory obligations to classify, mark and restrict access to content.

13.46 The proposed indicative list of industry code content was well received by stakeholders.[37] Free TV, for example, stated that the list was 'comprehensive and reasonable'.[38] Some concerns were expressed about possible duplication of classification obligations when content providers are operating across a range of platforms and therefore may be subject to more than one industry code;[39] and about codes encouraging inconsistent interpretation of the statutory classification criteria.[40] The ALRC observes that, under the new Act, content will generally only have to be classified once, and that codes are intended to provide guidance on the application of classification criteria, rather than differing interpretations.

35 See Ch 4, Principles 4, 7.
36 *Broadcasting Services Act 1992* (Cth) sch 7 cls 81, 82.
37 For example, Free TV Australia, *Submission CI 2519*; Uniting Church in Australia, *Submission CI 2504*; Foxtel, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Collective Shout, *Submission CI 2477*; Telstra, *Submission CI 2469*.
38 Free TV Australia, *Submission CI 2519*.
39 Ibid; Australian Subscription Television and Radio Association, *Submission CI 2494*.
40 Australian Council on Children and the Media, *Submission CI 2495*.

13.47 There are a range of classification-related matters that are too detailed or media-specific to be included in legislation. For example, the ALRC recommends that statutory obligations be placed on content providers to take reasonable steps to restrict access to R 18+ or X 18+ content to adults.[41] What constitutes reasonable steps may vary greatly, depending on the content and the industry.

13.48 Codes provide the flexibility to provide for what constitutes reasonable steps in relation to, for example, how to restrict access online; promoting and distributing of parental locks and user-based internet filters; and how and where to advertise, package and display hardcopy R 18+ and X 18+ content. For this reason, the ALRC recommends that the Classification of Media Content Act provide that reasonable steps to restrict access to content may be set out in industry codes.

13.49 Industry codes might also contain guidance on how classification markings should be displayed in different media. The ALRC recommends that the Classification of Media Content Act provide that, for content that must be classified and has been classified, content providers must display a classification marking. Exactly what this means for marking, for example, an online computer game, or content on an R 18+ website, may also be clarified in codes of practice.

13.50 Industry codes would also allow participants in media content industries to develop particular arrangements in areas where statutory classification or other obligations do not apply, provided these are consistent with the recommended single set of classification categories and criteria.

13.51 For example, the ALRC recommends 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 the classification of 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'.[42] Under the ALRC's recommendations, participants in the computer game industry might choose to use an authorised classifier or classification instrument, or have their own instrument approved by the Regulator for this purpose.[43]

Recommendation 13–1 The Classification of Media Content Act should provide for the development of industry classification codes by sections of industry or persons involved in the production and distribution of media content; and for the Regulator to request that a body or association representing a particular section of industry develop a code.

41 See Ch 10.
42 Interactive Games and Entertainment Association, *Submission CI 1101*.
43 See Ch 7.

Recommendation 13–2 Industry classification codes may include provisions relating to:

(a) methods of restricting access to certain content;

(b) the use of classification markings;

(c) methods of classifying media content, including by authorised industry classifiers;

(d) guidance on the application of statutory classification criteria;

(e) maintaining records, reporting classification decisions and quality assurance;

(f) protecting children from certain content;

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

(h) providing a responsive and effective means of addressing community concerns, including complaints handling; and

(i) reporting to the Regulator on the administration of the code.

Approval of codes

13.52 In the Discussion Paper, the ALRC proposed that the Regulator should be empowered to approve an industry classification code if satisfied that: the code is consistent with the statutory classification obligations, categories and criteria applicable to media content covered by the code; the body or association developing the code represents a particular section of the relevant media content industry; and there has been adequate public and industry consultation on the code.[44]

13.53 Industry stakeholders generally supported the proposal.[45] Free TV stated that the proposed criteria for code approval were 'achievable, practical and flexible'.[46] Telstra supported the proposal, but stated that the Act should provide that the Regulator must approve codes that satisfy the statutory requirements in order to protect against 'potential regulatory scope creep through the imposition of additional obligations in industry codes by the Regulator as a condition of acceptance'.[47]

13.54 The Interactive Games and Entertainment Association (iGEA) also supported the proposal, but submitted that it would be critical to include provisions in the Act to address issues concerning the approval of codes, including:

---

44 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 11–3.

45 For example, Free TV Australia, *Submission CI 2519*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

46 Free TV Australia, *Submission CI 2519*.

47 Telstra, *Submission CI 2469*.

- relevant timeframes for Regulator review, public consultation and Regulator approval;
- empowering the Regulator to provide guidance or relief in any transitionary period when an industry classification code of conduct is being considered; and
- outlining any appeal or review mechanism for situations where the Regulator does not approve an industry classification code of practice.[48]

13.55 Some stakeholders expressed concerns about the extent of public consultation that may be required.[49] The ACCM stated:

> Once again this echoes the co-regulatory system for commercial broadcasting. As indicated above, we have been disappointed at the level of scrutiny provided by the ACMA in the last two reviews of that code. In particular, it seems that 'adequate public and industry consultation' consists of inviting and receiving comments, but not necessarily taking notice of them.[50]

13.56 FamilyVoice submitted that the Act should specify at least some of the conditions for public consultation, including 'a minimum period of six weeks for input on draft codes of practice, the release of the final version of the code of practice as submitted to the Regulator for approval, and the opportunity for input directly to the Regulator'.[51]

13.57 The ALRC's proposal was based on provisions of sch 7 of the *Broadcasting Services Act*,[52] under which 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 public and industry consultation on the code.

13.58 Specifically, sch 7 requires that the ACMA be satisfied that the body or association has published a draft of the code and invited members of the public and participants in that section of the industry to make submissions about the draft within a specified period; and gave consideration to any submissions that were received within that period.[53]

13.59 The ALRC recommends that the Regulator under the Classification of Media Content Act be similarly empowered to approve an industry code. The code should also be required to be consistent with statutory obligations to classify and restrict access to media content and with statutory classification categories and criteria.

13.60 Industry codes might be developed, for example, by the film production and distribution industry, broadcast and subscription television, internet protocol television (IPTV), computer games production and distribution industry, and the internet and digital content industries. While it may sometimes be problematic to define what constitutes a particular section of the media content industry—particularly in the online

---

48 Interactive Games and Entertainment Association, *Submission CI 2470*.

49 FamilyVoice Australia, *Submission CI 2509*; Australian Council on Children and the Media, *Submission CI 2495*; Collective Shout, *Submission CI 2477*.

50 Australian Council on Children and the Media, *Submission CI 2495*.

51 FamilyVoice Australia, *Submission CI 2509*.

52 *Broadcasting Services Act 1992* (Cth) sch 7 cl 85.

53 Ibid sch 7 cl 85(1)(e), (f).

environment—part of the role of the Regulator would be to ensure that the body or association developing the code is sufficiently representative. As emerging content industries develop, the Regulator would be able to encourage or request the development of codes by new industry groupings. The Regulator may also have to resolve situations where two or more industry representative bodies wish to develop a code dealing with the same subject matter.

13.61 As is the case under sch 7 of the *Broadcasting Services Act*, the Regulator should also have the power to determine an industry standard where a code is desirable but cannot be, or is not, developed by industry. Such standards might be applied to aspects of the 'informal' online content industry—for example, prescribing what would constitute 'reasonable steps' by video-sharing sites to restrict access to R 18+ and X 18+ material.

13.62 In addition, in some circumstances, a code may be replaced with an industry standard that binds all participants in the industry.[54]

Recommendation 13–3 The Classification of Media Content Act should enable the Regulator to approve an industry classification code if satisfied that:

(a) the code is consistent with statutory obligations to classify and restrict access to media content and statutory classification categories and criteria;

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

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

Recommendation 13–4 The Classification of Media Content Act should enable the Regulator to determine an industry standard if:

(a) there is no appropriate body or association representing a relevant section of industry; or

(b) a request to develop an industry code is not complied with.

Mandatory and voluntary codes

13.63 In the Discussion Paper, the ALRC proposed that, where an industry code 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.[55] In contrast, compliance with a code that relates to media content that is not subject to statutory classification obligations would be voluntary.

54 Ibid sch 7 cl 95.

55 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 11–4.

13.64 While this proposal received support from some stakeholders,[56] concern was expressed about how it would operate in practice. In particular, Telstra submitted that caution should be used when attempting to make industry codes 'universally enforceable' against any participant in the relevant part of the media content industry—especially given the 'uneven membership of multiple industry groups dealing with issues related to online content'.[57]

13.65 Telstra considered that the ALRC's proposal created the risk of binding content providers who have not contributed to the development of a code, undermining the objective of 'using industry codes to develop a more detailed implementation of classification obligations reflective of the technical and commercial expertise of industry participants'. It submitted that the Act should include 'checks and balances as to the representativeness of the process for developing an industry code before being empowered to enforce it more broadly'.[58]

13.66 Concerns were also expressed about the possible effects on competition of industry codes:

> If new entrants to an industry are to be covered by a code formulated by incumbents without them having any say in the matter, the incumbents will have an incentive to develop the code in such a way as to disadvantage new entrants. To help prevent this, the Act should require the Regulator to obtain approval from the [Australian Competition and Consumer Commission] before approving a code.[59]

13.67 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.[60] 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.[61]

---

56 Uniting Church in Australia, *Submission CI 2504*; Foxtel, *Submission CI 2487*; Communications Law Centre, *Submission CI 2484*; Telstra, *Submission CI 2469*.

57 Telstra, *Submission CI 2469*.

58 Ibid.

59 Lin, *Submission CI 2476*. The Australian Competition and Consumer Commission has issued *Guidelines for Developing Effective Voluntary Industry Codes of Conduct*, which include guidance on ensuring codes do not have a negative effect on competition: Australian Competition and Consumer Commission, *Submission CI 2463*.

60 *Broadcasting Services Act 1992* (Cth) sch 7 cl 89.

61 *Competition and Consumer Act 2010* (Cth) s 51AE.

13.68 Given the diversity and rapidly evolving nature of the media content industry, the Regulator should have broad discretion to require compliance with a code. Issues concerning how this discretion should be exercised may be dealt with in enforcement guidelines, similar to those already issued by the ACMA. In existing 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'.[62]

13.69 For example, the guidelines set out how the ACMA will exercise its discretion to accept written undertakings given by a person that provide the person will take specified action to comply with an industry code.[63] Enforcement guidelines might also, for example, provide that, in considering the approval of industry codes, the Regulator will take into account the competitive effect of codes and may consult the Australian Competition and Consumer Commission in this regard.

13.70 The ALRC recommends that the Act should enable the Regulator to enforce compliance with a code against any participant in the relevant section of the media content industry, when an industry classification code relates to media content that must be classified or to which access must be restricted. Compliance with an industry code that relates to media content that is not subject to statutory classification-related obligations should be voluntary.

13.71 For example, the ALRC recommends that feature films and television programs that are both likely to have a significant Australian audience, and made and distributed on a commercial basis, should be classified.[64] If the film production and distribution industry were to develop a code, approved by the Regulator, the Regulator should have the power to require any Australian film production or distribution company to comply with it.

13.72 On the other hand, the ALRC recommends that computer games not likely to be classified MA 15+ or higher need not be classified. As noted above, participants in the computer game industry may choose to develop a code of practice governing how industry participants should classify games likely to be classified below MA 15+, and agree to be bound by the provisions of the code. If so, the Regulator would not be empowered to require a computer game developer or distributor, who had not agreed to be bound by the code, to comply with the code.

62 Australian Communications and Media Authority, *Guidelines Relating to the ACMA's Enforcement Powers Under the Broadcasting Services Act 1992 (Cth)* (2011) cl 6.1.
63 Ibid cls 9.6, 9.7, 9.10, 9.11.
64 Ch 6.

Recommendation 13–5 The Classification of Media Content Act should enable the Regulator to enforce compliance with a code against any participant in the relevant section of the media content industry, where an industry classification code relates to media content that must be classified or to which access must be restricted.

Self-regulatory codes

13.73 Some existing self-regulatory codes may continue to operate alongside the Classification of Media Content Act. For example, the *Recorded Music Labelling Code of Practice* developed by the Australian Music Retailers Association (AMRA) and the Australian Recording Industry Association (ARIA)[65] applies a three-tiered labelling scheme (Level 1, Level 2 and Level 3)[66] 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.[67]

13.74 Under the Act there would be, in practice, no statutory obligation to classify music—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.

13.75 However, ARIA and AMRA would also have the option of bringing these arrangements under the 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.

13.76 The scheme of industry self-regulation applying to advertising under the AANA Code of Ethics could also continue to operate alongside the Classification of Media Content Act, and the statutory obligation to restrict access to advertising likely to be R 18+.[68] The House of Representatives Standing Committee on Social Policy and Legal Affairs recommended that the Australian Government Attorney-General's Department review advertising regulation and, 'if the self-regulatory system is found

65 Australian Music Retailers Association and Australian Recording Industry Association, *Recorded Music Labelling Code of Practice* (2003).

66 These categories can be seen as broadly consistent with the M, MA 15+ and R 18+ categories of the *Classification Act*.

67 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*.

68 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*; Outdoor Media Association, *Submission CI 1195*; Advertising Standards Bureau, *Submission CI 1144*.

lacking', impose a 'co-regulatory system on advertising with government input into advertising codes of practice'.[69]

13.77 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.[70]

69 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.

70 See Ch 8.

14. The Regulator

Contents

Summary 321
Existing agencies 322
- Attorney-General's Department 322
- Classification Board and Classification Review Board 322
- Department of Broadband, Communications and the Digital Economy 323
- Australian Communications and Media Authority 323
- Australian Customs and Border Protection Service 324

The Regulator 325
- A convergent regulator 328
- Independence of the Regulator 330

Functions of the Regulator 331
- Enforcement of classification laws 331
- Complaint handling 332
- Authorising industry classifiers 336
- Classification training 337
- Industry classification codes 337
- Liaison 337
- Other functions 338

Summary

14.1 The ALRC recommends the establishment of a single Regulator with primary responsibility for regulating the new National Classification 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 reviewing classification decisions, on application.

14.2 The Regulator would be responsible for a range of functions similar to some of those currently performed by the Australian Government Attorney-General's Department (AGD); the Director of the Classification Board; the Department of Broadband, Communications and the Digital Economy (DBCDE); and the Australian Communications and Media Authority (ACMA).

14.3 The term 'the Regulator' is used to signify the agency that performs the set of regulatory functions identified in this report as the responsibility of the Regulator. The Regulator could form one part of the ACMA with its broader responsibilities for the regulation of broadcasting, the internet, radio-communications and

telecommunications. The ALRC also suggests that the functions of the Regulator should become responsibilities of a new convergent regulator for the digital economy, as recommended by the Convergence Review,[1] if such a body is established.

Existing agencies

14.4 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 classification decision-making, administrative and policy functions, as well as to encouraging, monitoring and enforcing compliance with classification laws.

Attorney-General's Department

14.5 The AGD is responsible for administering the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and dealing with classification matters (an element of which is 'censorship')[2] including:

- the development of Commonwealth classification policy and advising on legal matters related to the National Classification Scheme;
- providing Secretariat support to the Classification Board and the Classification Review Board;
- providing classification training; and
- administering the Classification Liaison Scheme.[3]

Classification Board and Classification Review Board

14.6 The Classification Board is responsible for classifying publications, films and computer games. The Classification Review Board reviews Classification Board decisions on application. Both Boards are independent statutory bodies established under the *Classification Act*.

14.7 The Classification Board classifies content, submitted by the ACMA for the purposes of online content regulation under the *Broadcasting Services Act 1992* (Cth). The television industry also makes use of Classification Board reports to classify content under *Broadcasting Services Act* codes.[4]

---

1 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 2.

2 *Administrative Arrangements Order 2010* (Cth).

3 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.

4 Television classifiers periodically request classification decision reports from the Classification Board which are subsequently used to inform their classification decisions. In the period from 3 November 2010 to 28 November 2011, the Board provided 1,327 reports to classifiers from the commercial, national and subscription broadcasters.

14.8 As discussed in Chapter 7, the Director of the Classification Board also has a role in relation to authorised industry-based assessors.[5] The Board authorises industry assessors; revokes such authorisations; and approves classification training for assessors.[6]

14.9 Under the existing Commonwealth, state and territory classification cooperative scheme, neither the AGD nor the Boards have power to enforce classification laws. As discussed in Chapter 16, the enforcement of classification laws is primarily the responsibility of states and territories. However, the Australian Government provides assistance in relation to enforcement, through the operation of the Classification Liaison Scheme, which monitors and verifies compliance with classification laws and refers breaches to state and territory police or other agencies.

Department of Broadband, Communications and the Digital Economy

14.10 The DBCDE is responsible for dealing with 'content policy relating to the information economy',[7] and the Minister for Broadband, Communications and the Digital Economy for administering the *Broadcasting Services Act*.

Australian Communications and Media Authority

14.11 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 online content.

14.12 The ACMA administers the 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.[8]

---

5 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 14, 14B, 17.

6 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].

7 *Administrative Arrangements Order 2010* (Cth).

8 Australian Communications and Media Authority, *Online Regulation* <http://www.acma.gov.au/> at 31 January 2012.

14.13 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.[9]

14.14 In exercising its enforcement powers, the ACMA must also have regard to its enforcement guidelines, which are formulated by the ACMA under the *Broadcasting Services Act*.[10]

Australian Customs and Border Protection Service

14.15 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) (the Customs Regulations) substantially mirror the definition of Refused Classification material in the National Classification Code.

14.16 The AGD provides information and assistance to Customs in relation to assessing whether material is objectionable.[11] There is also an administrative agreement between the agencies that outlines their respective roles and responsibilities.[12]

14.17 The Director and Deputy Director of the Classification Board are authorised to grant requests for permission to import or export goods to which the Customs Regulations apply.[13]

14.18 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'.[14] 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'.[15]

14.19 The ALRC envisages that responsibilities related to controls over the importation of 'objectionable' materials would remain with Customs, and the Director and Deputy Director of the Classification Board, supported by the Regulator.

---

9 *Broadcasting Services Act 1992* (Cth) ss 3, 4.

10 Ibid s 215. See Ch 16.

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 *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A(2A); *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 3(3).

14 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.

15 Australian Law Reform Commission, *Censorship Procedure*, ALRC Report 55 (1991), [5.16].

The Regulator

14.20 The ALRC's recommendation for a single regulator is a central element of the new National Classification Scheme, and arises as a consequence of regulating the classification of films, television, publications, computer games and online media content under a framework that can be more flexible and adaptive in the context of media convergence.

14.21 Combining a range of functions currently performed by the Classification Board, the AGD, the DBCDE and the ACMA in a single regulator should contribute to a more administratively streamlined scheme. A single regulator, that incorporates classification and media content regulation within a wider portfolio of responsibilities, may be more responsive to the challenges of media convergence than a framework where similar functions are separated on a platform-related basis.

14.22 As discussed in Chapter 1, in the ALRC's view, the net economic effects of a single regulator and greater industry responsibility for classification would generate significant short-term and medium-term benefits. However, the likely impact on government revenues and expenditures of the establishment of the Regulator is dependent on a number of factors. These include the extent to which the activities of the Regulator are already budget-funded, as part of existing appropriations—for example, of the ACMA. There may also be opportunities for cost recovery in relation to some activities, such as classification decision-making by the Classification Board, the maintenance of the classification decisions database, the approval of industry codes and the provision of training for industry classifiers.

14.23 Stakeholders called for a single regulator under the new National Classification Scheme and generally for measures to reduce the administrative complexity of current arrangements.[16] The ACMA, for example, stated that a single regulator would be:

- Better for citizens: a single approach to the application of community standards and protections within the new scheme.
- Better for the consumer: a one stop shop with less chance of being given 'the run-around'.
- Better for industry: superior, faster decision-making with increased expertise and a consistent approach.
- Better for Government: cost savings from economies of scale.
- More logical: converging platforms will incontrovertibly require a converged regulator.

16 See, eg, Arts Law Centre of Australia, *Submission CI 2490*; Australian Communications and Media Authority, *Submission CI 2489*; Foxtel, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; SBS, *Submission CI 1833*; MLCS Management, *Submission CI 1241*; Bravehearts Inc, *Submission CI 1175*.

14.24 The ACMA noted that many issues in communications and media regulation are 'inherently inter-dependent and inter-connected'.[17] Areas where broader communications and media regulation is likely to intersect with content classification and regulation under the ALRC model include:

- the handling of complaints, investigations and relevant enforcement functions;
- promoting the development of industry codes and approving and maintaining registers of such codes;
- liaison and interaction with relevant Australian and overseas media content regulators and law enforcement agencies in the areas of online content regulation, cyber-safety and cyber-security; and
- educational activities in the digital environment.[18]

14.25 The ACMA referred to the ALRC's proposal to provide for the development of industry classification codes,[19] and noted the benefits of ensuring that these codes 'dovetail with the various existing television and online code regimes which cover both classification matters and other broader areas' and are administered by the ACMA.[20]

14.26 Foxtel also cautioned the ALRC against 'recommending a scheme under which classification codes would be developed separately to codes for other broadcasting matters, and which would be registered by different regulators' and any scheme under which classification codes would be governed by the new classification regulator and non-classification matters regulated by the ACMA under the *Broadcasting Services Act*.[21]

14.27 The Australian Subscription Television and Radio Association considered that the Regulator should be part of the ACMA because

> consumers unsatisfied with a broadcaster's response to a content-related complaint would have to go to a different regulator depending on the type of content that is the subject of the complaint, and this is likely to create unnecessary confusion.[22]

14.28 The ABC and SBC also expressed support for the Regulator forming one part of the ACMA.[23] The Internet Industry Association expressed concern about 'a splitting of regulatory responsibility between the ACMA and a new regulator' if it would require content providers to deal with both.[24]

---

17 Australian Communications and Media Authority, *Submission CI 2489*.
18 Ibid.
19 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 11–1.
20 Australian Communications and Media Authority, *Submission CI 2489*.
21 Foxtel, *Submission CI 2487*.
22 Australian Subscription Television and Radio Association, *Submission CI 2494*.
23 Joint Submission Australian Broadcasting Corporation and SBS, *Submission CI 2521*.
24 Internet Industry Association, *Submission CI 2528.*

14.29 Other stakeholders suggested that, rather than merging the functions of the Regulator with those of the ACMA, the Regulator should be within the Attorney-General's portfolio responsibilities.[25] John Dickie, for example, stated that:

> In my view there is a much better chance of the Regulator retaining independence if the issues involved in the new regime are recognised primarily in the area of human rights and civil liberties which have always been the responsibility of the Attorney-General.[26]

14.30 Many of the Regulator's recommended powers and functions—approving industry classification codes, issuing industry standards, issuing notices with respect to online content and so on—are similar to those currently performed by the ACMA under the *Broadcasting Services Act*. In addition, under the ALRC model, the Regulator will be responsible for determining matters such as:

- whether particular content has a significant Australian audience;[27]
- what content must be classified by the Classification Board—having regard to matters including the need for benchmarks for popular or new types of media content, and the classification of similar content in other jurisdictions;[28]
- how content providers should mark different types of classified content—depending on the type of content provider and the platform or delivery method;[29] and
- what reasonable steps content providers should take to restrict access to adult content—again, depending on the type of content provider and the platform or delivery method.[30]

14.31 These roles require the Regulator to have an intimate knowledge of the communications and media market and technical capabilities in relation to, for example, parental locks on televisions and media devices, internet filters and online age verification systems.

14.32 More fundamentally, the ALRC does not intend to add new layers of regulation to existing ones. The media content industries should not have to deal with a separate regulator in relation to classification, as well as with the ACMA in relation to other matters of content regulation. Arguably, the functions of the Regulator under the Classification of Media Content Act should be brought together with other aspects of wider media content regulation.

---

25 J Dickie, *Submission CI 2457*; I Graham, *Submission CI 2507*.
26 J Dickie, *Submission CI 2457*.
27 See Ch 6.
28 See Ch 7.
29 See Ch 8.
30 See Ch 10.

14.33 The Discussion Paper suggested that the proposed Regulator might form one part of the ACMA with its broader responsibilities for the regulation of broadcasting, the internet, radio-communications and telecommunications.[31]

14.34 As discussed above, while the ACMA is a statutory agency within the portfolio of the Minister for Broadband, Communications and the Digital Economy, the AGD is responsible for dealing with classification matters and for administering the *Classification Act.*

14.35 In considering policy responsibilities for content classification regulation, one question that arises is whether classification—including the powers and functions of the Regulator—is fundamentally a matter of communications or legal policy.

14.36 Classification decision making—that is, the making of classification decisions according to statutory classification criteria—can be conceived of as a matter of legal policy much like, for example, copyright. Like the subsistence of copyright, a classification decision may have consequences for the owner of media content in terms of legal rights to sell and distribute that content, and for the financial value of the content. Further, classification decision making that results in content being banned or restricted has consequences under the criminal law and raises human rights implications in terms of freedom of speech and political communication and protecting certain groups of people, such as children, from harm—in which case, some might argue that it may be appropriate for the Regulator to be within the Attorney-General's portfolio.

14.37 In the ALRC's view, however, the recommended new scheme is best characterised as one element of broader media content regulation. Ultimately, it will be the role of Government to design the final form of such a convergent media content regulator.

A convergent regulator

14.38 In the ALRC's view, there are likely to be advantages in having one regulator responsible for all forms of media content regulation, whether or not regulation is related to classification matters. These benefits are likely to increase significantly in the context of media convergence, discussed in Chapter 3.

14.39 Under the current media content regulatory framework, the ACMA regulates Australian content (including Australian content in advertising) and children's program content on television under compulsory standards, as well as being responsible for the regulation of television and online content under the *Broadcasting Services Act.*

14.40 The ACMA also deals with licence conditions regulating matters such as: tobacco and therapeutic goods advertisements; sponsorship announcements on community television; the broadcast of political matter; the 'anti-siphoning' scheme; and standards prohibiting the broadcast of programs that encourage people to join or

---

31 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), [12.3].

finance terrorist organisations.[32] As noted above, it also has responsibilities in relation to cyber-safety, cyber-security, and educational initiatives in the digital environment.

14.41 The development of convergent regulators has been occurring worldwide during the 2000s. The ACMA was established in 2005 as a convergent regulator—that is, dealing with broadcasting, telecommunications and radio-communications matters that had previously been undertaken in separate Australian government agencies.

14.42 Convergent regulators in other jurisdictions include the Office of Communications (Ofcom) in the United Kingdom and the Media Development Authority (MDA) in Singapore. The International Telecommunications Union has observed that 'a more consistent approach can be taken within the [single] regulatory authority as it adapts to changing technologies',[33] and that a single regulator 'resolve[s] some of the overlap of regulatory functions and bring[s] down the cost of overall regulation'.[34]

14.43 In some instances, convergent regulators deal with matters relating to media delivery technologies and media content, but not with classification. For example, while Ofcom deals with both media carriage and content, films and DVDs must still be classified by the British Board of Film Classification before public release. Convergent media regulators in other jurisdictions do deal with classification as part of media content regulations more broadly. In Singapore, the Singapore Board of Film Censors is a division of the MDA, and classification is a part of broader media content regulation.[35]

14.44 In its interim report, the Convergence Review recommended that a new independent regulator for content and communications be established in Australia. This regulator would 'operate at arm's-length from government and industry, with the capacity to address technical, social and economic issues'.[36] The Convergence Review recommended that the new regulator should have the following features and functions:

- Given the pace of change in the digital economy, the regulator needs to have broad powers to make rules within the policy frameworks determined by parliament.
- The regulator should have scope to adopt flexible, managed regulation and to apply self-regulation, co-regulation or direct regulation as the circumstances require. It should also have a range of appropriate sanctions to encourage compliance.
- Within the framework of policies and principles established by legislation, the regulator should operate at arm's-length from government except for a limited range of specified matters. The regulator should have secure funding and cost-recovery mechanisms.

---

32 Australian Communications and Media Authority, *TV Content Regulation* (2012) <www.acma.gov.au> at 30 January 2012.

33 C Blackman and L Srivastava, *Telecommunications Regulation Handbook* (10th ed, 2011), 19.

34 Ibid, 19.

35 An overview of media content regulations in selected countries is provided in App 3.

36 Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011), 2.

- The regulator should have broad powers to encourage media diversity.
- The regulator should have flexible powers to deal with content-related competition issues, which will complement the Australian Competition and Consumer Commission's (ACCC) economy-wide powers.[37]

14.45 One challenge for convergent regulators is to avoid prioritising infrastructure and service delivery issues over questions of media content. Otherwise, 'issues of culture would come secondary to arguments on efficient market mechanisms and competition'.[38] The question of how to balance content questions and cultural regulation with carriage functions and economic regulation is a complex issue of regulatory design, and there are important lessons to be learnt from how other convergent media regulators have approached such issues.

14.46 For example, Ofcom has a Content Board, which is charged with 'understanding, analysing and championing the voices and interests of the viewer, the listener and citizen' and advises on content-related decisions. Its membership is deliberately drawn from diverse backgrounds, including lay members and broadcasting experts.[39]

14.47 The ALRC suggests that if a new convergent regulator for the digital economy is to be established, as recommended by the Convergence Review, the functions of the new regulator should include classification regulation. In developing such a convergent regulator, it will be crucial that the agency is developed in ways that give equal weight to the social and cultural dimensions of media regulation, including classification regulation, as to economic and technical regulation.

Independence of the Regulator

14.48 John Dickie submitted that the Regulator should be an independent statutory authority with 'sufficient status and standing in the Government to resist attempts to influence his or her decisions'.[40] Other stakeholders also referred to the need for the Regulator to have statutory guarantees of independence from political influence.[41]

14.49 While the Classification Board is an independent classification decision-maker, and would retain this status under the new Classification of Media Content Act,[42] the ACMA is subject to ministerial policy direction in relation to some of its roles—notably in relation to industry standards for online content.

14.50 For example, under the *Broadcasting Services Act*, the ACMA may determine an industry standard if a request for an industry code is not complied with by participants in a particular section of the content industry. The Minister may, by

---

37 Ibid, 2.
38 Organisation for Economic Co-operation and Development, *Convergence and Next Generation Networks: Ministerial Background Report* (2007), 49.
39 Office of Communications (UK), *Functions and Role of the Content Board* (2012) <www.ofcom.org.uk/about/how-ofcom-is-run/content-board/functions-and-role/> at 3 February 2012.
40 J Dickie, *Submission CI 2457*.
41 I Graham, *Submission CI 2507*; Lin, *Submission CI 2476*.
42 See Ch 7.

legislative instrument, give the ACMA a written direction as to the exercise of its powers under this provision.[43] The Minister also has a power to give directions of 'a general nature', under the *Australian Communications and Media Authority Act 2005* (Cth), concerning the ACMA's 'broadcasting, content and datacasting functions'.[44] The ACMA must perform its functions, and exercise its powers, in a manner consistent with any such directions.[45]

14.51 The extent of the Regulator's independence from ministerial direction is an important issue that will require further consideration in drafting the new Classification of Media Content Act or any separate legislation establishing the Regulator. While ministerial policy direction may be appropriate, some matters may need to be insulated from any operational direction—for example, decisions on whether particular categories of content have a significant Australian audience and, therefore, require classification.

Functions of the Regulator

14.52 The Regulator's functions should be based upon functions that are currently performed by the AGD in administering the classification scheme for publications, films and computer games; and the ACMA, in relation to online and mobile content and broadcast television.

14.53 In addition, while the Classification Board would be retained, some of its present functions, in a new form, would be conducted by the Regulator. These functions include the equivalent of the present powers for the Director of the Classification Board to require content to be submitted for classification—the 'call in' power[46] and to authorise industry assessors and approve training for assessors.[47]

14.54 The Regulator would also have functions necessary for the operation of the scheme, which do not currently have equivalents. These would include functions relating to the enforcement of classification laws that are currently the responsibility of state and territory agencies.[48] The recommended functions of the Regulator are summarised below.

Enforcement of classification laws

14.55 The ALRC recommends that the new Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.[49] The Regulator should generally exercise these powers—just as the ACMA is currently empowered to respond to breaches of the *Broadcasting Services Act*[50]—by taking

---

43 *Broadcasting Services Act 1992* (Cth) sch 7, cl 91(4). See also *Broadcasting Services Act 1992* (Cth) sch 5, cls 68(5), 69(4), 70(8), 71(8); sch 7, cls 92(3), 93(7), 94(7).

44 *Australian Communications and Media Authority Act 2005* (Cth) s 14(1).

45 Ibid s 14(4).

46 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 23(3), 23A(3), 24(3).

47 Ibid pt 2 div 2A.

48 See Ch 16.

49 See Ch 16.

50 Australian Communications and Media Authority, *Guidelines Relating to the ACMA's Enforcement Powers Under the Broadcasting Services Act 1992 (Cth)* (2011) cl 5.2.

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, and the continuing role state and territory law enforcement agencies, is discussed in Chapter 16.

14.56 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.

14.57 The new Classification of Media Content Act should also provide for the issuing by the Regulator of enforcement guidelines[51] and for the administration of a classification decisions database.[52]

Complaint handling

14.58 The Regulator should be empowered to handle and resolve complaints about the operation of the new National Classification Scheme.

14.59 In this context, a distinction needs to be made between complaints about classification decisions, and other complaints about the operation of the scheme. In the case of complaints about classification decisions, complaints should be directed, in the first instance, to the decision-making body or content provider. Additionally, an applicant for classification, the Minister or an aggrieved person may seek review of the classification decision. These processes, and related reforms, are discussed in Chapter 7.

14.60 Under the new scheme complaints may also be made about, for example, non-compliance with obligations to: classify content that should be classified; take reasonable steps to restrict access to adult content; or mark content. Industry codes may deal with a wide range of matters and also become the subject of complaints.

Industry complaint handling

14.61 In the Discussion Paper, the ALRC asked how the complaints handling function of the Regulator should be framed in the new Classification of Media Content Act and, in particular, whether complaints should be able to be made directly to the Regulator (for resolution) where an industry complaints handling scheme exists.[53]

14.62 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.

---

51 See Ch 16.

52 See Ch 7.

53 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 12–1.

14.63 In the Senate Legal and Constitutional Affairs References Committee review of the classification system (the Senate Committee review),[54] suggestions were made that complaints about online content should be able to be made directly to the ACMA. In response, the ACMA 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*. The ACMA also expressed concern about the effect such a change would have on its workload.[55]

14.64 Stakeholders generally agreed that complaints should not generally be made directly to the Regulator where there is an industry complaints-handling mechanism.[56] Foxtel, for example, stated that 'industry complaints-handling results in quicker outcomes for subscribers, and is more efficient for both industry and government'.[57] FamilyVoice Australian observed that there is 'some merit in having complaints submitted first to the media content provider as some complaints may be resolved quickly in this way'.[58]

14.65 In this context, the Internet Industry Association Code of Practice has developed well-established co-regulatory frameworks for dealing with complaints handling, take-down notices, promoting family friendly filters, and implementing restricted access systems for some content services. In doing so, the Code has obviated the need for the ACMA to issue access-prevention notices under sch 5 of the *Broadcasting Services Act*, thereby effectively addressing public concerns about prohibited content at the content service provider level, rather than requiring ongoing ACMA investigations.

14.66 The Interactive Games and Entertainment Association supported the view that 'those responsible for classifying content should be able to initially handle complaints about the classification decision, with the Regulator intervening when necessary', but observed:

> This approach is largely dependent on the ease with which consumers are able to identify the entity who is responsible for classifying the particular content. If there is likely to be any difficulty in identifying responsible entities, it would be ideal to have a classification 'clearing house' to direct concerned consumers to responsible entities.[59]

---

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

55 Australian Communications and Media Authority, *Responses to Questions Taken on Notice*, Senate Legal and Constitutional References Committee Hearing 27 April 2011, 13 May 2011.

56 See, eg, Free TV Australia, *Submission CI 2519*; FamilyVoice Australia, *Submission CI 2509*; Arts Law Centre of Australia, *Submission CI 2490*; Foxtel, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*. In contrast, Collective Shout was critical of existing self-regulatory complaint-handling and submitted that 'the first point of contact for complaints should be a regulatory body with the requisite powers to enforce meaningful penalties for breaches of community standards in a timely manner': Collective Shout, *Submission CI 2477*. See also Australian Council on Children and the Media, *Submission CI 2495*.

57 Foxtel, *Submission CI 2487*.

58 FamilyVoice Australia, *Submission CI 2509*.

59 Interactive Games and Entertainment Association, *Submission CI 2470*.

Regulator coordination role

14.67 The Senate Committee review also 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'.[60]

14.68 Some stakeholders supported the idea that the Regulator should perform a coordination role with respect to complaints.[61] The Classification Board noted the importance of one 'port of call' for all complaints:

> As such, the role of the Regulator as a complaints clearing house that could process complaints expeditiously and refer them correctly, with an accompanying ability to 'triage' complaints according to level of seriousness—such as those about online child sexual abuse material, or those complaints that raise systemic issues concerning the operation of industry classification arrangements—would appear to have merit.[62]

14.69 Similarly, the Motion Picture Distributors Association of Australia recommended that 'for pragmatic reasons' the Regulator should be the 'first point of contact' for complaints about the classification of films, trailers and advertising material for theatrical release.[63] Under the ALRC's recommendations, feature films for cinema release are to be classified by the Classification Board, in which case complaints about these decisions should be directed to the Classification Board initially. In practice, responses might involve advising the complainant about the process for review of classification decisions.

14.70 The ALRC considers that the starting point should be that complaints about matters under the Classification of Media Content should be resolved 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 closely 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 that raise systemic issues.

14.71 However, in some cases, it may be difficult for consumers to know where to complain. While the new scheme will simplify the current framework, there will still be a Regulator, a separately established Classification Board and multiple industry bodies that may handle complaints pursuant to industry classification codes or self-regulatory arrangements, such as those operated by the Australian Association of National Advertisers.

14.72 For this reason it is important that the Regulator be able to act as a first point of contact for complaints, even if most complaints are referred to content providers or industry bodies for resolution. A consumer 'should not be required to have a detailed

---

60 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 29.

61 Motion Picture Distributors Association of Australia, *Submission CI 2513*; J Trevaskis, *Submission CI 2493*; Classification Board, *Submission CI 2485*.

62 Classification Board, *Submission CI 2485*.

63 Motion Picture Distributors Association of Australia, *Submission CI 2513*.

knowledge of the classification system, along with the role of the various bodies involved in classification and their associated responsibilities'.[64]

14.73 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. For example, one stakeholder noted:

> Complaints will be particularly troublesome for overseas online content providers. It is even more unreasonable to expect an ISP to deal with such a complaint but obviously the content provider will not have a complaints-handling scheme in place. It seems likely that the Regulator will remain the destination for such complaints.[65]

Discretion not to investigate

14.74 Another issue related to complaint handling concerns the discretion of the Regulator to decline to investigate complaints. Under schs 5 and 7 of 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.[66]

14.75 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.[67]

14.76 In 2010–11, the ACMA received 4,865 complaints about online content, leading to investigations into 6,587 items of online content, which was a 72% increase in the number of online investigations compared to 2009–10. Of these, 1,957 investigations identified prohibited or potentially prohibited content, or 29.7% of total investigations. In other words, about 70% of the total items investigated were not in breach of the law, which was an increase from 50% of the items in 2009–10.[68]

14.77 In the Discussion Paper, the ALRC asked what discretion the Regulator should have to decline to investigate complaints.[69] A number of stakeholders suggested that such a discretion should be framed broadly.[70] Free TV Australia, for example, submitted that the current rules which apply to the ACMA 'are overly prescriptive and

---

64 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), [12.71].

65 J Trevaskis, *Submission CI 2493*.

66 *Broadcasting Services Act 1992* (Cth) sch 5 cl 26(2)(a); sch 7 cl 43(3)(a). 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: *Broadcasting Services Act 1992* (Cth) sch 5 cl 26(2)(b); sch 7 cl 43(3)(b).

67 Australian Communications and Media Authority, *Responses to Questions Taken on Notice*, Senate Legal and Constitutional References Committee Hearing 27 April 2011, 13 May 2011.

68 Australian Communications and Media Authority, *Annual Report 2010–11*, 112–113.

69 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Question 12–1.

70 Free TV Australia, *Submission CI 2519*; Foxtel, *Submission CI 2487*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

give rise to absurd investigations' because the ACMA is obliged to investigate all complaints:

> If the Regulator has the power to prioritise certain complaints, serious or systemic complaints can be dealt with in a timely manner and frivolous or minor complaints can be declined.[71]

14.78 The discretion of other Australian Government regulators is not similarly constrained.[72] The discretion of the ACMA to decline to investigate complaints under other legislation is also broader than under the *Broadcasting Services Act*. For example, under the *Telecommunications Act 1997* (Cth), the ACMA 'may' investigate complaints about contraventions of the *Do Not Call Register Act 2006* (Cth) and *Spam Act 2003* (Cth). The ACMA's discretion to decline to investigate is unconstrained.[73]

14.79 In the ALRC's view, the Regulator should be granted broad discretion to determine how best to respond to complaints. Given its wide responsibilities and finite resources, it is critical that the 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.

Authorising industry classifiers

14.80 The ALRC recommends that some media content should be able to be classified by authorised industry classifiers.[74] The ALRC recommends that the Regulator have a number of important roles in relation to industry classification, including authorising industry classifiers who have completed training approved by the Regulator.

14.81 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).[75] The ALRC recommends that the 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. 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.

---

71 Free TV Australia, *Submission CI 2519*.

72 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).

73 *Telecommunications Act 1997* (Cth) s 510(1). However, the ACMA must investigate if requested by the Minister: *Telecommunications Act 1997* (Cth) s 510(3).

74 See Ch 7.

75 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) pt 2 div 2A.

14.82 The ALRC also recommends that the Regulator authorise industry-developed classification instruments—such as online, interactive questionnaires—as suitable for use in making classification decisions.[76]

Classification training

14.83 Under existing arrangements, the AGD provides classification training to members of the Classification Board and the Classification Review Board, industry assessors and staff of other government agencies, including the ACMA and Customs.[77]

14.84 Consistency in training is essential for an acceptance by the community of an expanded role for industry classifiers. The ALRC recommends that, under the new scheme, the Regulator should provide classification training. The Regulator should also be empowered to accredit other media content classification professionals or related organisations to deliver training developed and approved by the Regulator, should the need arise. Classification training is discussed in Chapter 7.

Industry classification codes

14.85 The ALRC recommends that the Classification of Media Content Act should provide for the development and operation of industry codes.[78] The Regulator would promote and facilitate industry classification of media content under codes and, in relation to some codes, enforce compliance.

14.86 As discussed in Chapter 13, the Regulator would be responsible for overseeing the development of, and approving, industry codes. The 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—similar to the role currently played by the ACMA in relation to broadcasting and internet codes.

14.87 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.[79]

Liaison

14.88 The 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.[80] The ACMA currently liaises with regulatory and law

---

76 See Ch 7.

77 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.

78 See Ch 13.

79 See Ch 13.

80 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 cl 69.

enforcement bodies overseas with the aim of developing cooperative arrangements for preventing and reporting child abuse material that is online.[81]

Other functions

14.89 The Regulator might have a number of other functions, although these might also be performed by the 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; 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.

Recommendation 14–1 A single agency ('the Regulator') should be responsible for regulation under the Classification of Media Content Act. 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 and providing and approving classification training;

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

(e) liaising with relevant Australian and overseas media content regulators, classification bodies and law enforcement agencies; and

(f) educating the public about the National Classification Scheme.

In addition, the Regulator's functions may include:

(g) providing administrative support to the Classification Board;

81 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.

(h) maintaining a database of classification decisions;

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

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

(k) promoting media literacy and cyber-safety.

Recommendation 14–2 The Classification of Media Content Act should provide the Regulator with broad discretion whether to investigate complaints.

15. Enacting the New Scheme

Contents

Summary 341
The Classification of Media Content Act 341
The classification cooperative scheme 342
State and territory classification powers 342
Commonwealth legislative powers 344
Enacting the new Act 345
Referral of state powers 347
Inconsistency of Commonwealth and state laws 349
Consultation with states and territories 351

Summary

15.1 This chapter discusses the legislative and constitutional basis for the existing Commonwealth, state and territory cooperative scheme for the classification of publications, films and computer games (the classification cooperative scheme) and the *Broadcasting Services Act 1992* (Cth).

15.2 The ALRC recommends that the Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme. This conclusion is dictated by the need for classification law to respond effectively to media convergence and the desirability of consistent classification laws, decision making and enforcement.

15.3 The ALRC concludes that the potential scope of Commonwealth legislative power in this area is broad and likely to be sufficient to legislate all significant aspects of a new National Classification Scheme.

15.4 The ALRC also recommends that the new Act should express an intention that it is to cover the field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*.

The Classification of Media Content Act

15.5 As discussed in Chapter 5, the ALRC recommends that a new National Classification Scheme be enacted to provide consolidated and modernised laws to replace the classification cooperative scheme and the co-regulatory schemes for regulating television, online content and content provided by mobile carriers contained in the *Broadcasting Services Act*.

15.6 As the centrepiece of this framework, the ALRC recommends a Classification of Media Content Act, establishing a new classification scheme applicable to offline and online media content.

15.7 An important part of the rationale for having a new scheme is to avoid inconsistency in the enforcement of classification laws. Chapter 16 discusses enforcement in more detail.

The classification cooperative scheme

15.8 As explained in Chapter 2, the classification cooperative scheme is based on the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*) and complementary state and territory enforcement legislation and is underpinned by the Intergovernmental Agreement on Censorship (the Intergovernmental Agreement).

15.9 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]

15.10 The *Classification Act* itself 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.[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]

State and territory classification powers

15.11 Some states and territories retain powers to classify or reclassify material.[5] Four jurisdictions—Queensland, South Australia, Tasmania and the Northern Territory—have legislated concurrent classification powers.[6]

---

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). A party may withdraw from the agreement by one month's notice in writing: *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(3).

5 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.

6 *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.

15.12 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*.[7] 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.[8]

15.13 Three jurisdictions also reserve the power to reclassify publications, films and computer games already classified by the Classification Board.[9] 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*.[10]

15.14 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'.[11]

15.15 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, breach the Intergovernmental Agreement.[12] 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.[13]

15.16 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

---

7 *Classification of Computer Games and Images Act 1995* (Qld) s 5.

8 Ibid s 4(2). No inconsistency with a law of the Commonwealth arises, in terms of s 109 of the *Constitution* (discussed below), because the Classification Board decision may only have effect in Queensland through the operation of the Queensland Act itself.

9 *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.

10 *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+ classification from the Classification Board: 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.

11 South Australian Classification Council, *Annual Report 2008–09*, 2.

12 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.

13 Ibid, 143.

and the enforcement of classification decisions are to be found in complementary laws of the States and Territories'.[14]

15.17 As discussed in Chapter 16, state and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. Penalties for similar offences also differ.

Commonwealth legislative powers

15.18 A threshold question concerning a National Classification Scheme centred on a Classification of Media Content Act, is the extent to which the Parliament of Australia has legislative power to enact legislation establishing such a framework.

15.19 The Parliament of Australia has power to make classification laws with respect to content:

- 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);[15]
- sold, screened or distributed online or sent through the post—relying on s 51(v) of the *Constitution* (the communications power);[16]
- advocating the doing of a terrorist act—relying on s 51(vi) of the *Constitution* (the defence power);[17]
- sold, screened, provided online or otherwise distributed by foreign or trading corporations—relying on s 51(xx) of the *Constitution* (the 'corporations' power);[18] and
- sold, screened, provided online or otherwise distributed in the territories—relying on s 122 of the *Constitution* (the 'territories' power).[19]

15.20 The external affairs power contained in s 51(xxix) of the *Constitution* may 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*;[20]

---

14 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 3.

15 For example, *Customs Act 1901* (Cth) s 233BAB.

16 This is one constitutional basis for schs 5 and 7 of the *Broadcasting Services Act*.

17 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A.

18 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.

19 This is the constitutional basis of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

20 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), art 19.

- constraints on freedom of expression—recognising Australia's international obligations under the *International Covenant on Civil and Political Rights*;[21] and
- suppression of obscene publications—recognising Australia's international obligations under the *Convention for the Suppression of the Circulation and Traffic in Obscene Publications*.[22]

Enacting the new Act

15.21 In the Discussion Paper, the ALRC proposed that the Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.[23]

15.22 This proposal was widely supported by stakeholders.[24] Telstra, for example, considered that there is 'adequate constitutional power' for the Australian Parliament to enact the Classification of Media Content Act and noted that

> modern media content industries are national and frequently international in nature. Differing state based classification regimes significantly increase regulatory compliance costs for industry with little consumer benefit. In this context, ensuring a consistent and certain national classification regime is important for the success of the Australian classification scheme.[25]

15.23 Similarly, the National Association for the Visual Arts observed:

> It is hard to see how different standards can be justified around a cohesive country with a small population like Australia, especially in the digital age where communication is instantaneous. These differences serve only to cause confusion, especially where state borders are simply lines on maps. This especially is the case where currently some state legislation can be used to override the decisions of the Classification Board …[26]

15.24 Other stakeholders, including the Attorney General of Western Australia and the Victorian Government, expressed opposition to the Australian Government having sole responsibility for classification of media content and favoured the retention of aspects of the classification cooperative scheme.[27]

---

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

22 *Convention for the Suppression of the Circulation and Traffic in Obscene Publications*, 12 September 1923, [1935] ATS 19 (entered into force 7 August 1924) as varied by the *Protocol to amend the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*, 12 November 1947, [1947] ATS 16 (entered into force 12 November 1947).

23 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 13–1.

24 Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*; Foxtel, *Submission CI 2487*; S Ailwood, *Submission CI 2486*; New South Wales Council for Civil Liberties, *Submission CI 2481*; National Association for the Visual Arts, *Submission CI 2471*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.

25 Telstra, *Submission CI 2469*.

26 National Association for the Visual Arts, *Submission CI 2471*.

27 Victorian Government, *Submission CI 2526*; FamilyVoice Australia, *Submission CI 2509*; Collective

15.25 The Victorian Government expressed the view that, rather than the Australian Government 'taking full legislative and enforcement responsibility for content regulation as the solution to the existing challenges to the scheme', reforms to the existing cooperative arrangements could 'ameliorate many of the acknowledged problems' with the efficient operation of the National Classification Scheme.[28]

> For example, problems associated with inconsistency across jurisdictions could be overcome through the creation of model provisions that could be adopted either through an applied laws regime or through mirror legislation. Difficulties associated with media convergence could be offset through more clearly describing and distinguishing the regulatory responsibility of Victoria and the Commonwealth and by ensuring that the regulation of online content is complementary to 'offline' content and applies the same standards … Furthermore, the governance and decision-making processes underpinning the NCS could be revised with a view to enhancing efficiency and cooperation between participating jurisdictions.[29]

15.26 The Attorney General of Western Australia submitted that the classification cooperative scheme, which he considered to operate satisfactorily, 'ought not be replaced by a centralised Commonwealth regime'. Rather, reform of the National Classification Scheme should take place within the framework of a new cooperative scheme.[30]

15.27 Among other things, the Attorney General stated that the challenges of media convergence could be dealt 'legislatively and administratively' within the framework of a cooperative scheme; the need for Commonwealth, state and territory ministers to reach unanimous agreement on amendments to the Classification Code and guidelines 'demonstrates the strength of the cooperative arrangements' and ensures that account is taken of differing views; and inconsistencies in state and territory enforcement legislation are necessary.[31]

15.28 Classification law needs to respond effectively to media convergence and the ensure consistent classification of content, decision making and enforcement. The ALRC recommends that the Classification of Media Content Act be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme.

15.29 A central principle for reform is that, in an environment of converging media, classification regulation should be focused upon content rather than the means of delivery.[32] This suggests that, as far as possible, the same rules should apply to the classification of all classifiable content—offline and online. 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.

Shout, *Submission CI 2450*; Attorney General of Western Australia, *Submission CI 2465*.

28 Victorian Government, *Submission CI 2526*.

29 Ibid.

30 Attorney General of Western Australia, *Submission CI 2465*.

31 Ibid.

32 See Ch 4, Principle 8.

15.30 There are currently several regimes for classification of media content: under the classification cooperative scheme; and co-regulatory schemes for regulating television, online content and content provided by mobile carriers contained in the *Broadcasting Services Act*. The ALRC considers that the framework for any new scheme should unify these laws and amalgamate, as far as possible, the functions of existing agencies and departments responsible for content classification and regulation.

15.31 Given that the Australian Government 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 approach to regulating online content. There was considerable support expressed in submissions for the idea that the Parliament of Australia should enact new national classification laws with this coverage.

15.32 The potential scope of Commonwealth legislative power in this area is broad and likely to be sufficient to legislate for all significant aspects of a new 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.

Referral of state powers

15.33 The Discussion Paper noted that, 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 *Constitution*.[33]

15.34 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.[34] That is, if there are some areas of activity that should be covered by the new scheme, and to which Commonwealth legislative powers may not extend, such a referral of power by the states would be intended to ensure that the legislation is comprehensive in its coverage and not vulnerable to constitutional challenge.

---

33 *Australian Constitution* s 51(xxxvii) 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: *Corporations Act 2001* (Cth) s 3; *Criminal Code* (Cth) s 100.3.

34 See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW) and cognate state and territory legislation; *Corporations Act 2001* (Cth) s 3.

15.35 The Senate Legal and Constitutional Affairs References Committee, in its review of the existing classification scheme in 2011, 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'.[35] However, 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'.[36]

15.36 In the Discussion Paper, the ALRC proposed that state referrals of power should be used in enacting the Classification of Media Content Act.[37] Some stakeholders supported the idea of referral of powers, at least where reform cannot be implemented effectively using Commonwealth legislative powers alone.[38] Free TV Australia, for example, stated that referrals might 'deal with the problematic inconsistencies that currently exist between Commonwealth and State legislation'.[39]

15.37 In the ALRC's view, it is unnecessary for the Australian Government to seek referral of powers because the Commonwealth's legislative powers are sufficient to enact the Classification of Media Content Act.

15.38 In summary, the Australian Parliament has power to enact legislation for the classification of media content and the enforcement of classification decisions where content is being sold, screened, provided online or otherwise distributed:

- using a communication service;
- by a foreign or Australian trading or financial corporation; or
- in a territory.

15.39 Commonwealth legislative power would also reach content:

- imported into, or exported from, Australia, or dealt with in the course of trade and commerce between states, between a state and a territory, or between territories; or
- that may be classified Prohibited because it is obscene or advocates a terrorist act.

15.40 The Discussion Paper noted that it might be 'problematic' to apply Commonwealth classification laws to material sold and distributed only within one

---

35 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), Rec 10.

36 Ibid, Rec 11.

37 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 13–2.

38 Arts Law Centre of Australia, *Submission CI 2490*; Watch On Censorship, *Submission CI 2472*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*; Free TV Australia, *Submission CI 2452*.

39 Free TV Australia, *Submission CI 2452*.

state. However, this limitation in the coverage of a Commonwealth-only scheme would only apply where the activities do not involve:

- a foreign or Australian trading or financial corporation;
- a communications service; or
- content that is Prohibited because it is obscene or advocates terrorism.

15.41 This limitation in the reach of the Classification of Media Content Act does not appear critical to the success of the overall regime, in particular considering the centrality of communications services (that is, the internet and other communications networks) to content provision.

Inconsistency of Commonwealth and state laws

15.42 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 Classification of Media Content Act would rely, questions involving inconsistency of laws may arise.

15.43 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'.

15.44 Schedules 5 and 7 of the *Broadcasting Services Act* expressly provide 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'.[40]

15.45 As state and territory law is not excluded by schs 5 and 7 of the *Broadcasting Services Act*, 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'.[41]

15.46 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*.[42]

15.47 In the Discussion Paper, the ALRC suggested that the Classification of Media Content Act should be drafted so that state legislation allowing for the classification or re-classification of media content under existing concurrent powers would be

40 *Broadcasting Services Act 1992* (Cth) sch 5 cl 90; sch 7 cl 122.

41 Telstra, *Submission CI 1184*.

42 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.

inoperative. However, some stakeholders favoured the retention of these concurrent powers.[43] FamilyVoice, for example, stated that there was:

> A legitimate role for 'competitive federalism' in which an individual state (or territory) may opt for stricter laws in response to perceived community attitudes in that jurisdiction.[44]

15.48 Telstra stated that it welcomed the suggestion that the Classification of Media Content Act should 'cover the field' and noted that 'the absence of such a statement with respect to online content regulation under the *Broadcasting Services Act* is a source of unnecessary regulatory uncertainty for online content providers'.[45]

15.49 In the ALRC's view, the Classification of Media Content Act should be drafted to 'cover the field' in constitutional terms. 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.

15.50 A 'cover the field' provision would need to be drafted carefully to ensure it is not overly broad and is targeted—for example, to cover laws with respect to the 'classification of media content and the enforcement of such classification decisions'.

15.51 There are many state and territory laws which deal with the distribution of content, which it is not intended that the new Act displace. These include criminal laws (other than those contained in state and territory classification enforcement legislation)—for example, those prohibiting the distribution of child pornography.

15.52 A number of complexities will arise in considering the desirable application of a 'cover the field' provision. For example, as discussed in Chapter 16, some state and territory enforcement legislation contains provisions dealing with the regulation of online content, making it an offence to upload certain types of content.

15.53 The *Classification (Publications, Films and Computer Games) (Enforcement Act) 1995* (Vic) provides that a person must not use an 'on-line information service to publish or transmit, or make available for transmission' certain types of material, including 'objectionable material' and 'material unsuitable for minors'.[46] 'Objectionable material' and 'material unsuitable for minors' are defined, only in part, by reference to classification categories.[47]

---

43 FamilyVoice Australia, *Submission CI 2509*; Collective Shout, *Submission CI 2477*; Attorney General of Western Australia, *Submission CI 2465*.

44 FamilyVoice Australia, *Submission CI 2509*.

45 Telstra, *Submission CI 2469*.

46 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 56, 57, 57A, 58.

47 Ibid s 56.

15.54 The Classification of Media Content Act would make it an offence to upload Prohibited content. The extent to which such a provision in Commonwealth legislation would (or should) invalidate the Victorian provision, or similar state or territory offences remains to be resolved.

Consultation with states and territories

15.55 The Victorian Government suggested that, if the Australian Government were to take sole responsibility for classification laws, it should have an obligation to consult with state and territory governments on policy matters of significance to the scheme.

15.56 The Victorian Government advocated legislative requirements for ongoing consultation on, and state and territory government endorsement of, significant policy changes. Significant policy changes were seen to include changes in relation to: classification categories and criteria; restrictions on access to content (for example, display requirements) or related offences and penalties; the use of co-regulatory codes of conduct; and the form of any public consultation in relation to classification matters.[48] The Victorian Government submitted that consultation obligations should be 'entrenched in the governance framework underpinning the content regulation scheme' to ensure consultation 'is meaningful and to allow Victoria to make informed contributions to policy proposals'.[49]

15.57 The fact that, under the ALRC's recommendations, the Australian Government would have sole responsibility for classification laws does not rule out the need for consultation with the states and territories about the operation of these laws.

15.58 However, the ALRC does not consider that specific consultation obligations need to be imposed by legislation. Australian Government policy and practice recognises the importance of consultation with states and territories, including through ministerial councils. The Regulator can also be expected to consult interested stakeholders before making significant regulatory decisions and the *Legislative Instruments Act 2003* (Cth) requires appropriate consultation to be undertaken before a legislative instrument is made, complementing existing Government policy and practice.

15.59 Further, under the Classification of Media Content Act, state or territory governments would continue to be consulted on the membership of the Classification Board,[50] have standing to request reviews of classification decisions made by the Classification Board or industry classifiers, and be involved in the enforcement of classification laws through the activities of state and territory police forces.

---

48 Victorian Government, *Submission CI 2526*.

49 Ibid.

50 As is currently the case under *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 48(3). See Ch 7.

Recommendation 15–1 The Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

Recommendation 15–2 The Classification of Media Content Act should express an intention that it cover the field, so that any state legislation operating in the same field ceases to operate, pursuant to s 109 of the *Constitution*.

16. Enforcing Classification Laws

Contents

Summary 353
Enforcement of classification laws offline and online 354
Enforcement under the classification cooperative scheme 354
State and territory offences 354
State and territory law enforcement agencies 356
The Classification Liaison Service 356
Customs and Border Protection Service 357
Enforcement under the *Broadcasting Services Act* 357
Television content 357
Online content 357
State and territory online content regulation 359
Enforcement problems 359
Classification cooperative scheme 359
Online regulation 360
Enforcement under Commonwealth law 360
Alternative approach 361
Offences and penalties 363
Conducting enforcement activity 367

Summary

16.1 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 the *Broadcasting Services Act 1992* (Cth).

16.2 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.

16.3 An important part of the rationale for replacing the existing National Classification Scheme is to avoid inconsistency in enforcement of classification laws and associated penalties. The ALRC concludes that the Australian Government should be responsible for the enforcement of classification laws and makes recommendations for a regime of offences and penalties.

Enforcement of classification laws offline and online

16.4 The following material describes the offences and penalties relevant to the enforcement of current 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).

16.5 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

16.6 Under the classification cooperative scheme, state and territory enforcement legislation prohibits the sale, distribution and advertising of unclassified material; and restricts the sale, distribution and advertising of classified material in various ways.

16.7 State and territory enforcement legislation also provides that the Director of the Classification Board may require 'submittable 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.

State and territory offences

16.8 State and territory enforcement legislation provides for a range of offences, which vary markedly between jurisdictions. The main types of offence concern:

- selling, screening, distributing or advertising unclassified material;
- failing to comply with restrictions on the sale, distribution and advertising of classified material; and
- failing to comply with call in notices.

Offences in relation to unclassified material

16.9 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:

---

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).

- sell or publicly exhibit an unclassified film;
- sell or deliver a submittable publication; or
- sell or publicly demonstrate an unclassified computer game.[2]

16.10 Similar offences apply in all other state and territory jurisdictions, with minor variations in formulation.[3]

Offences in relation to classified material

16.11 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.

16.12 These differences can be illustrated by reference to X 18+ films. While the sale or public exhibition of X 18+ films is prohibited in all states, the ACT and the Northern Territory permit it,[4] subject to various restrictions. Similarly, while Queensland prohibits the selling, distributing or advertising of Category 1 Restricted and Category 2 Restricted publications,[5] these publications may be sold in all other states and territories.

16.13 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. For example, in 2009, South Australia enacted new laws restricting the display and promotion of R 18+ films. These impose requirements to display material for an R 18+ film in a different area of business premises from material for other films and with a prescribed notice warning that the material may cause offence.[6] These requirements are unique to South Australia.

---

2 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 6, 19, 27.

3 See, eg, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 6, 15, 25, 34.

4 *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.

5 *Classification of Publications Act 1991* (Qld) s 12.

6 *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 40A, inserted by *Classification (Publications, Films and Computer Games) (R 18+ Films) Amendment Act 2009* (SA).

16.14 Penalties for similar offences also 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).[7]

Offences in relation to call in notices

16.15 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;[8]
- unclassified films that are not exempt films; and
- computer games that contain contentious material, and unclassified games that are not exempt.[9]

State and territory law enforcement agencies

16.16 In most jurisdictions, state and territory police are responsible for enforcing classification laws.[10] In the ACT, classification laws are enforced by ACT Policing and by the ACT Office of Regulatory Services.[11]

16.17 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.[12]

The Classification Liaison Service

16.18 The Australian Government provides some assistance in relation to enforcement, through the operation of the Classification Liaison Scheme (CLS). The Attorney-General's Department operates the CLS—a joint Australian Government, state and territory initiative.

---

7 *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), 46A(2), 47(2).

8 See *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5 definition of 'submittable publication'.

9 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 46, 46A, 47.

10 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.

11 Ibid.

12 See, Explanatory Notes State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld).

16.19 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 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.[13]

Customs and Border Protection Service

16.20 As discussed in Chapter 13, 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 *Classification Act* and National Classification Code.

Enforcement under the *Broadcasting Services Act*

Television content

16.21 Under the *Broadcasting Services Act*, commercial television content is regulated under a system of industry-developed codes of practice, which must be approved by the ACMA.[14]

16.22 The ACMA acts as an independent adjudicator where complaints about matters relating to codes of practice—including under codes of practice notified by the Australian Broadcasting Corporation and the Special Broadcasting Service[15]—are not resolved between the complainant and the television station.

16.23 Where ACMA finds a breach of a code of practice, it may take enforcement action by imposing an additional condition on a licence or accepting an enforceable undertaking.[16]

Online content

16.24 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'. Prohibited content and potential prohibited content are defined with reference to the classification categories in the *Classification Act*. The ACMA and content or hosting service providers may apply to the Board for

---

13 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.

14 In addition, licence conditions regulate matters such as tobacco and therapeutic goods advertisements, sponsorship announcements on community television and the broadcast of political matter; and compulsory standards determined by the ACMA regulate Australian content and children's program content.

15 *Australian Broadcasting Corporation Act 1983* (Cth) s 8(e)(i); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(j).

16 *Broadcasting Services Act 1992* (Cth) s 205W.

classification of content.[17] The steps the ACMA may take following an investigation, including the issuing of a take-down notice, are summarised in Chapter 2.

16.25 Schedules 5 and 7 of the *Broadcasting Services Act* provide for a range of offences, punishable by criminal, civil and administrative penalties.

16.26 Schedule 5 contains criminal offences concerning contravention of 'online provider rules',[18] including contravening an industry code or industry standard.[19] 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)[20] for an individual and $27,500 for a body corporate. These are continuing offences, so that a person who contravenes the provisions is guilty of a separate offence in respect of each day during which the contravention continues.[21]

16.27 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.[22] It is a criminal offence to contravene a designated content/hosting service provider rule[23] or a written direction from the ACMA with respect to a contravention of such a rule.[24] 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.

16.28 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.[25] Such penalties must not exceed the maximum penalty that could have been imposed on conviction for the corresponding criminal offence.[26]

16.29 Finally, a range of administrative 'quasi-penalties'[27] 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.[28] In addition, contraventions of

---

17 Ibid sch 7 cl 22.

18 See Ibid sch 5 cls 79, 82, 83.

19 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.

20 *Broadcasting Services Act 1992* (Cth) sch 5 cls 82–83.

21 Ibid sch 5 cl 86.

22 Ibid sch 7 cl 53(6).

23 Ibid sch 7 cl 106.

24 Ibid sch 7 cl 108.

25 Ibid sch 7 cls 107, 108(7)–(8).

26 Ibid s 205F(4).

27 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].

28 *Broadcasting Services Act 1992* (Cth) sch 7 cl 110.

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.[29]

State and territory online content regulation

16.30 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) makes it an offence to 'use an on-line information service to publish or transmit, or make available for transmission' objectionable material, child pornography or 'material unsuitable for minors'—the latter category being defined by reference to classification categories.[30]

16.31 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'.[31]

Enforcement problems

Classification cooperative scheme

16.32 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.[32]

16.33 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.[33]

---

29 Ibid s 98.

30 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 56, 57, 57A, 58.

31 C Penfold, 'Child Pornography Laws: The Luck of the Locale' (2005) 30(3) *Alternative Law Journal* 123, 125.

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

33 Ibid, recs 12, 13, 15–21.

Online regulation

16.34 As discussed in various contexts elsewhere in this Report, 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.

Enforcement under Commonwealth law

16.35 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.

16.36 There are also inconsistencies in the regulation of classifiable content between the classification cooperative scheme and schs 5 and 7 of the *Broadcasting Services Act*. For example, content classified X 18+ is prohibited content under the *Broadcasting Services Act*, but may be sold as a DVD or magazine in some Australian jurisdictions.

16.37 In response to the Issues Paper, many stakeholders emphasised the importance of consistency in the enforcement of classification laws, including in relation to international standards. Lack of consistency was identified as causing a number of problems, including higher compliance costs for media content publishers and distributors.[34]

16.38 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. For example, the Attorney General of Western Australia stated that inconsistent laws may be necessary because 'local communities and States may, for very good reasons, have differing views on what classification levels ought to apply'—as is the case with X 18+ films.[35]

16.39 In contrast, the Victorian Government referred to the 'diminishing relevance of State and Territory borders in an era of national distribution' and to the proliferation of

---

34 See Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), [14.37].

35 For example, Attorney General of Western Australia, *Submission CI 2465*. The extent to which community standards relevant to classification may differ between states and territories is a matter that might be tested by research.

online content as making such inconsistencies harder to justify.[36] Arguably, in 'today's digital media landscape, the concept of state boundaries is no longer applicable'.[37]

16.40 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"'.[38]

16.41 There was broad support from stakeholders, in responses to the Discussion Paper,[39] for classification laws to be enforced under Commonwealth, rather than state and territory, law.[40] The New South Wales Council for Civil Liberties, for example, noted that it is 'unsatisfactory that activities that are acceptable in one state or territory are illegal in another'.[41] Free TV Australia reinforced that

> any enforcement provisions should be set out in Commonwealth legislation. A single set of central and uniform laws more appropriately deals with the realities of the content distribution environment and will eliminate inconsistencies that currently exist.[42]

16.42 The ALRC recommends that the Classification of Media Content Act provide for enforcement of classification laws under Commonwealth law. The Act should require media content providers to have certain content classified—whether by the 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. The Classification of Media Content Act should also provide for restrictions on access to content, and on the sale, screening, provision online or other distribution of content.

Alternative approach

16.43 Under the ALRC's recommendations, existing inconsistencies in state and territory legislation concerning restrictions on the sale, distribution or advertising of classifiable publications, films and computer games would be resolved in the Classification of Media Content Act—for example, in relation to the sale and distribution of X 18+ films and DVDs.

16.44 The Discussion Paper noted that, for political or pragmatic reasons, the Australian Government may consider that the states and territories should retain some enforcement powers. While it did not consider this desirable, the ALRC proposed that, if this were the case, a new intergovernmental agreement should be entered into under

---

36 Victorian Government, *Submission CI 2526*.
37 SBS, *Submission CI 1833*.
38 Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), 175.
39 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 14–1.
40 ACP Magazines, *Submission CI 2520*; Free TV Australia, *Submission CI 2519*; Arts Law Centre of Australia, *Submission CI 2490*; New South Wales Council for Civil Liberties, *Submission CI 2481*; Interactive Games and Entertainment Association, *Submission CI 2470*; Telstra, *Submission CI 2469*.
41 New South Wales Council for Civil Liberties, *Submission CI 2481*.
42 Free TV Australia, *Submission CI 2519*.

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 only.[43]

16.45 Under such an agreement, Commonwealth, state and territory ministers would agree on the best approach to classification-related offences and penalties and to apply, or enact, uniform provisions. Without further agreement between the Commonwealth, states and territories, leaving enforcement to the states and territories would be likely to result in a new scheme with similar inconsistencies to those that exist at present.

16.46 The existing classification cooperative scheme has been criticised,[44] 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;[45] and the intergovernmental agreement under which the scheme is established and maintained may be amended only by unanimous agreement.[46]

16.47 The need for unanimity has been criticised[47] 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.[48]

16.48 Two main approaches to implementing a new Commonwealth, state and territory classification cooperative scheme appear available. 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.[49] 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.[50]

16.49 A number of stakeholders supported continued state and territory responsibility for enforcement laws under a new intergovernmental agreement.[51] The Attorney General of Western Australia submitted that the ALRC should more clearly set out the

---

43 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 14–2.

44 I Graham, *Submission CI 1244*; MLCS Management, *Submission CI 1241*.

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

46 *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).

47 I Graham, *Submission CI 1244*. 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*.

48 I Graham, *Submission CI 1244*.

49 A recent example of such a scheme is the Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth).

50 The uniform Evidence Acts are an example of mirror legislation, although the original Acts have diverged somewhat over time.

51 Victorian Government, *Submission CI 2526*; Motion Picture Distributors Association of Australia, *Submission CI 2513*; FamilyVoice Australia, *Submission CI 2509*; Collective Shout, *Submission CI 2477*; Attorney General of Western Australia, *Submission CI 2465*.

'federal cooperative alternative to a centralised classification scheme'.[52] The Victorian Government considered that alternatives to sole Commonwealth responsibility including model legislation or an applied law regime should be 'discussed by all jurisdictions at an appropriate time, and the merits of such alternatives thoroughly tested'.[53] John Dickie suggested that further consideration be given to a 'possible supervisory federal structure' incorporating the ALRC's other reforms, to act as a 'fallback' position in the event states and territories retain enforcement powers.[54]

Offences and penalties

16.50 If, as is recommended, the 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.

16.51 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.[55]

16.52 One starting point for framing new offence and penalty provisions might be those set out in 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.[56]

16.53 Existing state and territory provisions are also starting points for the framing of new offences and penalties. Some states, for example, have enacted infringement notice schemes applicable to minor breaches of classification laws.

16.54 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.[57] 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

52 Attorney General of Western Australia, *Submission CI 2465*.
53 Victorian Government, *Submission CI 2526*.
54 J Dickie, *Submission CI 2457*.
55 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007).
56 See Ch 1.
57 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

maximum fine.[58] 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.[59]

16.55 In the Discussion Paper, the ALRC proposed that the Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with restrictions on the sale, screening, distribution and advertising of classified material; statutory obligations to classify media content or to restrict access to media content; provisions of industry codes or directions of the Regulator.[60]

16.56 The ALRC also proposed that breaches of the new Act should be subject to criminal, civil and administrative penalties similar to those under the *Broadcasting Services Act*;[61] and the Australian Government should consider whether the Act should provide for an infringement notice scheme in relation to more minor breaches of classification laws.[62]

16.57 Stakeholders provided a range of comments about how enforcement provisions should operate in relation to classification laws. Free TV Australia, for example, stated that criminal offences for breach of the Act should be 'reserved for acts that are particularly serious or likely to cause significant harm to the community' and that the 'compliance and enforcement regime is proportionate, and framed to punish the most damaging breaches'. In particular, offences should apply only to:

> failure to comply with a statutory obligation to classify content … where that content is likely to be rated R 18+ or above. It should not apply in cases where the 'must classify' rule may be arguable—for example, in relation to a current affairs program on commercial free-to-air television, where there is some dispute over whether the content satisfies the description of 'current affairs'. Limiting the offence provision to instances where exposure to the content may cause harm to minors is supported by the underlying rationale of the classification regime, and means that the consequences will be commensurate with the breach.[63]

16.58 Another stakeholder commented in similar terms that:

> it is not appropriate to punish people, especially individuals engaging in non-commercial publication, for an inability to accurately predict the decisions of the Classification Board. No offences should apply to people who publish unclassified content in an honest belief that it was not likely to be classified in such a way as to make their action illegal, even if their belief would not be regarded as reasonable by a

---

58 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).

59 *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 24A(4). NSW and Western Australia have enacted similar schemes. The ALRC understands in none of these jurisdictions have infringement notices actually been issued in relation to classification matters.

60 Australian Law Reform Commission, *National Classification Scheme Review*, ALRC Discussion Paper 77 (2011), Proposal 14–3.

61 Ibid, Proposal 14–4.

62 Ibid, Proposal 14–5.

63 Free TV Australia, *Submission CI 2519*.

> person with a full knowledge of the classification criteria and the tendencies of the Classification Board (although higher-level RC content may be an exception).[64]

16.59 Stakeholders also emphasised the need for offences and penalties to provide a proportionate response to non-compliance with classification-related obligations. The Australian Home Entertainment Distributors Association stated that 'the sanctions regime should involve graduated response mechanisms starting with educational notices, escalate to warnings and then finally some sort of sanction'.[65] Free TV Australia also submitted that 'a range of graduated enforcement actions' should be available to the Regulator, including:

- acceptance of a voluntary undertaking, for example, in relation to training or quality assurance;
- acceptance of an enforceable undertaking;
- in the event of a repeated failure to comply with a Code, the imposition of a Standard or Rule; and
- in the case of repeated egregious breaches, the issue of an infringement notice.[66]

16.60 Other stakeholders expressed concerns about the idea of basing offence and penalty provisions on those of the *Broadcasting Services Act*.[67] Irene Graham noted that offences under sch 7 of the *Broadcasting Services Act* apply to generally commercial 'designated content/hosting service providers' and involve significant monetary penalties, and may not be a suitable model for provisions applicable to non-commercial content providers who are covered by the Classification of Media Content Act.

> The types of offences in sch 7 of BSA are, in the writer's opinion, totally unsuitable for application to many types of online content providers, and some offline providers under ALRC proposals, as are offences in States' Classification Enforcement Acts.[68]

16.61 Amy Hightower also noted that a clear distinction should be drawn between commercial operators, non-commercial operators and individuals for the purposes of any form of enforcement.[69]

16.62 Other stakeholders also made specific comments on offences and penalties. For example, Free TV Australia expressed particular concern that simple failure to comply with an industry code should not be an offence, given the wide range of obligations that may be imposed by codes.[70]

16.63 The Interactive Games and Entertainment Association stated that it generally supported an infringement notice scheme for more minor breaches of the new Act,

---

64 Lin, *Submission CI 2476*.
65 Australian Home Entertainment Distribution Association, *Submission CI 2478*.
66 Free TV Australia, *Submission CI 2519*.
67 I Graham, *Submission CI 2507*; A Hightower, *Submission CI 2511*.
68 I Graham, *Submission CI 2507*.
69 A Hightower, *Submission CI 2511*.
70 Free TV Australia, *Submission CI 2519*.

provided these were clearly identified.[71] FamilyVoice commented that while infringement notice schemes can be an appropriate means of dealing with minor breaches, they 'are counterproductive if the scheme reduces the penalty to such insignificance that its imposition fails to provide any deterrent to the committing of the offence or breach'.[72] Another stakeholder noted that infringement notice schemes 'are problematic in principle because they impose costs and risks on people who exercise their right to defend themselves in court'.[73]

Drafting offence and penalty provisions

16.64 The Discussion Paper proposed that the penalty regime provided by sch 7 of the *Broadcasting Services Act* apply to offences under the Classification of Media Content Act. However, this was only intended to indicate that a modern, flexible regime of penalties would be required—one that provides for criminal, civil and administrative penalties. The *Broadcasting Services Act* serves as one sensible starting point in this regard.

16.65 In addition, it may be desirable to implement an infringement notice scheme for minor offences. 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'.[74]

16.66 The ALRC has not chosen to develop detailed recommendations on how the offence and penalty provisions in the Classification of Media Content Act should be drafted. This would require offence-specific consideration of different options for imposing liability, the relevant physical and fault elements of offences, penalty benchmarks, extraterritorial application and other matters which are beyond the present capacity of the Inquiry to resolve. Furthermore, the appropriate framing of offences and penalties is dependent on the eventual framing of classification-related obligations under the new Act.

16.67 The ALRC recommends simply that the Classification of Media Content Act provide a flexible range of compliance and enforcement mechanisms. These should allow the Regulator, depending on the circumstances, to issue notices to comply with provisions of the Act, industry codes or standards; accept enforceable undertakings; pursue civil penalty orders; refer matters for criminal prosecution; and issue infringement notices.

16.68 The Act should provide for the imposition, depending on the circumstances, of criminal, civil and administrative penalties in relation to failing to comply with notices of the Regulator; an industry code or standard; restrictions on the sale, screening,

---

71 Interactive Games and Entertainment Association, *Submission CI 2470*.
72 FamilyVoice Australia, *Submission CI 2509*.
73 Lin, *Submission CI 2476*.
74 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

distribution and advertising of media content; statutory obligations to restrict access to media content; and statutory obligations to classify and mark media content.

16.69 For example, the Classification of Media Content Act might provide for:

- A criminal offence applicable to intentionally making content available to the public, knowing or being reckless as to whether the content is, or would be, Prohibited content.
- A criminal offence and civil penalty applicable to failing to comply with notices from the Regulator ordering that reasonable steps be taken to restrict access to R 18+ or X 18+ content.
- Infringement notices to be issued by the Regulator—providing an alternative to prosecution for minor offences or civil litigation—for example, in relation to failing to properly mark content or comply with any restrictions on the display of content.
- Administrative action by the Regulator to remove the authorisation of an industry classifier.

16.70 Other chapters provide more discussion of how some of the classification-related obligations provided by the Classification of Media Content Act may be enforced by the Regulator.

Conducting enforcement activity

16.71 As discussed in Chapter 14, the Regulator would be responsible for most regulatory activities related to the classification of media content—both offline and online—and including encouraging, monitoring and enforcing compliance with classification laws.

16.72 The Regulator would initiate criminal prosecutions through the Office of the Commonwealth Director of Public Prosecutions (CDPP),[75] bring civil proceedings and take administrative actions, such as withdrawing authorisation of an industry classifier. The Regulator might be empowered to prosecute some more minor offences and could, for example, issue infringement notices, if such a scheme were implemented.

16.73 The ALRC recommends that the Regulator issue enforcement guidelines explaining the factors it will take into account and the principles it will apply in exercising its enforcement powers. By analogy, in exercising its enforcement powers, the ACMA must have regard to enforcement guidelines formulated under a provision of the *Broadcasting Services Act*.[76] These provide, among other things, for a 'graduated approach' so that enforcement is 'commensurate with the seriousness of the

75 The CDPP is responsible for the majority of prosecutions under Commonwealth criminal law—although some regulators such as the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission, have power to prosecute some offences.

76 *Broadcasting Services Act 1992* (Cth) s 215.

breach concerned'.[77] The enforcement guidelines state that the ACMA will use its 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'.[78]

16.74 In relation to classification-related enforcement activity, enforcement guidelines should explain the range of factors the Regulator will take into account in deciding whether to take action with respect to particular items of media content.

16.75 The ALRC would expect these factors to include, for example, the likely size and age of the Australian audience; whether the content has been the subject of complaints, and if so, the number of complaints; the likely classification of the content; any relevant international classification decision; and whether issuing a notice is likely to have any practical effect.

16.76 The size and age of the Australian audience is clearly relevant to determining whether, for example, film and television content has a significant Australian audience and classification requirements should be enforced. However, it may also be relevant to prioritising enforcement action in other contexts in that the Regulator may be expected to focus on content most likely to be viewed by an Australian audience.

16.77 While the Regulator should have discretion not to investigate complaints, the number of non-frivolous complaints received about a particular item of content may be relevant to decisions about whether or not to pursue enforcement action.

16.78 The Regulator's attention may be expected to be focused more on Prohibited content rather than content at low classification levels. The equivalence of international classification decisions may also be relevant to decisions about whether to enforce Australian classification requirements on international content, as will limitations on the effective enforcement of Australian law on overseas entities.

16.79 Other bodies may also be involved in enforcing classification laws under the Classification of Media Content Act. For example, the AFP might undertake the investigation of serious criminal offences, such as providing content that would be classified as Prohibited over the internet on a commercial basis.

16.80 In addition, there is no reason why state and territory law enforcement agencies should not also be involved in the enforcement of criminal offences under the Classification of Media Content Act. 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.[79]

---

77 Australian Communications and Media Authority, *Guidelines Relating to the ACMA's Enforcement Powers Under the Broadcasting Services Act 1992 (Cth)* (2011), [3.3].

78 Ibid, [3.3], [3.4].

79 See, for example, *Crimes Act 1914* (Cth) pt 1AA, div 4 (powers of arrest) and pt IE (forfeiture of child pornography material).

State and territory authorities may also institute proceedings for any Commonwealth offence in state and territory courts.[80]

16.81 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.

Recommendation 16–1 The Classification of Media Content Act should provide for enforcement of classification laws under Commonwealth law.

Recommendation 16–2 The Classification of Media Content Act should provide a flexible range of compliance and enforcement mechanisms allowing the Regulator, depending on the circumstances, to:

(a) issue notices to comply with provisions of the Act, industry codes or standards;

(b) accept enforceable undertakings;

(c) pursue civil penalty orders;

(d) refer matters for criminal prosecution; and

(e) issue infringement notices.

Recommendation 16–3 The Classification of Media Content Act should provide for the imposition of criminal, civil and administrative penalties in relation to failing to comply with:

(a) notices of the Regulator;

(b) an industry code or standard;

(c) restrictions on the sale, screening, online provision and distribution of media content;

(d) statutory obligations to restrict access to media content; and

(e) statutory obligations to classify and mark media content.

Recommendation 16–4 The Classification of Media Content Act should require the Regulator to issue enforcement guidelines outlining the factors it will take into account and the principles it will apply in exercising its enforcement powers.

---

80 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]. In an analogous area of content regulation, state police and public prosecutors are involved in copyright and trade marks prosecutions under Commonwealth intellectual property legislation: M Speck and G Urbas, 'Criminal Infringement of Intellectual Property Rights in Australia: Assessing Recent Reforms' (Paper presented at Australian Copyright Council Copyright Symposium, Sydney, 13 October 2011).

Appendix 1. Agencies, Organisations and Individuals Consulted

Name	***Location***
Mark Armstrong, Executive Director, Network Insight	Sydney, June 2011
Michael Atkins, Sony Pictures; Lori Flekser, Motion Pictures Distributors Association of Australia	Sydney, October 2011
Robyn Ayres, Executive Director; Jo Teng, Solicitor, Arts Law Centre of Australia	Sydney, July 2011
Chris Berg, Research Fellow, Institute of Public Affairs	Melbourne, October 2011
Barbara Biggins, President, Young Media Australia; Professor Elizabeth Handsley, President, Australian Council on Children and the Media	Adelaide, July 2011
Glen Boreham; Malcolm Long; Louise McElvogue, Convergence Review Committee	Sydney, May 2011
Lisa Brown, Policy Manager, Australian Mobile Telecommunications Association	Sydney, June 2011
Petra Buchanan, Chief Executive Officer; Simon Curtis, Policy and Regulatory Affairs Manager, Australian Subscription Television and Radio Association	Sydney, June 2011
Associate Professor Jane Burns, Chief Executive Officer, Young and Well Co-operative Research Centre; Dr. Judith Slocombe, Chief Executive Officer, The Allannah and Madeline Foundation	Sydney, June 2011
Associate Professor Jane Burns, Chief Executive Officer, Young and Well Co-operative Research Centre; Jonathan Brown, SYN Media; Professor Mary Katsikidis, Professor of Psychology, University of the Sunshine Coast; Salote Mafi, Researcher, Kids Help Line; Megan Scannell, Office of Child Safety Commissioner, Government of Victoria; Andrew Cummings, Executive Director, Australian Youth Affairs Coalition	Melbourne, October 2011

Name	***Location***
Simon Bush, Chief Executive Officer, Australian Home Entertainment Distributors Association	Canberra, June and October 2011
Simon Cordina, Assistant Secretary, Cyber-Safety and Trade; Tim Edwards, Director, Online Content; Steph Mellor, Assistant Director, Online Content, Department of Broadband, Communications and the Digital Economy	Canberra, June 2011
Ron Curry, Chief Executive Officer, Interactive Games and Entertainment Association; Joshua Cavalleri, Tress Cox Lawyers, Policy Adviser to Interactive Games and Entertainment Association	Sydney, June and October 2011
Dr Terry Cutler, Executive Director, Cutler & Co	Melbourne, July 2011
John Dickie, John Dickie Communications (former Head of Office of Film and Literature Classification)	Sydney, August 2011
Associate Professor Catherine Driscoll, School of Philosophical and Historical Studies, University of Sydney	Sydney, January 2012
Tim Edwards, Director, Online Content Section; Steph Mellor, Assistant Director, Online Content Section; Jared Henry, Manager, Broadcasting Content Section, Department of Broadband, Communications and the Digital Economy	Canberra, November 2011 (tele)
Patrick Fair, Partner, Baker & McKenzie (representing Internet Industry Association)	Sydney, June and November 2011
Iarla Flynn; Ishtar Vij, Public Policy and Government Affairs, Google Australia and New Zealand	Sydney, June 2011
Iarla Flynn, Public Policy and Government Affairs, Google Australia and New Zealand	Sydney, December 2011
Julie Flynn, Chief Executive Officer, Free TV Australia; Holly Brimble, Director of Legal and Broadcasting Policy, Free TV	Sydney,

Name	***Location***
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	June 2011
Julie Flynn, Chief Executive Officer, Free TV Australia; Holly Brimble, Director of Legal and Broadcasting Policy, Free TV Australia; Clare O'Neill, Free TV Australia; Nick O'Donnell, Legal Counsel, Regulatory & Business Affairs, Seven Network; Scott Briggs, Director, Corporate & Regulatory Affairs, Nine Entertainment Co; Adrian Carnelutti, Channel Seven; Sally Stockbridge, Channel Ten; Richard Lyle, Channel Nine	Sydney, November 2011
Professor Michael Fraser, Director, Communications Law Centre	Sydney, November 2011
Mia Garlick, Communications and Public Policy Australia and New Zealand, Facebook	Sydney, October 2011
Professor Lelia Green, Edith Cowan University, WA	Brisbane, July 2011
Amy Hightower	Perth, December 2011 (tele)
Peter Holder, Editor and Publisher, Men's Lifestyle Magazines; Adrian Goss, Corporate Counsel; Scott Briggs, Director, Regulatory and Corporate Affairs, ACP Magazines Ltd	Sydney, November 2011
Fiona Jolly, Chief Executive Officer, Advertising Standards Bureau	Canberra, October 2011
Mr Aubeck Kam, Chief Executive Officer; Ms Toh Kai Ling, Director, Policy; Ms Chang Sook Fen, Assistant Director (Media Policy); Mr Twang Geng Chong, Executive (Media Policy), Singapore Media Development Authority	Sydney, November 2011
Lee Kim Keat, Malaysian Law Reform Committee; Albert Kok, Deputy Minister, Prime Minister's Department, Malaysian Government; Datuk Liew Vui Keong, Deputy Minister, Prime Minister's Department, Malaysian Government; Hamidun Datuk HJ	Sydney, December 2011

Name	***Location***
Abdul Fatah, Attorney General's Chambers, Malaysia; Datuk Lim Ming Hoo, Parliament of Malaysia; Ira Biswas, Partner, Chooi and Co. Advocates and Solicitors	
Peter Leonard, Partner, Gilbert + Tobin Lawyers	Sydney, August 2011
Fr Richard Leonard, Director, Australian Catholic Office for Film and Broadcasting, Australian Catholic Bishops' Conference	Sydney, July 2011
Simon Little, Managing Director, Pan European Games Initiative (PEGI)	Brussels, November 2011 (tele)
Malcolm Long; Louise McElvogue, Convergence Review Committee	Sydney, November 2011
Lauren Loz, Asia Pacific Google Policy Fellow	Sydney, October 2011
Professor Catharine Lumby; Associate Professor Kate Crawford, Journalism and Media Research Centre, University of New South Wales	Sydney, July 2011
Sue McCreadie, Senior Manager, Film and Creative Industries, Department of Trade and Investment, Regional Infrastructure and Services, NSW Government	Sydney, August 2011
Donald McDonald AC, Director; Lesley O'Brien, Deputy Director; Greg Scott, Senior Classifier, Classification Board	Sydney, May 2011
Geoff McDonald, First Assistant Secretary, National Security Law and Policy Division; Annette Willing, Assistant Secretary, Security Law Branch; Matt Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department	Canberra, June 2011
Professor Alan McKee, Film and Television, Creative Industries Faculty, Queensland University of Technology	Brisbane, July 2011
Bruce Meagher, Director of Strategy and Communications; Therese Iverach; Laurence O'Neill, Classifications Manager, Special Broadcasting Service; David Sutton, Head of Corporate Affairs;	Sydney, November 2011

Name	***Location***
Michael Brearly, Head of Strategy and Governance; Kylie Burke, Manager of Editorial Policies; Rachel Williams, Network Classifier; Sarah Harmelink, Policy Researcher, Australian Broadcasting Corporation (joint SBS/ABC consultation)	
Matt Minogue, First Assistant Secretary, Civil Law Division; Chris Collett, Acting Assistant Secretary, Classification Branch; Wendy Banfield, Principal Legal Officer, Classification Branch; Isabella Cosenza, Principal Legal Officer, Classification Branch, Attorney-General's Department	Sydney, May 2011
Matt Minogue, First Assistant Secretary, Civil Law Division; Jane Fitzgerald, Assistant Secretary, Classification Branch; Wendy Banfield, Principal Legal Officer, Classification Branch, Attorney-General's Department	Sydney, June 2011
Matt Minogue, First Assistant Secretary, Civil Law Division; Jane Fitzgerald, Assistant Secretary, Classification Branch, Attorney-General's Department	Sydney, October 2011
Dr Lyria Bennett Moses, Senior Lecturer, Faculty of Law, University of New South Wales	Sydney, June 2011
Susan Moylan-Coombes, National Indigenous Television	Sydney, November 2011
Rob Nicholls, General Manager, Convergence and Mobility Branch, Communications Group; Tara Morice, Director, Mobiles and Spectrum, Australian Competition and Consumer Commission	Sydney, October 2011
Elise Parham, Advisor, Office of the Attorney-General, Government of Victoria; Tilda Hum, Legal Policy Officer, Civil Law Policy, Department of Justice, Victoria	Melbourne, October 2011
Fiona Patten, Chief Executive Officer, EROS Association; Robbie Swan, Executive Officer, EROS Association; David Haines, Non-Executive Chairman, Mobile Active	Canberra, June 2011
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; Michael Selwyn, Managing Director, Paramount Pictures Australia	Sydney, June 2011

Name	***Location***
Paul Puech, Sales and Marketing Manager, Gameloft	Sydney, October 2011
Dr Jason Potts, Department of Economics, University of Queensland	Sydney, November 2011
Victoria Rubensohn, Chair, Classification Review Board	Sydney, May 2011
Jonquil Ritter, Executive Manager, Citizen and Community Branch; Jeremy Fenton, Manager, Content Classification Section, Australian Communications and Media Authority	Sydney, May 2011
Jonquil Ritter, Executive Manager, Citizen and Community Branch; Jeremy Fenton, Manager, Content Classification Section; Lesley Osborne; Dean Martin; Dominic Byrne; Jaclyn Smith, Australian Communications and Media Authority	Sydney, November 2011
Dr Andy Ruddock, Department of English, Communication and Performance Studies, Monash University	Boston, May 2011
Lyle Shelton, Chief of Staff; Ben Williams, Deputy Chief of Staff, Australian Christian Lobby	Canberra, June 2011
Gary Smith, General Manager of Regulatory Compliance and Self Regulation, Optus	Melbourne, June 2011
Dr Sally Stockbridge, Network Classifications Manager, Network Ten	Sydney, May 2011
Dr David Sutton, Head of Corporate Strategy & Governance; Michael Brealey, Head of Strategy & Governance, Australian Broadcasting Corporation	Sydney, July 2011
Tim Seirlis, Classification Training Officer, Attorney-General's Department	Sydney, July 2011
Professor Stephen Towers, Dean of Studies, Queensland University of Technology	Brisbane, September 2011 (tele)

Name	***Location***
Dr Gregor Urbas; Mr Tristan Kelly, School of Law, Australian National University	Canberra, October 2011
Patricia Vance, President, Entertainment Software Review Board	New York, November 2011 (tele)
Adrienne Vanek, Head of Government Affairs, Apple, Asia-Pacific Region; Feyi Akindoyeni, Partner, Kreab Gavin Anderson	Sydney, October 2011
Tim Watts, Regulatory Manager, Regulatory Affairs, Strategy and Corporate Services; Kate Jones, Supervising Counsel, Telstra	Melbourne, June 2011
Marcus Westbury, Director of International Symposium on Electronic Art (ISEA) 2013	Beijing, May 2011
Professor Mark Western, Director, Institute for Social Science Research (ISSR), University of Queensland; Associate Professor Michele Haynes, Head of Research Methods and Social Statistics, ISSR; Sue McKell, Manager, Innovation and Commercial Development, UniQuest Pty Ltd	Brisbane, December 2011
Dr. Mark Zirnzak, Director, Justice and International Mission Unit; Cath James, Social Justice Policy Officer, Uniting Church in Australia, Synod of Victoria and Tasmania	Melbourne, October 2011

Appendix 2. Key Obligations Under the New Scheme

The key statutory obligations	Who must comply
1. The classification obligation: To classify and mark the following content: • feature films; • television programs; and • computer games likely to be MA 15+ or higher. However, this content must only be classified if it is both: • made and distributed on a commercial basis; and • likely to have a significant Australian audience.	**Content providers**, such as film and computer game distributors, broadcasters, cinemas, retailers, and online content platforms. This obligation only applies to commercial content. For some, complying will mean not distributing content unless someone else (eg, a distributor) has had it classified.
2. The restrict access obligation: To take reasonable steps to restrict access to 'adult content'—ie, content that has been, or is likely to be, classified R 18+ or X 18+. These reasonable steps will vary, depending on the content and the content provider. For some, it might mean trying to verify the age of customers. For others, it might mean promoting parental locks and internet filters. This obligation does not require content providers to classify their content.	**Content providers** (see above), and particularly retailers, publishers and distributors of adult films and magazines, and online content platforms that provide adult content. This obligation applies to both commercial and non-commercial content, but more would be expected of commercial content providers.
3. The Prohibited content obligation: Not to distribute Prohibited content—ie, content that has been, or is likely to be, classified Prohibited. This will involve identifying, or taking reasonable steps to identify, Prohibited content, and responding to notices from the Regulator.	**Content providers** (see above), and **internet intermediaries**, such as application service providers, host providers and internet access providers.

Appendix 3. International Comparison of Classification and Content Regulation

Contents

Introduction 381
Summary of trends 381
The United States 383
The United Kingdom 385
Canada 387
New Zealand 389
Singapore 391
Table: International comparison of film classifications 393

Introduction

As part of this Inquiry, the ALRC has explored the operation of classification schemes and media content regulation in other jurisdictions. This appendix provides a summary of trends in classification and content regulation including an overview of the key elements of content classification in the United States (US), United Kingdom (UK), Canada, New Zealand (NZ), and Singapore. To illustrate, this appendix includes an international comparison of film classifications in table form.

Summary of trends

Examination of content regulation in the US, UK, Canada, NZ, and Singapore reveals a number of trends that have informed the ALRC's considerations in reviewing the National Classification Scheme. International jurisdictions were selected for analysis based on similarities to Australia in their socio-political structure, legal system, and level of economic development.

In each country surveyed, industry participation is a feature of media content regulation. Even where film and video classification is not mandated, industry agreement driven by consumer pressure has spawned widespread use of classification systems.

Film and DVD classification in the US and UK is handled exclusively by independent organisations originally established by the film industry. A similar scheme is employed in Canada, where an organisation established by the film industry is responsible for aggregating the classifications assigned by the Provincial Classification Boards to provide a uniform classification scheme. Though content classification is largely handled by government bodies in NZ and Singapore, there has been a shift towards industry co-regulation in Singapore.

While there is some variation in the legal force given to the regulation of computer games, classification is self-regulated by industry in key games markets:

- the US and numerous Canadian provinces utilise a voluntary classification scheme run by the Electronic Software Ratings Board (ESRB), an independent body established under the auspices of industry;
- the UK recently announced that all computer games sold in the UK would be classified by the Pan European Games Information (PEGI) system, an independent body responsible for computer games classification throughout Europe; and
- though NZ law only requires that certain restricted level games be classified and marked with NZ labels, other games are generally marketed with overseas classification labels including Australian markings.

Use of a 'watershed' in order to limit the broadcast of adult content during hours children are likely to be watching is common to all countries surveyed. Many regulatory schemes distinguish between free-to-air and subscription or on-demand services, with more stringent regulation applying to free-to-air television while subscription and video-on-demand enjoy fewer restrictions. A similar distinction is commonly made between linear and non-linear content. Internet Protocol television (IPTV) is regulated in each of the countries surveyed except for the United States; however, regulatory approaches to IPTV vary widely.

Classification of pornography varies across the countries surveyed, ranging from an outright ban on pornography in Singapore to a lack of any classification requirements in the US. In the UK, NZ, and several Canadian provinces, pornographic films and DVDs are required to be classified while internet content and pornographic publications are not. Even though classification is not required by US law, many producers voluntarily affix the adult-content label 'X' to pornographic films. All countries restrict the sale of pornography to those below a certain age, typically eighteen. In addition to laws concerning child pornography, laws commonly outlaw certain forms of 'extreme pornography' such as depictions of rape, necrophilia, and bestiality.

With the exception of content deemed 'obscene', such as child pornography, which is strictly forbidden, the regulatory schemes surveyed share a common lack of classification of internet content. However, internet activity in each country is still subject to criminal laws and content is monitored by law enforcement. Self-regulatory agreements such as Internet Codes of Practices adopted by Internet Service Providers (ISPs), often in conjunction with initiatives such as the Internet Watch Foundation's worldwide list of child sexual abuse content, are commonly deployed to combat child pornography. In addition, there is a rise in the use of internet filters by schools, libraries, and parents in order to protect minors from objectionable content.

The United States

Overview

There is very little government regulation of media content in the US. Classification of content is generally performed by industry on a voluntary basis. This is largely due to the freedom of speech protections found in the First Amendment to the *United States Constitution*. Various legislative attempts to censor or restrict content have been declared invalid by the Supreme Court on this basis.

Film

Films are classified by the Classification and Rating Administration (CARA), an independent organisation comprised of parents, established by the Motion Picture Association of America (MPAA). Participation in the scheme is voluntary, but most cinemas agree to enforce the MPAA film classifications for commercial reasons. Some of the smaller or independent studios have chosen not to participate in the scheme due to cost.

The CARA assigns classifications of G—General Audiences; PG—Parental Guidance Suggested; PG-13—Parents Strongly Cautioned; R—Restricted; and NC-17—No One 17 and Under Admitted. Admission to NC-17 films is restricted to adults, while R-rated films may be viewed by persons at least 17 years of age or children accompanied by a parent or adult guardian. In the 1990s, classification descriptors such as 'contains mild language and some crude humour' were added in order to increase transparency about the specific reasons for a film's classification.

DVD classification is also voluntary. DVDs generally carry the classification assigned by the MPAA for the film previously released in cinemas, though it is not uncommon for producers to add additional 'unrated' content to DVD releases. DVDs that have not been previously exhibited in theatres may be submitted to CARA for classification or released as 'unrated'. By industry agreement, retailers screen customers to ensure that DVDs rated R or NC-17 are not purchased by individuals under the age of eighteen.

Computer games

Computer games are classified by the ESRB, an independent industry body which employs specially-trained game classifiers who typically have experience with children to evaluate computer games. While participation in the scheme is voluntary, the vast majority of game developers submit their games to the ESRB because major retailers have agreed to carry only rated copies of computer games.

Games are classified in six categories: EC (appropriate for children 3 and older); E (6 and older); E 10+ (10 and older); T (13 and older); M (17 and older); and AO (18 and older). Less than one percent of games are rated AO. There are also approximately 30 'content descriptors', which identify the type of content—such as violence, sex or language—that led to the classification. A recent attempt by California to make the

ESRB prohibitions on the sale of M or AO-rated games to children, legally enforceable, was struck down by the Supreme Court as unconstitutional.[1]

Television

Television programs are classified by television stations according to the *TV Parental Guidelines*. The Guidelines were developed by industry and are part of a voluntary scheme adopted by the majority of television networks in the US. The Guidelines have been approved by the Federal Communications Commission (FCC). As of 2000, all television sets are required to include a V-chip, which allows users to block programs with objectionable content. Producers self-assign classifications, ranging from TV-Y (all children) to TV-MA (mature audiences only), and may also use content descriptors identifying the source of the classification. The FCC has yet to rule on the regulatory status of IPTV.

On both free-to-air television and radio, material which is 'indecent', defined as 'material containing patently offensive sexual or excretory material that does not rise to the level of obscenity;' or 'profane', defined as 'including language so grossly offensive to members of the public who actually hear it as to amount to a nuisance,' cannot be broadcast between the hours of 6 am and 10 pm. No such time restrictions are placed on cable networks; however, all stations are barred from airing obscene material at any time. 'Obscene' has been defined by the Supreme Court as material that is prurient in nature; completely devoid of scientific, political, educational, or social value; and in violation of local community standards.[2]

Internet

Due to freedom of speech protections afforded by the First Amendment, internet content is largely unregulated. However, internet content is not exempt from laws regarding libel (defamation), intellectual property, child pornography, obscenity, etc, and internet activity in violation of these laws can lead to criminal prosecution. In addition, sites may also be penalised for using misleading domain names to deceive persons into viewing obscenity or other material harmful to minors.[3]

The 2001 *Children's Internet Protection Act* made the implementation of content filters in schools and libraries a condition of certain federal government grants. The government has also partnered with private industry to accomplish policy goals. Some agreements between government and private enterprises exist to rapidly identify and respond to the existence of child pornography online. Law enforcement agencies promote identity verification systems online and pressure private companies to take on voluntary regulatory initiatives, which in some cases have entailed identifying specific material and asking website owners or ISPs to remove it.[4]

---

1 *Brown v Entertainment Merchants Association* 131 S Ct 2729 (2011).
2 *Miller v California* 413 US 15 (1973).
3 18 USC 110 § 2252B.
4 See, eg, *Zieper v Metzinger* 392 F Supp 2d 516 (SD NY, 2005).

Pornography

Pornography that is not deemed 'obscene' is covered by the First Amendment's freedom of speech protections and widely available to adults through publications, videos, and the internet. The US does not require that pornography be classified; however, many producers voluntarily label pornographic films with the non-trademarked classification of 'X' to indicate adult content. In most states, laws prohibit the sale of pornography to persons under 18 years of age (17 in some states).

Production, distribution, or possession of child pornography, defined as 'the visual depiction of a person under the age of 18 engaged in sexually explicit conduct,' is a criminal offence punishable by up to life imprisonment in the case of repeat offenders. In 2003, the US passed the *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act* (*PROTECT Act*), which strengthened protections against child pornography and amended the definition of child pornography to include computer-generated images of a minor engaging in sexually explicit conduct.

The United Kingdom

Overview

Classification in the UK is based on statute and is relatively complex and extensive, similar to the current Australian scheme.

Film

Films and DVDs must be classified by the British Board of Film Classification (BBFC) before public release. The BBFC is an independent, non-government body established by the film industry to classify films. Though the BBFC's classification decisions may be overridden by local council authorities, this is a rare occurrence. Films may be classified U, PG, 12/12A, 15, 18, and R18. Films that receive U, PG, or 12 classifications are unrestricted; however, anyone under 12 years of age must be accompanied by an adult in order to view a 12A film. No one under 15 may see or purchase a film classified '15', and one must be at least 18 to view or purchase a film rated '18'.

The BBFC also has, and exercises, the authority to refuse a classification to films or other media deemed 'obscene', defined as material whose 'effect is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.' Rejected films may not be legally sold anywhere in the UK.

Computer games

Until recently, most computer games were exempt from classification unless they contained content such as sexual activity, gross violence or other matters of concern. Games in this category were classified by the BBFC before they could be distributed. All other computer games were classified on a voluntary basis by the Video Standards Council (VSC) using the PEGI classification system which is used throughout Europe.

In 2009, the UK announced that all computer games sold in the UK would receive classifications from PEGI, which has a nine-member advisory board comprised of parents, consumers associations, child psychology experts, academics, media experts and the interactive software industry. Under the new system, games are classified and labelled under the PEGI classifications of 3, 7, 12, 16, or 18, which also include descriptors that depict the reasons why a game received a particular classification. The classifications, which correspond to the age requirement for purchasing the game, are legally enforceable. The VSC retains the power to ban games it deems inappropriate for release in the UK even if they have received a PEGI classification.

Television

Television is regulated under the *Ofcom Broadcasting Code* (Broadcasting Code) administered by the Office of Communications ('Ofcom'), the government regulator for the communications industry. Since the adoption of the *Audiovisual Media Service Directive*[5] in 2009, IPTV is also subject to certain baseline content regulations for both television broadcasting and on-demand services. Though the Broadcasting Code does not mandate a classification system for television content, some television stations have voluntarily implemented their own classification system. The Broadcasting Code provides that content inappropriate for children should not be aired between the hours of 5.30 am and 9 pm. Premium film services may air content equivalent to BBFC-rated 15 any time of day so long as a pin-protected system is in place to restrict access to those authorised to view. There is a further requirement that 'those security systems which are in place to protect children must be clearly explained to all subscribers.'[6]

Internet

Internet content in the UK is largely unregulated. On a voluntary basis, most ISPs block URLs on the Internet Watch Foundation's worldwide list of child sexual abuse content, as well as criminally obscene adult content including non-photographic child sexual abuse images hosted in the UK. In October 2011, four of the largest ISPs in the UK committed to a government-backed *Code of Practice on Parental Controls* that includes updating their policy in order to give new customers an 'active choice' whether to activate a filter to screen sexually explicit content on computers connected to their account.

Pornography

The *Criminal Justice and Immigration Act* 2008 c 4 (UK) made possession of material deemed 'extreme pornography' a criminal offence. Extreme pornography is defined as an image for sexual arousal that 'is grossly offensive, disgusting or otherwise of an obscene character,' which depicts bestiality, necrophilia, or an act which is likely to result in serious injury or death.[7] Pornographic material not deemed extreme is legal but may only be sold to adults age 18 or older. Neither internet pornography nor pornographic publications are required to be classified, and the latter can be found in

5 See Ch 6.
6 Office of Communications, *Ofcom Broadcasting Code*, [1.24].
7 *Criminal Justice and Immigration Act 2008* c 4 (UK) s 63.

shops that sell newspapers and magazines. Classification of all videos, including pornographic films is mandated. Films classified R18 must only be screened to adults in specially licensed cinemas while DVDs assigned an R18 classification may only be sold in licensed sex shops which are prohibited from displaying their wares in shop windows. Film classification requirements do not apply to material on the internet, and the BBFC has noted that 'material cut as a condition of classification can also be posted on a website ... the viewer then simply has to visit the website to see the material that was cut under the [*Video Recordings Act 1984*]'.[8]

The possession, production, or distribution of child pornography is illegal, with an offence punishable by up to 10 years' imprisonment.

Canada

Overview

Driven by a constitutional right to 'freedom of expression', classification of content in Canada is largely unregulated. Canada has adopted many of the standards and classification methods used in the US.

Film

Canadian law makes the classification of films, DVDs and computer games the responsibility of the provinces and territories. Some provinces require classification of all films, while others require classification only for films which contain certain content. DVDs are classified under a voluntary system administered by the Canadian Motion Picture Association, which aggregates the classifications provided by the Provincial Classification Boards to provide for uniform classification information for the home entertainment market in Canada. DVDs are classified as G—General Audience; PG—Parental Guidance; 14A—14 or Accompanied by an Adult; 18A—18 or Accompanied by an Adult; R—Restricted; and A—Adult. In addition to the classification, most provincial boards also include information about specific reasons for a film's classification.

Computer games

The classification of computer games is also the responsibility of provinces and territories. Many Canadian provinces have adopted the ESRB classification system used in the US, and do not require developers to submit games for classification to a government body. The ESRB classifies games in six categories: EC (appropriate for children 3 and older); E (6 and older); E10+ (10 and older); T (13 and older); M (17 and older); and AO (18 and older). In addition, the ESRB uses approximately 30 'content descriptors', which identify the type of content—such as violence, sex or language—that led to the classification. In some Canadian provinces, the ESRB classification is legally enforceable; in these provinces, the sale of games classified M

8 British Board of Film Classification, S*ubmission to the House of Commons Select Committee on Culture, Media and Sport*, 20 February 2006.

or AO to anyone under 18 is prohibited by law. However, as in the UK, an ESRB classification can be overridden by a decision of the provincial film classification body.

Television

Television programs are classified by television stations according to voluntary codes that are administered by the Canadian Broadcasting Standards Council, an independent non-governmental organisation created by the Canadian Association of Broadcasters. Adherence to the industry codes is a condition of licensing. The classification system for television content has six categories: C—Children; C8—Children over 8 Years; G—General; PG—Parental Guidance; 14+—Over 14 Years; and 18+—Adults, and was developed in 1997 for use with the V-chip. Subscription television and free-to-air classifications are administered under different codes which have been approved by the government regulator, the Canadian Radio-Television and Communications Commission (CRTC). IPTV providers fall within the category of broadcasting distribution companies, and are licensed and regulated accordingly by the CRTC. Broadcasters are prohibited from airing programming that contains material intended exclusively for adult audiences between the hours of 6 am until 9 pm.

Internet

The Canadian government does not actively regulate access to the internet, however, websites hosted within Canada, as well as sites hosted on servers in other jurisdictions, are subject to local laws governing child pornography, defamation, anti-discrimination and copyright. Federal obscenity provisions encompass online offences and courts can require ISPs to remove material found to be 'obscene'. 'Obscene' material is content in which 'a dominant characteristic ... is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence'.[9] Cleanfeed Canada—a coalition of ISPs, federal and provincial governments, and law enforcement bodies—is a voluntary initiative designed to filter access to foreign-hosted URLs associated with images of child sexual abuse. The list of filtered sites is compiled by cybertip.ca, an independent organisation similar to the Internet Watch Foundation in the UK.

Pornography

With the exception of a 1993 amendment regarding 'child pornography,' Canadian criminal law does not use the word 'pornography' but rather 'obscenity'. Pornographic material featuring consenting adults is regulated through the 'obscenity' provision of the *Criminal Code*, and is legal in Canada if it is not deemed to be obscene. Pornographic material is readily accessible in retail stores through the sale and exchange of DVDs, videos, films, books and magazines, as well as in theatres, on television and over the Internet. Neither internet pornography nor pornographic publications are required to be classified; however, most provinces require that pornographic films and DVDs be classified before release and provide for the removal of content depicting bestiality, necrophilia, child pornography, and other 'obscene'

9 *Criminal Code*, RSC 1985, c C-46, s 163(8).

content. The sale of restricted material to persons aged under 18 (or 19 in certain provinces) is prohibited, though possession by such individuals is not an offence.

Accessing or possessing child pornography, regardless of knowledge or intent, is a criminal offence punishable by up to five years imprisonment, while the punishment for making or distributing of child pornography is up to ten years imprisonment.

New Zealand

Overview

Classification of media content in NZ is similar to the Australian scheme. In fact, the NZ classification system incorporates some Australian classification decisions of films and computer games as binding legal classifications.

Film

All films and some DVDs must be submitted to the government Film and Video Labelling Body (FVLB) before being supplied to the public. Films intended only for television broadcast are exempted from this requirement. The Labelling Body provides a classification and label for all unrestricted content and refers films that may need to be banned or restricted to the Office of Film and Literature Classification (OFLC). Labels used by the FVLB include unrestricted classifications of G, PG, and M, while the OFLC assigns the restricted classifications of 13, 15, 16, 18, and R. In addition to the classification, an explanatory note also lists whether there is content in a film such as offensive language, sex scenes, violence, cruelty or other potentially disturbing material.

When content has been classified in Australia or the UK as unrestricted then the FVLB will apply the equivalent New Zealand classification without viewing the film. Content not previously classified in Australia or the UK that is likely to be unrestricted (G, PG or M) is viewed and classified by the FVLB.

Content that has been age-restricted in Australia or the UK, Refused Classification in Australia, or banned in the UK must be formally classified by the OFLC.

Computer games

Though the legislation governing the classification of films in NZ defines 'film' to include 'any other medium with moving images', computer games are expressly exempt from labelling requirements.[10] This means that computer games are not required to be submitted for classification or labelling unless they contain age-restricted content or have been banned or classified with an age restriction in the Australia or the UK. Games with restricted content must be classified by the OFLC and be marked with a NZ label before sale, while non-restricted computer games sold in NZ are often sold with their overseas label visible.

---

10 *Films, Videos, and Publications Classification Act 1993* (NZ) s 8(1)(q).

Television

Television content is exempt from the *Films, Videos, and Publications Classification Act 1993* (NZ) and regulated under codes of practice created by industry and registered with the Broadcasting Standards Authority. Television stations classify their own content according to the codes. Individuals with complaints about content raise them first with the broadcaster but can elevate them to the Broadcasting Standards Authority if a satisfactory resolution is not reached.

There are separate television classification systems and watershed requirements for free-to-air and subscription television services. Free-to-air television rated G can be broadcast at all times, while Parental Guidance Recommended (PGR) content may be screened between 9 am until 4 pm and after 7 pm until 6 am. Adults only programming may be screened between midday and 3 pm on weekdays (except school holidays) and after 8.30 pm until 5 am. Subscription television is rated G, PG, M, 16, and 18 and may be broadcast at any time as long as filtering technology is automatically made available to subscribers free of charge and regularly promoted by the broadcaster for subscriber use. When filtering technology is not automatically available, content rated 18 is restricted to the hours of 8 pm until 6 am daily and 9 am until 3 pm on weekdays (excluding school holidays).

Regulation of IPTV is based on the degree of interactivity allowed by the service. Programming that is linear (transmitted at a scheduled time) is generally subject to television broadcasting and content regulations, while non-linear content (that selected by the user and shown when the viewer wishes) is exempt from those regulations.

Internet

Internet content is largely unregulated; however, content which is 'objectionable' cannot be distributed over the internet, or through any other medium. Objectionable content is defined by NZ law as that which

> describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.[11]

Possession of objectionable content is also prohibited.

According to the OFLC, computer files downloaded from the internet fall under the purview of the *Films, Videos, and Publications Classification Act*, making internet-sourced publications, films and games downloaded in NZ subject to local law. Further, the OLFC has jurisdiction over websites that are operated or updated from NZ. Criminal laws prohibit the distribution and possession of child pornography, but NZ has not passed legislation to allow issuance of take-down notices for objectionable content. A significant number of ISPs in NZ have voluntarily implemented a filter to screen child sexual abuse images.

---

11 *Films, Videos, and Publications Classification Act 1993* (NZ) s 3(1).

Pornography

All pornographic films supplied to the public are required to be classified by the OFLC before public release. Pornographic publications and internet content are not required to be classified; however, publications may be voluntarily submitted to the OFLC by a distributor, law enforcement agency, or interested party for labelling. The sale of pornography is restricted to adults, and it is an offence to knowingly supply, distribute, exhibit or display restricted material to anyone other than the audience specified.

Objectionable material, including depictions of child pornography, rape, and bestiality, is strictly prohibited. Knowing possession or distribution of objectionable material via the internet or otherwise is punishable by fine and imprisonment.

Singapore

Overview

Singapore has been working to transition their content regulation scheme away from censorship and toward classification. Singapore directly regulates all media forms through the Media Development Authority (MDA) and has a majority ownership stake in the ISPs; however, corporate internet access for business purposes is exempt from regulation and there is a move toward co-regulation with a heightened emphasis on industry feedback and participation.

Film

All films distributed in Singapore are required to be classified by the Singapore Board of Film Censors (BFC), a division of the government-run MDA. Over the years, the BFC has moved away from censorship toward classification. Prior to 1991, Singapore used a single-tier system in which films were either approved for release or disallowed. In recent years, the Singapore classification scheme has evolved to include six different classifications: G—General Audiences; PG—Parental Guidance; PG13—Parental Guidance for Children Under 13; NC16—No Children Under 16; M18—Mature 18; and R21—Restricted 21.

Computer games

Singapore introduced a computer game classification system in 2008, operated by the MDA. The MDA assigns two different classifications to computer games—'suitable for 16 & above' and M18—and also bans games that contain content deemed 'Not Allowed for All Ratings' ('NAR'). NAR content includes content 'which denigrates any race or religion, or undermines Singapore's national interest', 'content that glorifies deviant sexual behaviour', and 'clear instructional details of criminal activities'.[12] Computer game developers are required to submit games likely to receive either of these classifications to the MDA, however, computer games which do not contain content inappropriate for children are not required to be classified.

12 Media Development Authority, *Video Games Classification* (2008), 5.

Television

Television programs are required to comply with content codes established by the MDA, which vary depending on the licence issued to the broadcaster. The guidelines that the broadcasters need to comply with depend on the size of audience and whether the service is available for free or on a paid-for basis. Free-to-air television cannot air PG-13 content between the hours of 6 am and 10 pm, and must clearly label any PG content aired during those hours. Subscription and Video-on-Demand channels can air content rated NC16 or below at all times and can also broadcast M18 content between the hours of 10 pm and 6 am.

Scheduled programming on IPTV is regulated by the same content standards as subscription television, while the Video-on-Demand programme code applies to on-demand content delivered via IPTV.

Internet

As the majority stakeholder in each of the three ISPs, the Singapore government exercises significant discretion and control over the nation's media services. In contrast to other nations surveyed, Singapore exercises internet and new media regulation through access controls and legal pressures more than technological filtering or blocking methods. Under the class licence scheme implemented by the MDA, all internet service or content providers are required to register with the MDA, obtain a licence, and abide by the MDA's Internet Code of Practice. Providers who are granted a licence must abide by all MDA requests to filter or modify the content they post or face sanctions and revocation of their broadcasting privileges.

The MDA also has the authority to require ISPs to block external sites and demand the removal of objectionable content, which includes material of a pornographic nature; advocacy of 'homosexuality or lesbianism'; depictions of 'detailed or relished acts of extreme violence or cruelty' and material that 'glorifies, incites or endorses ethnic, racial or religious hatred, strife or intolerance'.[13] Corporate internet access for business uses is exempt from MDA regulation, as Singapore authorities distinguish between information for business or educational uses—which they believe should be as uninhibited as possible—and information for personal use.[14]

Media self-regulation is also prevalent due to the threat of legal sanction and the fact that Singapore has some of the strictest defamation laws in the world, with the burden of proof resting on the defendant to show that the alleged defamatory statements were actually true.

Pornography

The possession, distribution, or sale of pornographic material in any form is illegal in Singapore; however, visiting pornographic websites and viewing their content is not an offence as long as pornographic content is not downloaded and stored. While the MDA

13 Media Development Authority, *Internet Code of Practice* (1997).
14 Media Development Authority, *Internet Industry Guidelines*, <www.mda.gov.sg> at 22 February 2012.

has the authority to require ISPs to block external sites containing 'Prohibited Material', defined to include material that is pornographic in nature, only a small number of pornographic websites are included on Singapore's block list.

Table: International comparison of film classifications

<table>
<tr><th>Australia</th><th>UK</th><th>US</th><th>Canada*</th><th colspan="2">NZ</th><th>Singapore</th></tr>
<tr><td>G</td><td>Unrestricted</td><td>G</td><td>G</td><td colspan="2">G</td><td>G</td></tr>
<tr><td>PG</td><td>PG</td><td>PG</td><td>PG</td><td colspan="2">PG</td><td>PG</td></tr>
<tr><td>M</td><td>12A</td><td rowspan="2">PG-13</td><td rowspan="3">14A</td><td colspan="2">M</td><td rowspan="2">PG-13</td></tr>
<tr><td rowspan="3">MA15+</td><td rowspan="3">15</td><td>R13</td><td rowspan="3">RP 13</td></tr>
<tr><td rowspan="2">R</td><td>R15</td><td>NC-16</td></tr>
<tr><td rowspan="3">NC17</td><td rowspan="2">18A</td><td rowspan="2">R16</td><td rowspan="3">RP16</td><td rowspan="3">M18</td></tr>
<tr><td>R18+</td><td>18</td><td>R</td><td colspan="2" rowspan="2">R18</td><td rowspan="2">R21</td></tr>
<tr><td>X18+</td><td>R18</td><td>Adult</td></tr>
</table>

May be viewed by people of any age.

May be viewed by people of any ages in the presence of a parent or guardian.

May only be viewed by people who meet or exceed the age of the numerical classification.

*Includes provinces of Ontario and Alberta only.

Appendix 4. Glossary of Key Terms

Term	Meaning in this Report
Adult content	Media content that has been classified R 18+ or X 18+ or, if classified, would be likely to be classified R 18+ or X 18+. These classifications are for content that is not suitable for those under 18 years of age.
Application service provider	An internet intermediary that facilitates access to content by indexing, filtering or formatting content, but is not itself a content platform. An example is a search engine, such as Google.
Authorised industry classifier	Industry-based classifiers who have completed training approved by the Regulator and are authorised by the Regulator to classify media content.
Call-in notice	A notice issued to a content provider requiring that it submit content to the Classification Board for classification. The *Classification Act* currently provides for such notices, and similar notices are recommended under the new Classification of Media Content Act.
Censorship	The outright banning of media content on moral or other grounds. Content currently classified 'RC', or classified 'Prohibited' under the new scheme, is effectively banned.
Classifiable elements	Key elements of media content that are considered in making classification decisions. For example, under the current *Guidelines for the Classification of Films and Computer Games* there are six classifiable elements: themes; violence; sex; coarse language; drug use; and nudity.
Classification	The process of assessing media content against criteria and guidelines, and assigning the content to a category, such as 'G' or 'M'. Content is classified for the purpose of providing information to consumers, restricting persons of a certain age from access to some content, and to prohibit certain content.
Classification of Media Content Act	The Act recommended in this Report to establish the new National Classification Scheme.

Term	**Meaning in this Report**
Classification Act	*Classification (Publications, Films and Computer Games) Act 1995* (Cth)
Classification categories	These are the categories assigned to media content as an outcome of the classification process. Currently different categories exist for different types of media content. The categories recommended in this Report for all media content are: G (General); PG (Parental Guidance); M (Mature); MA 15+ (Mature Audience); R 18+ (Restricted); X 18+ (Restricted); and Prohibited.
Classification cooperative scheme	The existing Commonwealth, state and territory cooperative scheme for the classification of publications, films and computer games.
Classification instrument	A classification tool, such as a dynamic online questionnaire and declaration that generates automated classification decisions. These tools generally rely on content providers submitting information in response to questions about the nature and substance of the media content. Classification tools are intended to reflect classification criteria used by classifiers.
Classification markings	A symbol representing the classification given to a piece of media content, such as the letter 'G' in a triangle on a green background.
Classified content	Media content that has been classified through an authorised process.
Classification criteria	The term used by the ALRC broadly to describe the current principles, criteria, guidelines and other matters that must be applied or taken into account in making classification decisions. The ALRC recommends one set of 'statutory classification criteria' which refers to the criteria that should be applied and the matters that should be taken into account by classifiers making classification decisions under the new classification scheme.
Classifier	A member of the Classification Board or a person who has been authorised to classify media content by the Regulator.

Term	**Meaning in this Report**
Classify notice	A notice from the Regulator to a content provider that requires the content provider to classify their content, using either the Classification Board or an authorised industry classifier.
Commercial content provider	A content provider that provides content on a commercial basis, whether through payment for content or associated advertising, or other revenue-raising measures.
Consumer advice	Information that accompanies a classification decision that provides more detail on which classifiable elements (for example violence, sex, coarse language, themes, drug use and/or nudity) led to the classification, to assist consumers to make more informed choices about media content.
Content platform	An entity that provides third party content on the internet through its website. An example is the YouTube platform.
Content provider	An individual or organisation that sells, screens, provides online, or otherwise distributes content to the Australian public.
Convergence	The process through which digitisation of media content, and common standards, technologies and platforms for content delivery, are blurring traditional distinctions between media types, and elements of the supply chain for content generation, aggregation and distribution.
Deeming	The process of providing for an equivalent Australian classification by reference to a decision made under another classification system, as authorised by the Regulator under the new Classification of Media Content Act.
Enforcement legislation	State and territory enforcement legislation under the classification cooperative scheme that prohibits the sale, distribution and advertising of unclassified material; and restricts the sale, distribution and advertising of classified material.
Exempt content	Content that is exempt from laws requiring content to be classified. This includes news and current affairs programs, sporting events, recordings of live performances, and business and educational computer games.

Term	**Meaning in this Report**
Host provider	An entity that hosts websites on a computer server, connecting with the internet and providing storage capacities.
Industry classification codes	Codes dealing with classification-related matters developed by sections of industry and approved by the Regulator under the Classification of Media Content Act.
Internet access provider	An entity that provides services that enable users to access the internet—for example, by connecting the user to the internet via a telecommunications link or otherwise making websites accessible. Includes Telstra, Optus, iiNet, Internode and other providers of internet access.
Internet intermediary	An entity that provides services that enable online content to be provided to the public and includes content platforms, application service providers, host providers and internet access providers.
Legislative instrument	Laws, regulations, rules or guidelines made by a person or body authorised to do so by an Act of the Parliament. Such instruments have the force of law but may be disallowable — that is, subject to Parliamentary scrutiny under the *Legislative Instruments Act 2003* (Cth).
Media content	Content that is delivered through media delivery technologies, including print, broadcast, cinema, digital and online platforms, and is intended for an audience, rather than being interpersonal communication.
Media content industry	Industries including film, print, broadcasting, computer games, internet and other industries engaged in producing and distributing media content. This is often, but not exclusively, an activity undertaken on a commercial basis.
Modified content	Content that has had additional elements added or elements removed since it was first classified. Examples include the inclusion of extra items when films or television programs are released as DVDs, and 'expansion packs' available with computer games. It may also refer to content released in more than one format (eg, 2D and 3D films) or content that has had elements removed when distributed on other platforms (eg, feature films modified for screening on television in order to meet classification guidelines).

Term	**Meaning in this Report**
National Classification Code	The *Classification Act* provides for a National Classification Code (the Code). Classification decisions made under the Act must be made in accordance with the criteria set out in the Code and give effect, as far as possible, to the principles outlined in the Code.
National Classification Scheme	The ALRC uses the term to describe the existing classification cooperative scheme for publications, films and computer games, together with related classification laws applying to online and mobile content and television under the *Broadcasting Services Act 1992* (Cth). Also used to refer to the scheme based on the recommended Classification of Media Content Act.
Offline content	A generic term for media content that is not accessed through the internet.
Online content provider	An entity that provides content made available online through its own website or through an internet intermediary and includes content platforms that control how content is uploaded, generated or displayed.
Prohibited content	Under the recommended Classification of Media Content Act, the 'Refused Classification' category of content—across all media platforms both offline and online—would be named 'Prohibited'. Note that the *Broadcasting Services Act* schs 5 and 7 currently use 'prohibited content' to refer to online content classified RC or X 18+, or classified R 18+ or MA 15+ where not subject to a restricted access system.
Refused Classification (RC)	The highest classification that can be given to media content in Australia at present. Access to such content is restricted by way of prohibitions on sale and distribution; prohibitions on import and export; and prohibitions on publication online.
Regulator	The Australian Government agency responsible for regulating the classification of media content under the recommended Classification of Media Content Act.

Term	**Meaning in this Report**
Restrict access	To take measures to prevent persons of a certain age from accessing content. Measures may include seeking to verify the age of customers in retail outlets and facilitating the use of parental locks and internet filters.
Unclassified content	Content that has not been classified under Australian law.