

## The ALRC Review of the National Classification System

### Paper presented by Terry Flew, Commissioner, Australian Law Reform Commission, to Classification Enforcement Contacts Forum 2011, Sydney, 7 June 2011

On 24 March 2011, Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire and report on the framework for the classification of media content in Australia, based on the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (the *Classification Act*) and *Broadcasting Services Act 1992* (Cth). In the terms of reference provided to the ALRC for the National Classification Scheme Review, it is required that the Review have 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 on industry;
- 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 statutory review of Schedule 7 of the *Broadcasting Services Act 1992* and other sections relevant to the classification of content.<sup>1</sup>

The ALRC National Classification Scheme Review occurs in the context of wider debates about the policy and regulatory frameworks that will apply to the media and communications landscape in Australia. Most notably, it is occurring in parallel with the Convergence review being conducted for the Department of Broadband, Communications and the Digital Economy (DBCDE), and both reviews are expected to be completed in the first quarter of 2012. Of particular relevance are the principles outlined in the Convergence Review the policy objectives suitable for a converging media environment should include:

- communications and media services that are available to Australians should reflect community standards and the views and expectations of the Australian public; and

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<sup>1</sup> Australian Law Reform Commission, *Terms of Reference* (24 March 2011) <<http://www.alrc.gov.au/inquiries/classification/terms-reference>>.

- Australians should have access to the broadest range of content across platforms and services as possible.<sup>2</sup>

The ALRC Review follows the Attorney-General's Department's public consultation on an R 18+ classification of computer games conducted during 2010, which received over 58,000 public submissions. Of these, 98% supported the introduction of such a classification.

It will also be occurring alongside a review of the Refused Classification (RC) category, to be conducted by the Minister for Home Affairs, Brendan O'Connor, in cooperation with relevant State and Territory Ministers. That review will examine the current scope of the existing RC classification, and assess whether it adequately reflects community standards, in the context of consideration of a mandatory Internet Service Provider (ISP) filtering policy that has been under consideration for some time.

For the ALRC, it is an intriguing brief, since it is exactly 20 years since the then Attorney-General, Michael Duffy, gave the then ALRC President, Justice Elizabeth Evatt, a brief to review how the censorship of imported and locally produced film for public exhibition and sale or hire, related advertising matter and imported and local printed matter can be simplified and made more uniform and efficient while giving effect to the policy agreed between the Commonwealth, the States and the Territories.<sup>3</sup>

Looking back at that review of 20 years ago, it is fascinating to consider what has changed in the classification enforcement landscape, and what has remained constant. The major change, of course, is the rise of the Internet and digital media technologies. It is now estimated that 72% of Australian households have broadband Internet connections, as compared to 30% in 2005, and that this number will increase to almost 90% of homes by 2014. Moreover, it is estimated that there will be 3.5 million mobile Internet subscribers by 2014.<sup>4</sup>

It is in the context of these dramatic shifts in how people are accessing media content in Australia, and the associated changes to industry structures and business models, that the need for a revised policy and regulatory framework for media and communications in Australia emerges, and the current National Classification Scheme review, along with the *Convergence Review*, are very much a part of that shift.

Things that have not changed since the 1991 ALRC Review include the difficulties in getting agreement in state, territory and Commonwealth laws in the field, and the difficulties in getting consistency in the regulations across media platforms.

The absence of an R18+ classification for computer games is an obvious case in point. It has been argued that global blockbuster games such as *Grand Theft Auto IV* recall the *neo noir* sensibility of classic 1970s New York films such as *Taxi Driver* and *The French Connection*. Yet while there was no question that a film such as *Taxi Driver* as an R-rated film - a confronting film for adults, but one that may prove disturbing for children - the absence of an R18+ classification for games such as *Grand Theft Auto IV* means that we either have to slightly modify the game to achieve an MA15+ rating, or exclude it altogether from Australia. As Ben Eltham has observed, this creates what he describes as "the absurd scenario where a lightly-edited version of *Grand Theft Auto IV* was given an MA15+ rating and

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<sup>2</sup> Convergence Review Committee, 'Convergence Review' (Framing Paper, Department of Broadband, Communications and the Digital Economy, 28 April 2011) 15-16.

<sup>3</sup> Australian Law Reform Commission, *Film and Literature Censorship Procedure*, Report No 55 (1991).

<sup>4</sup> PriceWaterhouseCoopers, *Global Entertainment and Media Outlook 2010-2014* (2010) <<http://www.pwc.com/gx/en/global-entertainment-media-outlook>>.

allowed for sale to minors, despite its high-impact scenarios depicting murder, blackmail, extortion and sex with prostitutes”.<sup>5</sup>

The risk is that if this issue cannot be resolved, Australian games producers will be adrift in what is now a \$70 billion worldwide industry<sup>6</sup>, and Australian games players – the backbone of the future games production industry – will either be cut out of the leading edge of these creative industries professions, or forced to break Customs laws in order to access the games they love, and others around the world have ready access to.

## Legal and Regulatory Framework

The NCS is an example of a Commonwealth-State cooperative scheme. Under such schemes each participating jurisdiction promulgates legislation to facilitate the application of a standard set of legislative provisions in that jurisdiction to regulate a matter of common concern.<sup>7</sup> 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 Parliament’s power to make laws for the government of a territory (the territories power).<sup>8</sup> It was always the Act specifically provides that it is intended to form part of a Commonwealth, state and territory scheme for classification and the enforcement of classifications and notes that ‘provisions dealing with the consequences of not having material classified and the enforcement of classification decisions are to be found in complementary laws of the States and Territories’.

In practice, the NCS is a complementary ‘non-applied’ law scheme. That is, the *Classification Act* is not enacted as a law of each other participating jurisdiction. Rather, the states and territories have enacted complementary legislation that provides for the enforcement of the classification decisions made under the *Classification Act*. This arrangement may be seen as having significant disadvantages for what is intended to be a national scheme. For example, there are substantial variations in state and territory (and Commonwealth) enforcement provisions:

- the ACT and Northern Territory do not prohibit the sale and exhibition of X 18+ films;<sup>9</sup>
- Queensland prohibits the sale of Category 1 restricted and Category 2 restricted publications;<sup>10</sup> and
- the *Classification Act* itself 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—offences that do not apply to persons in any other part of Australia.<sup>11</sup>

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<sup>5</sup> Ben Eltham, ‘Government Converges on Growing Cultural Reality’ on *Crikey* (6 May 2011) <<http://www.crikey.com.au/2011/05/06/my-cup-of-tea-government-converges-on-growing-cultural-reality/>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Marina Farnan, ‘Commonwealth-State Cooperative Schemes: Issues for Drafters’ (Paper presented at 4th Australasian Drafting Conference, Sydney, 3–5 August 2005), 3.

<sup>8</sup> *Australian Constitution* s 122.

<sup>9</sup> *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) s 9, 22.

Cf *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 6.

<sup>10</sup> *Classification of Publications Act 1991* (Qld) s 12.

<sup>11</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 101–102. These provisions were enacted as part of the Northern Territory National Emergency Response: *Families*,

More fundamentally, some states and territories retain powers to classify or re-classify material<sup>12</sup>—although only the South Australian Classification Council actively classifies or reclassifies material.<sup>13</sup>

The ALRC is interested in comment on whether a new framework for the classification of media content in Australia should be based on the current cooperative scheme, or whether this should be replaced with some other form of scheme. A threshold question concerns the extent to which the Australian Parliament might enact legislation establishing such a framework. There are a number of constitutional heads of legislative power that are relevant.

Under the communications power,<sup>14</sup> the Australian Parliament may, and does, regulate online content and broadcasting (television and radio).<sup>15</sup> The trade and commerce power<sup>16</sup> grants the Commonwealth legislative power to regulate imported or exported media content including—for example, pornography<sup>17</sup>—and interstate trade in such content. In combination with other heads of legislative power, such as the corporations powers,<sup>18</sup> the Australian Parliament may be able to legislate more broadly in relation to classification of media content than is currently the case.

Other possible models would involve a referral of state powers to the Commonwealth under s 51(xxxvii) of the *Australian Constitution*. 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.<sup>19</sup> A referral of power by the states would ensure that Commonwealth classification legislation was comprehensive in its coverage and less vulnerable to constitutional challenge.

Another further option is a complementary applied law scheme, where Commonwealth legislation, as in force from time to time, would be applied by the other jurisdictions. Provided that there were effective limits on modification of the legislation—for example, through a new intergovernmental agreement on classification—this would provide a substantial degree of uniformity.

## Strengths and Weaknesses of the current NCS

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*Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

12 *Classification of Publications Act 1991* (Qld) s 9; *Classification of Films Act 1991* (Qld) 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.

13 In 2008–09, the South Australian Classification Council reviewed the classification of a number of publications, but did not consider the classification of any films or computer games: South Australian Classification Council, *Annual Report 2008-2009* (2009) [4–5].

14 *Australian Constitution* s 51(v).

15 See, e.g. *Broadcasting Services Act 1992* (Cth) schs 5, 7.

16 *Australian Constitution* s 51(i).

17 See e.g. *Customs Act 1901* (Cth) s 233BAB.

18 *Australian Constitution* s 51(i), (xx).

19 See, eg. *Corporations (Commonwealth Powers) Act 2001* (NSW) and cognate state and territory legislation; *Corporations Act 2001* (Cth) s 3.

### *Strengths*

Compared to the previous scheme's 'complex network' of laws—under which the classification of one film might have involved 13 pieces of state and territory legislation—the current classification system is widely acknowledged as an improvement.<sup>20</sup> In 2009-2010 the Classification Board received 7,302 applications, including applications to classify 4,820 films, 1,101 computer games, 291 publications, 258 online content referrals from ACMA, and 88 referrals from enforcement agencies. The number of call-in notices sent out in 2010-2011 were for 444 adult films and 49 adult magazines. In other words, most classification activity occurred in a context of broad agreement between the classification agencies and the film distributors, publishers, games developers and other media distributors operating in Australia.

The Classification Board and the Classification Review Board are independent statutory bodies, operating apart from government and industry. This formal independence has been described as one of the system's very important features, and it is consistent with the arm's-length principle that operates in a range of sectors in Australia, from arts and cultural funding to the allocation of research grants to university academics and medical researchers.

The Classification Scheme also benefits from being well-known and widely understood by the public. In a 2005 survey, virtually all respondents were familiar with the classification system for film and video and the vast majority believed that classification symbols were useful.<sup>21</sup> While discussion has taken place on possible alternative ratings, such as the C (children), P (preschool) and AV (adult violence) classifications used by the commercial television broadcasters, or the various age-based classifications used by overseas bodies such as the British Board of Film Classification, there is a strong case for arguing that potential benefits from change here may well be outweighed by the costs associated with losing the community understanding that exists towards the existing classifications.

We expect that this Review will see considerable discussion of the pros and cons of co-regulation and industry self-regulation as ways of developing more flexible and adaptive frameworks for administering classification that are better suited to the fast-changing and more user-driven environments that characterise convergent media delivered through fast broadband or wireless networks to digital and mobile devices. It is already happening in cyberspace, as companies such as Google and Apple administer the vast array of *YouTube* videos or iPhone apps they receive from a global army of content creators and digital producers or, as Axel Bruns has referred to them, 'producers', who are now both the creators and the consumers of digital media content.<sup>22</sup>

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20 Gareth Griffith, 'Censorship in Australia: Regulating the Internet and Other Recent Developments' (Briefing Paper No 4, Parliamentary Library, Parliament of New South Wales, 2002); [McDonald Speech 'Sense and Censorability'] (classifying one film could have involved thirteen different pieces of legislation across Australia). See also Michael Ramaraj Dunstan, 'National Classification System for Publications, Films and Computer Games' (2009) 37 *Federal Law Review* 142, 153; Australian Law Reform Commission, *Film and Literature Censorship Procedure*, Report No 55 (1991) [1.11] (describing lack of uniformity).

21 Office of Film and Literature Classification, *Classification Study* (June 2005), Australian Government Attorney General's Department Classification, 6, 17, 32  
<[http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~80000256540+classification+study.pdf/\\$file/80000256540+classification+study.pdf](http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~80000256540+classification+study.pdf/$file/80000256540+classification+study.pdf)>

22 Axel Bruns, *Blogs, Wikipedia, Second Life, and beyond: From Production to Prodsusage*, (Peter Lang, 2008)

We should not underestimate the deadweight losses associated with administration of the current classification system. For example, when a TV series is re-released as a DVD, it needs to be reclassified by the Classification Board to check against its original broadcast TV classification. This can lead to some of our finest taxpayer-funded minds spending several hours in a viewing room in Surry Hills watching early series of *A Country Practice* or *Sons and Daughters*.

The experience of almost 20 years of co-regulation in television broadcasting offers some encouraging lessons in this regard. In 2009-2010, the Australian Communication and Media Authority received 194 complaints and conducted 39 investigations into classification matters for broadcasting content.<sup>23</sup> The vast majority of complaints went directly to the broadcasters and their representative bodies themselves, who were able to deal with them without a subsequent referral to ACMA. This in turn frees up ACMA resources for other activities more related to planning for future media services, rather than monitoring compliance with existing codes.

### ***Weaknesses***

Technological developments have altered the media landscape and challenged many of the underlying assumptions and justifications of content regulation.<sup>24</sup> Perhaps most obviously, regulators face an enormous amount of internet content, much of which is more mutable, housed outside of Australia, and less amenable to border-based regulation than offline content.<sup>25</sup> In noting some strengths of co-regulation in the broadcasting sphere, however, we also need to be aware of operational difficulties in applying such principles to the realm of online content. The number of items investigated by AMCA has grown exponentially, from 346 in 1999-2000 to 5945 in 2010-2011, a 1700% increase in the volume of investigations driven almost entirely by complaints about online content. The sustainability of this in terms of resource commitments needs to be seriously addressed.

The structure of media delivery has changed, with the influence of media convergence—the availability of content across platforms and devices that previously had distinct functions.<sup>26</sup> Media convergence dramatically alters the practical implementation of classification principles, as news, information and entertainment services are increasingly being accessed across multiple platforms, and activities that may once have been public are increasingly private, and vice versa. Movies that were once viewed in cinemas are increasingly downloaded to be viewed at home, while conversations and media consumption that may once have occurred at home now happens in Internet cafes, on mobile phones, and through iPads and MP3 players.

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<sup>23</sup> Australian Communications and Media Authority, *Overview of the Australian Communications and Media Authority's interaction with the National Classification Scheme*, report prepared by ACMA, May 2011.

<sup>24</sup> See, eg, Veronica Scott and Caitlin Fankhauser, 'It's Different on the Internet: Regulation Online Content' 13(1) *Internet Law Bulletin* 200; Helen Coonan, 'Reforming Australia's Media Legislation to Meet the Challenge of a Multi-Media Revolution' (2007) 30(1) *The University of New South Wales Law Journal* 232, 233; Interactive Games and Entertainment Industry Association, Submission No 38 to Senate Committee, Parliament of Australia, *Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011.

<sup>25</sup> *Ibid.*

<sup>26</sup> See Department of Communications, Broadband and the Digital Economy, *Convergence Questions and Answers* (9 May 2011)

<[http://www.dbcde.gov.au/digital\\_economy/convergence\\_review/questions\\_and\\_answers](http://www.dbcde.gov.au/digital_economy/convergence_review/questions_and_answers)>.

For example, new devices allow for private viewing of media that once would have been available only in public stores or venues and, in some instances, this decreases the need to protect others from unsolicited material. Conversely, in other situations it is harder to protect consumers—an individual's age, for example, is more difficult to authenticate online, undermining the effective implementation of age-based restrictions.<sup>27</sup>

These broad shifts in the media landscape have manifested themselves in practical weaknesses in the classification system. The status of new types of media, such as mobile phone games and apps, has been ambiguous and uncertain.<sup>28</sup> Despite frequent discussion about the need to treat similar content consistently across media platforms, there are numerous inconsistencies—for example, the same online content is treated differently depending on where it is hosted, and RC material can frequently be accessed online by those actively seeking such material.<sup>29</sup>

It has also been argued that the nature of media consumers has changed, from the passive recipients of media content to active co-creators in a more participatory media culture, as seen with multi-player online games, blogs, citizen journalism and social media sites such as *Facebook*, *Flickr* and *Twitter*.<sup>30</sup>

At the same time, global providers of digital media content have developed their own mechanisms for regulating material that is available to users. The online video service *YouTube* has 24 hours of content uploaded every minute of every day, and the site received two billion views per day.<sup>31</sup> As such a massive volume of material would be impossible to pre-classify, Google, as the owners of *YouTube* rely upon their user base to flag material that may be inappropriate, which is then evaluated by specialist content reviewers. It has also been estimated that there were 500,000 apps available for downloading to mobile phones in early 2011, and the mobile telecommunications providers argue that it is most cost-effective that they manage an approval process internationally rather than rely upon nationally-based classifiers and content regulators.<sup>32</sup>

Inconsistent or ineffective compliance and enforcement has also emerged as a significant issue across media contexts. Controlling access to and enforcing penalties for online material

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27 See generally Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501 (an early articulation of the ways in which the internet altered the regulatory paradigm, with particular discussion of age-based 'zoning' laws).

28 Attorney General's Department, Submission No 46 to Senate Committee, *Inquiry into the Australian Film and Literature Classification Scheme*, 2010, 15; Interactive Games and Entertainment Industry Association, Submission No 38 to Senate Committee, Parliament of Australia, *Inquiry into the Australian Film and Literature Classification Scheme*, 4 March 2011. An "app" refers to computer software designed for performance of a specific task. While it has typically referred to applications related to documents (e.g. graphics or accounting software), the term is increasingly used to refer to small items downloadable onto handheld devices such as mobile phones and tablet computers that have a myriad of purposes, from productivity tools to games to news and information.

29 Lyria Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33(2) *The University of New South Wales Law Journal* 581, 588-591. See also Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Senate Estimates Review* (18 October 2010) [Testimony of Mr Donald McDonald ] 11.

30 Henry Jenkins, *Convergence Culture: When Old and New Media Collide* (2006); Jean Burgess and Joshua Green, *YouTube* (2009); Bruns, above n 22.

31 Kate Crawford and Catharine Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia* (2011) 44.

32 Senate Legal and Constitutional Reference Committee, Parliament of Australia, *Australian Film and Literature Classification Scheme*, (25 March 2011) [Testimony of Ms Adele Beachley] 44.

pose significant challenges.<sup>33</sup> Other issues relate to the cooperative scheme: call-in notices are routinely ignored,<sup>34</sup> and states and territories have inconsistent enforcement provisions.<sup>35</sup>

## Next Steps

The ALRC has released an Issues Paper in order to provide a framework for public consultations. It is accessible from our website, and submissions can be made online based upon the 29 questions developed by the Review team, or can be sent by mail or email. In addition, we are commencing a process of consultation with representatives of industry, community organisations and government. We are also forming an Advisory Committee of experts across relevant media industry sectors as well as academic researchers that will meet and advise us on the direction of our work. A Discussion Paper will be made available in September 2011, that will flesh out our own thinking in more detail, before a Final Report that will be provided to the Attorney-General's Department by 31 January 2011.

We are working closely with a range of relevant government agencies, including the Attorney-General's Department, the Australian Communications and Media Authority, the Classification Board and the Classification review Board. We are in an ongoing dialogue with the Convergence Review Committee formed through the Department of Broadband, Communications and the Digital Economy and chaired by Glen Boreham, and the two reviews are expected to inform the development of new legislation to go to the Federal Parliament in 2012.

We welcome the contributions that can be made to our review from those engaged in classification enforcement at Commonwealth, state and territory levels. In order to make recommendations about a revised National Classification Scheme, we need the clearest understanding possible of the strengths and weaknesses of the existing framework. Our deliberations can only be enhanced by the perspectives of those who are at the front lines of administering the system, and ensuring that it best meets its purposes of protecting children from potentially harmful material and the general public from potentially offensive material, while enabling adults to see, hear and read what they wish to the maximum degree that is appropriate, and ensuring that decisions about where such balances are struck are subject to forms of public scrutiny that are appropriate in a democratic society.

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33 See, eg. Attorney General's Department, Submission No 46 to Senate Committee, *Inquiry into the Australian Film and Literature Classification Scheme*, 2010, 14.

34 Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Senate Estimates Review* (18 October 2010) [Testimony of Mr Donald McDonald ] 11, 14; Attorney General's Department, Submission No 46 to Senate Committee, *Inquiry into the Australian Film and Literature Classification Scheme*, 2010, 6.

35 Cross-reference XX.