SUBMISSION TO THE NATIONAL CLASSIFICATION SCHEME REVIEW

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APPROACH TO THE INQUIRY

Question 1. In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?

The ALRC should focus on developing a new framework for classification that is future-proof, internally consistent, interoperable with international classification schemes and difficult to abuse.

The current framework, while indeed more unified than the pre-1995 media classification/censorship landscape, is still a patchwork of conflicting and inconsistent regulations. There are a staggering **seven** different codes of practice for television (free-to-air commercial, ABC, SBS, subscription broadcast, subscription narrowcast, community broadcast, open narrowcast[1]). Radio, again, is governed by **six** separate industry codes (commercial, community, ABC, SBS, subscription narrowcast, open narrowcast[1]). The classification of music intended for physical sale is entirely self-regulated, lacking even an industry code.

Printed material relies on an odd mix of industry self-regulation and government classification; moreover, such material is treated differently depending on its publication format (serial or non-serial), and has its own, unique rating system comprising of just four (Unrestricted, Unrestricted M, Category 1, Category 1[2]) classifications (two of which, in practice, are almost never used) and a Refused Classification (RC) category. Film is subject to rigorous classification by government officials (the Australian Classification Board or ACB), but the ratings and criteria for those ratings as applied by government censors to film differ from the ones applied by those same censors to print. Video games are rated under the film system, but are not permitted two of the ratings common to film (R18+ and X18+). Bizarrely *all* online content is likewise subject to the film rating system, regardless of whether it is textual, visual or audible in nature, but regulatory authority for online content rests not with the ACB but with the Australian Communications and Media Authority (ACMA).

All of these systems effectively exist within a void relative to each other, leading to grey areas where some content is rated differently in one format compared to another. Indeed, due to the treatment of online material, a work that is entirely legal to sell in print form may be illegal to distribute digitally. Likewise, it is not uncommon for situations to arise where works may be classified multiple times by multiple people. Television show *South Park* takes this to a ludicrous extreme; the show may have ultimately been classified in Australia a staggering four times by four different regulatory bodies under four similar – but not identical - sets of rules:

- When first broadcast on SBS, under the SBS Codes of Practice
- When the subsequently broadcast on Channel 9, under the Commercial Television Industry Code of Practice
- When subsequently broadcast on Foxtel, under the Subscription Broadcast Television Codes of Practice
- When sold on DVD at retail, under the Guidelines for the Classification of Films and Computer Games

The current framework has allowed for sometimes extreme inconsistencies to arise between Federal, State and Territory legislation (examined in more detail in the answer to question 26) and, without substantial reform, will almost certainly allow further inconsistencies to be created. Moreover, the existing framework, such as it is, is a purely reactionary framework, and, time and time again, has proven incapable of handling new developments within the media landscape. Massively Multiplayer Online Games (MMOs) such as *World*

[1] http://www.acma.gov.au/WEB/STANDARD/pc=IND_REG_CODES_BCAST
[2] http://www.classification.gov.au/www/cob/classification.nsf/Page/HowtoComplywithClassificationLaws_ComplianceforSaleofPublications

of Warcraft, for example, avoided classification for years due to advice from the then-Office of Film and Literature Classification (OFLC) and later ACB that such online-only games were unclassifiable under the Act, which only required games with an offline component be classified[3,4,5]. Going back further, video cassette technology may have been available since the 1950's, but it wasn't until 1984, roughly four years after the introduction of VHS to Australian homes, that it was considered that such recordings might require classification[6,7]. And in the present day, as noted the issues paper, the regulatory status of smartphone 'apps' and the like is extremely uncertain, and has been for several years.

Finally, the current framework lacks any checks and balances on the exercise of government power to censor, and so is subject to abuse by the political process. This has seen media regulation become, on the whole, more censorious over time. The Standing Committee of Attorneys General (SCAG), for example, is an effectively unelected and extremely unrepresentative body that operates under minimal oversight and meets so infrequently that it may take years to reach a decision regarding the classification matters it is charged to oversee. The Commonwealth Government, on the other hand, can and has unilaterally imposed changes to the classification framework, overruling SCAG in outright defiance of public opinion and its own consultations[8].

Meanwhile, reviews and inquiries into classification matters are more often than not driven by parliamentarians who are well known for their desire to further restrict access to certain types of material, such as former senators Brian Harradine, Steven Fielding and Guy Barnett. This also serves to further a perception within the public that certain moral and religious lobby groups are more privileged than other types of organisations or even individuals when it comes to input on classification and censorship matters. This is a perception that has some measure of validity to it: a change to the Act in 2001 did indeed give such groups special standing to contest classifications[9], and recent, high-profile classification inquiries and decisions have been dogged by accusations that religious lobbyists, in particular, are considered key stakeholders whose input is actively solicited, while free speech bodies are excluded[10,11].

WHY CLASSIFY AND REGULATE CONTENT?

Question 2. What should be the primary objectives of a national classification scheme?

To ensure that Australians are able to make informed choices about the content that they consume across the broadest possible range of content and platforms.

The issues paper identifies three potential reasons for classifying and regulating content:

- providing advice to consumers to help inform their viewing choices, including warning them of material they might find offensive;
- protecting children from harmful or disturbing content; and
- restricting all Australians from accessing certain types of content.

[3] http://kotaku.com/5377769/years-later-world-of-warcraft-finally-gets-rated-in-australia
[4] http://massively.joystiq.com/2009/01/28/mmogs-defy-classification-in-australia-part-2/
[5] http://www.kotaku.com.au/2009/02/blizzard_wow_is_sold_legally_in_australia_after_all/
[6] http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1984-10-04%2F0086%22
[7] http://libertus.net/censor/rdocs/xrhoax2.htm
[8] http://libertus.net/censor/debate/censor_bill_terr2007.html
[9] http://web.archive.org/web/20021212230649/http://old.smh.com.au/news/0103/22/features/features7.html
[10] http://www.theaustralian.com.au/australian-it/concern-at-lobby-groups-influence-as-christians-get-filter-plan-tip-off/story-e6frgakx-1225894280482
[11] http://www.abc.net.au/technology/articles/2011/01/19/3116261.htm

Of the three, providing consumer advice, where possible, would be the primary purpose of classification. By doing so, classification allows consumers to make informed decisions about what content they consume, allowing individuals to self-censor as appropriate to their tastes and sensibilities. The government, it must be said, is historically an exceedingly poor arbitrator of individual taste and public sensibility, but it can prove effective in the role of educator and advocate. However, a modern classification framework must recognize that it is impossible to provide advice in both the necessary scale and detail, and so focus instead on empowering users by giving them the tools and knowledge with which they may assess for themselves if they wish to engage with the content.

The primary functions of empowering users and providing advice works excellently to further the second nominated reason: protecting children. Informed parents and guardians may make informed decisions regarding the content their children consume, providing the primary bulwark against access to inappropriate content. This bulwark may potentially be supplemented by regulation, much as it is under the current framework, by making it illegal to sell, loan, screen etc. works classified with an adult rating to minors. However, it is manifestly inappropriate to make the *primary* purpose of an Australia-wide classification system the protection of minors; the majority of Australians are adults[12], the primary consumers and purchasers of media within Australia are adults, and nearly two-thirds of Australian households do not contain dependent children, a number that is expected to rise significantly in coming years[13].

The third potential reason nominated by the paper – preventing access by all Australians – is not a valid reason for content regulation. There is little point to using classification as a means to attempt to restrict access to certain types of content; illegal content is still illegal regardless of whether it is classified or not, and so is better handled by law enforcement agencies than media classifiers. If the content itself is not illegal, there is no legitimate reason to try to prevent access by adult Australians.

It is likely that a fourth possible reason will be put forth by some members of the public and organisations submitting to this inquiry: to prevent offence. Given the wildly divergent views and opinions held by ordinary Australians, legislating to prevent individuals from being offended is simply impossible. Indeed, the very act of branding some expression offensive will cause offence. The recent Rip & Roll advertising campaign, for example, comprising of a series of posters featuring a gay couple promoting condom use, was found to be deeply offensive by some members of the community; others, who thought it sweet and an important public health message, found the idea that the ads might be considered offensive offensive[14].

Furthermore, attempts legislate on the basis of preventing offence are fundamentally detrimental to our society and democracy, chilling public discourse and artistic expression, and preventing individuals from having their beliefs, ideas and mindsets challenged.

WHAT CONTENT SHOULD BE CLASSIFIED AND REGULATED?

Question 3. Should the technology or platform used to access content affect whether content should be classified, and, if so, why?

Ideally, no. Practically, yes.

In an ideal world, we would be able to classify all media content in a platform-neutral way. Indeed, where possible, content classification *should* be platform neutral: books and ebooks should be classified in the same manner, video accessed via a handheld device be treated as video screened in a cinema or purchased on DVD.

[12] http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyTopic/1F51406DCEEBAC14CA256EC7007B5B4E?OpenDocument
[13] http://www.abs.gov.au/AUSSTATS/abs@.nsf/0/916F96F929978825CA25773700169C65?opendocument
[14] http://www.abc.net.au/news/stories/2011/06/01/3233007.htm

However, actually achieving this is impossible, and any classification framework must acknowledge and respect the inherent futility of attempting universal classification. Simply put, the amount of material being produced on a daily basis exceeds our capacity to classify it. To manually classify the amount of content uploaded to YouTube – itself but a single site among trillions - each *minute* would require the full-time employment of at least seven people[15]. Even China, who employs tens of thousands of people to classify and then censor content, fails spectacularly in the pursuit of universal classification, a failure that is expected to grow still larger over time[16].

A second problem faced by any pursuit of universal classification is that of jurisdiction. While it may be possible for Australia to require a film distributor to have a film rated as a perquisite for screening it in Australian cinemas, it has extremely limited recourse to force that same distributor, if they choose to release it online and use overseas servers, to comply with Australian law. Similarly, thousands of Australians today play the smash-hit game *Minecraft* though it has never been classified for sale within Australia, and, given it is distributed entirely digitally, using on overseas servers and overseas financial services, almost certainly never will be.

Finally, there is historical basis for exempting some forms of media from classification; introducing universal classification may simply prove an unnecessary and costly regulatory burden on industries that have been lightly regulated or wholly unregulated for decades, even centuries, with few to no indications that it is needed. Literature, for example, has historically been more or less excluded from classification, relying on the principle that the vast majority of such works are self-censoring: people access material according to their reading ability. The instances where literary works in Australia have been subject to classification are notable for their rarity, the controversies banning them inspired and, often, how quaint many appear with the benefit of historical hindsight. Attempts today to ban *Ulysses* by James Joyce, as was done in 1912[17], would rightly be laughed at.

Question 4. Should some content only be required to be classified if the content has been the subject of a complaint?

Potentially.

In areas where the regulatory burden would otherwise be too high, the only feasible way to classify content is on a complaints basis, if at all. Examples of situations that would preclude pre-publication classification include instances where the time or monetary cost of assessing works is high, where works are subject to frequent modification, and/or where the a volume of content being is produced and/or modified is great.

However, within a complaints-based system, efforts must be made to dissuade frivolous and malicious complaints, and complaints made by those who are, for want of a better term, perpetually offended. A potential method for doing would be to require a fee be paid on submission of a complaint. Complaints made by parliamentarians and/or special interest/lobby groups should be given no special standing comparative to members of the public.

Additionally, the issue of jurisdiction crops up with regard to complaints-based classification of online material (as it does with any consideration of online material). Australians may complain and Australian classifiers subsequently classify media in as much detail as they wish but, unless that material is considered illegal by the nation in which it is hosted, the content creator or distributor may safely ignore the strange antipodeans making noise. This obviously raises the question of: why waste time and money?

[15] http://www.telegraph.co.uk/technology/google/8536634/YouTube-users-uploading-two-days-of-video-every-minute.html
[16] http://www.time.com/time/world/article/0,8599,1981566,00.html
[17] http://www.caslon.com.au/auscensorregimesnote15.htm

Engaging in a futile arms race of filtering technologies, in order to enforce our classification system on the rest of the world, will also be a waste of time and money. The example of China's famous 'Great Firewall' is a lesson in this; despite having access to vastly cheaper labour, and state sanctioned extreme restrictions on content, the firewall is easily breached in seconds, by anyone with the will and means.

Question 5a. Should the potential impact of content affect whether it should be classified?

No.

'Impact' appears to be an idea relatively unique to the Australian classification framework. More problematically, it appears to be a wholly subjective measurement: while we currently regulate content on the basis of its 'impact', 'impact' is not a term or concept properly defined anywhere in the Act, Code or Guidelines. What is 'impact'? How is it measured, by whom and over what timeframe? What separates high from moderate impact'? Do we rate content with a high positive 'impact' similarly to content with a high negative 'impact'? Against who or what are we judging/applying impact? Adults? Children? The media landscape? The wider community? Viewers who are targeted? Incidental viewers?

Moreover, if classifying content on the basis of its impact is subjective, classifying it on the basis of its *potential* impact is doubly so. It's pure guesswork, speculation as to the future strength of an ill-defined property. Such guesswork can often be completely wrong. Video games, for example, have been denied an adult classification due to the ongoing perception that their 'potential impact' is greater than other media due to their greater level of interactivity. Twenty years of research into the matter, however, has consistently shown that any effects engendered by games are comparable to those engendered by other media[18].

Question 5b. Should content designed for children be classified across all media?

Again, while this is potentially desirable, it is not possible for the reasons outlined in the response to question three. Moreover, producers of content intended for children, particularly young children, are already strongly incentivized to provide accurate classification information; failure to do so leads to marketplace failure.

Question 6. Should the size or market position of particular content producers and distributors, or the potential mass market reach of the material, affect whether content should be classified?

No.

This is an entirely subjective and impractical measure. Furthermore, as more and more content is released in a purely digital form, and more and more people access that content primarily through online services, the *potential* 'mass market reach' of any material is, in practice, the *largest* possible market.

Question 7. Should some artworks be required to be classified before exhibition for the purpose of restricting access or providing consumer advice?

Artworks are already subject to industry classification prior to exhibition, albeit in a less formalized way than some other media. There is no demonstrated need to change this situation; complaints against art exhibitions and/or art works are, once again, notable for their rarity, and are almost never borne out. Indeed, the works at the centre of the biggest such controversy within the last decade in Australia, photographs of a naked 13-

[18] http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf (p.13)

year-old taken by Bill Hensen and exhibited in 2008, were, on classification, found to be wholly inoffensive and given a rating of PG[19]. There has been nothing remotely comparable since, and it is difficult to find examples of similar outrages before.

Question 8. Should music and other sound recordings (such as audio books) be classified or regulated in the same way as other content?

Yes.

The question is, of course, which types of 'other content'? Given that there is no demonstrated need to change the way music is classified or regulated, it having happily operated under a self-regulatory framework since time immoral, it should continue to self-regulate, in the same manner that artworks have. At most, the introduction of an industry code might be considered.

Audio books in need of classification, however, should be classified according to the print work from which they originate. Music videos should be treated as other video content.

Question 9. Should the potential size and composition of the audience affect whether content should be classified?

No.

This is an entirely subjective and impractical measure. Again, the *potential* size and composition of audience any work is effectively incalculable. Even when the question is examined in more narrow terms, time and time again works are created that attract interest from audiences well outside of their expected or target demographic. The interest from adults in the *Harry Potter* series of children's novels, for example, was so immense that it ultimately led the publishers to release versions with more 'grown up' covers. More recently, animated television series *My Little Pony: Friendship is Magic*, much to the delight of its creators, attracted a huge following of older, male fans (known as 'bronies), despite being explicitly targeted at young girls[20].

A consideration of *intended* audience rather than potential might be more appropriate, but universally requiring classification based on this raises the problems posed in the answer to question three.

Question 10. Should the fact that content is accessed in public or at home affect whether it should be classified?

No.

This is an archaic distinction. Five years ago, the primary (and, in many cases, only) means of accessing the internet for most Australians was through computers in their home or place of work. Today, millions carry mobile devices with them constantly that enable quick and easy internet access, and by 2014 it is expected that these devices will be the primary means of accessing the internet[21]. These same devices enable the access of other content previously relegated to the home or specialised venues – television, movies, video games. In another five years time, these devices are expected to be even more ubiquitous and powerful, including new hardware and systems, such as miniaturised projectors and short-range radio transmitters, that turn them into broad and narrowcast devices.

[19] http://www.theage.com.au/national/no-charges-for-henson-20080606-2mnv.html
[20] http://www.wired.com/underwire/2011/06/bronies-my-little-ponys/
[21] http://www.scribd.com/doc/29850507/Internet-Trends-Mary-Meeker-04-12-2010

The long held dream of media convergence has arrived, and media formats and methods of interaction and display will continue to blend into each other over the next decade. Any classification system needs to take into account the increasingly mobile and flexible nature of media consumption. Indeed, with the rise of 'augmented reality' the line between real life interactions, and media consumption becomes extremely thin.

Question 11. In addition to the factors considered above, what other factors should influence whether content should be classified?

Factors that should potentially influence what content requires classification include:

- Whether it is actually feasible to require classification
- Whether the content is broadcast, narrowcast or unicast
- Whether operators within the industry already provide some form of content advisory
- Whether the content is already subject to assessment under another reputable classification framework
- Whether the material is intended to be primarily educational in nature
- Whether there is an established historical expectation from the public for third-party content advisory

HOW SHOULD ACCESS TO CONTENT BE CONTROLLED?

Question 12. What are the most effective methods of controlling access to online content, access to which would be restricted under the National Classification Scheme?

The simply is no truly effective means of controlling access to online content, let alone a demonstrated need for government intervention to do so. Indeed, most methods for attempting to control access to online content amount to nothing more than expensive security theatre. The least invasive methods are the most ineffective for preventing access to material supposedly prohibited, and the most effective means are deeply invasive and penalise ordinary internet users with slow speeds and inappropriate blocking while advanced users easily circumvent them.

Question 13. How can children's access to potentially inappropriate content be better controlled online?

Again, there is no demonstrated need for government intervention in this arena; the vast majority of Australian parents are comfortable with their ability to control and monitor their children's use[22]. This existing competency may be encouraged by providing sources of continuing education to parents about on and offline safety issues. The government is already considered to be a trusted source of such information[23].

Question 14. How can access to restricted offline content, such as sexually explicit magazines, be better controlled?

This question is largely moot. The problem, if such a thing actually does exist, of uncontrolled sale of sexually explicit material off-line – primarily magazines and videos – will vanish as the market for these products

[22] http://www.acma.gov.au/webwr/_assets/main/lib101058/media_and_society_report_2007.pdf (p.23)
[23] http://www.acma.gov.au/webwr/_assets/main/lib310665/cybersmart%20parents_connecting%20parents%20to%20cybersafety%20resources.pdf (p.14)

continues to collapse in favour of digital offerings, which are cheaper, more varied and subject to fewer restrictions.

The interim solution would require two key revisions to the way erotica and pornography are treated by the Australian classification framework: sale of X18+ material must be legalized Australia-wide, and the scope of material that falls under this rating be broadened to include legal sexual acts. Much of the problem with illegal sale of X18+ material stems from the paradox within the States of ownership being permitted but sale not; shop owners wish to meet demand and law enforcement officers are reluctant to waste resources pursuing people for selling material that is actually legal. When police do pursue those selling adult material to adults, it is less a triumph and more a miscarriage of justice – one need only ask Daryl Cohen, the first person in some sixty years to be jailed for selling otherwise legal pornography[24].

Question 15. When should content be required to display classification markings, warnings or consumer advice?

Where such advice is otherwise unavailable.

However, in the case of physically distributed media, it is not necessarily unreasonable to continue, as has been done, to require basic classification information on the covering, or to precede broadcast media with content advisories.

WHO SHOULD CLASSIFY AND REGULATE CONTENT?

Question 16. What should be the respective roles of government agencies, industry bodies and users in the regulation of content?

With the increasing impossibility of universal content classification, the primary burden of content regulation now lies on the user. It is their task to provide warnings as to the suitability of content they produce, to seek out information regarding content they are considering consuming, and to make their own judgments regarding the suitability of that content in the absence of regulatory authority. Users are, with rare exception, already well practiced in this regard; for over twenty years internet content has effectively been regulated (or gone unregulated) in this way, and most prominent content sharing sites, be they run by corporate bodies or communities of otherwise unconnected individuals, provide users with some means of identifying the nature and/or contents of material. Video sharing sites like YouTube prohibit certain types of content, provide basic age restrictions and allow users to flag potentially inappropriate content[25]. Art sharing websites like DeviantArt allow users to enable users to filter out mature images[26]. Textual fiction archives like fanfiction.net require users to provide film-style ratings for their works – far above and beyond what is required by Australian law - and don't display mature content by default[27].

More importantly, users have learned that the appropriate action when encountering content they don't like is to hit the back button and go on their merry way. When there is little to no expectation of third-party regulation, users can and will regulate for themselves.

If/where more formal classification is required, it should be moved to appropriate industry bodies. In such cases, the government should provide oversight in the form of random audits and assessment of material based on valid public complaints against agreed industry codes. The government itself should not be in the

[24] http://www.abc.net.au/unleashed/34994.html
[25] http://www.google.com/support/youtube/bin/topic.py?hl=en&topic=10551
[26] http://about.deviantart.com/policy/etiquette/
[27] http://www.fanfiction.net/guidelines/

business of media classification outside of determining what does and does not constitute criminal acts and applying appropriate penalties, and ensuring that industry codes are properly upheld.

Question 17. Would co-regulatory models under which industry itself is responsible for classifying content, and government works with industry on a suitable code, be more effective and practical than current arrangements?

Yes. Though, again, with the caveat that universal regulation is impossible, and that primary focus should be on educating and empowering users to inform themselves and each other without relying on a regulatory body.

Question 18. What content, if any, should industry classify because the likely classification is obvious and straightforward?

Where formal classification is required (and self-classification is not possible/impractical), industry should always be the primary classifiers.

CLASSIFICATION FEES

Question 19. In what circumstances should the Government subsidise the classification of content? For example, should the classification of small independent films be subsidised?

There should not be a fee for having a work classified if the content producer/distributor is required to do so.

Requiring fees for classification reduces the amount and variety of material Australians have access to. It is also particularly discriminatory against Australians who do not speak English, or for whom English is a second language, as it effectively imposes a high financial burden upon them simply for wishing to view, read, listen to or play content produced in their native tongue.

In the event that classification fees are required, libraries, museums and other cultural and educational institutions should be made exempt from charge. Likewise, this exemption should extend to organisations working on behalf of individuals with auditory or visual disabilities, and individuals who do not speak English or for whom English is a second language. Costs should also be subsidised for all content producers when the cost of classification constitutes a significant percentage or is greater than the cost of creating the work, or for importers of physical media bringing in only small amounts of a particular piece of content.

CLASSIFICATION CATEGORIES AND CRITERIA

Question 20. Are the existing classification categories understood in the community? Which classification categories, if any, cause confusion?

While the G, PG and R18+ film and game categories are well understood, there is considerable confusion regarding classification categories across several media:

M15+ & MA15+

The confusion regarding the difference between the M15+ and MA15+ is well known. The two ratings are often conflated, with parents either thinking that they are one and the same, or that either rating is suitable for younger teens.

X18+

The X18+ classification category suffers from two misconceptions. The first is that both ownership and sale are outlawed. The second is that it contains all non-illegal pornography when, in reality, the vast majority of such material falls into the Refused Classification category.

RC

There is a great deal of confusion and misinformation regarding the Refused Classification category of content. Most problematically, this confusion extends to those charged with making policy decisions regarding media content. The common perception is that RC is illegal when, as noted in the issues paper, this category contains a mixture of legal and illegal content. There is also a common misconception that RC also equals banned; again, this is not the case, as ownership, save when the material itself is illegal, is legal for most Australians.

This confusion is not helped by having three different RC standards: (in order of lenience) print publications, film and online content, and computer games.

Category 1 & 2 Publications

Most Australians are likely unaware that these categories exist or, if they are, that they can and do contain more than pornographic magazines. It is not entirely without the realm of possibility that many Australians would not realise that non-serial print publications are subject to classification at all.

Question 21. Is there a need for new classification categories and, if so, what are they? Should any existing classification categories be removed or merged?

Yes and yes.

While this review should consider if the classification categories as a whole should be retooled and renamed, the following improvements could be made to the existing framework as an interim measure:

R18+ and X18+ Classifications for Games

Games should be brought into parity with other media through the introduction of adult content classifications. There is no valid reason to suppress content based on delivery platform, and the longstanding arguments for preventing the introduction of adult classifications (i.e. that games are inherently more harmful than other media) have proven baseless.

M15+ and MA15+

To alleviate the confusion between the M15+ and MA15+ categories, the M15+ category should be retooled to unequivocally target a younger demographic, similar to the MPAA PG-13, PEGI 12 or BBFC 12 standards. This would provide better guidance for parents, allowing them to differentiate between content that is suitable for tweens/young teenagers and young adults/older teens.

X18+ and RC in all media save Print

The RC category of content should be abolished. Content that is currently RC but not illegal that cannot meet the guidelines for an R18+ or below rating should be placed within the X18+ category, and both the X18+ and

R18+ categories retooled to reflect this. Content that is currently RC and illegal should be referred to law enforcement when found.

Category 1, 2 and RC Publications

Category 1 and Category 2 publications should be rebranded R18+ and X18+ and given comparable criteria to their film counterparts. The RC category should be abolished. Content that is currently RC but not illegal should be placed into other ratings as appropriate. Content that is currently RC and illegal should be referred to law enforcement when found.

Question 22. How can classification markings, criteria and guidelines be made more consistent across different types of content in order to recognise greater convergence between media formats?

Language and markings can be standardised across media and platforms. Ambiguity and arbitrary tests can be removed.

Question 23. Should the classification criteria in the Classification (Publications, Films and Computer Games) Act 1995 (Cth), National Classification Code, Guidelines for the Classification of Publications and Guidelines for the Classification of Films and Computer Games be consolidated?

Yes.

REFUSED CLASSIFICATION (RC) CATEGORY

Question 24. Access to what content, if any, should be entirely prohibited online?

The only content that should be entirely prohibited online are those that required the commission of certain illegal acts to produce, such as child abuse material, and do not have any artistic, literary, academic, historic or newsworthiness value. However, media classification is not the appropriate tool for prohibition; such material is better handled through law enforcement agencies than media classifiers.

Question 25. Does the current scope of the Refused Classification (RC) category reflect the content that should be prohibited online?

No.

Currently, the RC category of content contains material that is both legal and illegal to watch or own, and, due to broad wording of the relevant legislative tools, potentially captures a great deal more material than intended. Legal material should not be prohibited for adults. Illegal material should be illegal. There should not be a grey area of "material that's legal but treated as if it's illegal because some people don't like it".

REFORM OF THE COOPERATIVE SCHEME

Question 26. Is consistency of state and territory classification laws important, and, if so, how should it be promoted?

Consistency between Federal, State and Territory classification laws is extremely important. It should be promoted by nullifying the Cooperative Agreement, stripping the states of the power to legislate regarding media content and legislating on this matter only at the Federal level. This move should be accompanied by other legislative changes whose purpose is to check the power of the Commonwealth to restrict expression, such as enacting a Bill of Rights or enshrining the right to free expression within the Australian Constitution.

The current cooperative agreement is an abject failure. This failure is primarily evidenced in two ways:

- extreme inconsistencies in state and territory regulation of media content
- the ineffectiveness of the Standing Committee of Attorneys General (SCAG) in dealing with classification matters

The issues paper lays out several of the most glaring inconsistencies regarding media content classification. The worst offender, of course, is the X18+ double-standard, which permits the sale of X18+ material in the territories, but not the states, giving Australia a thriving mail-order pornography trade. The less prominent inconsistencies, however, are also potentially some of the most problematic, as they present the greatest opportunities for Australians to become criminals simply by moving from state to state. A person moving from Melbourne to Perth, for example, should not have to risk fines or imprisonment for bringing a copy of a Refused Classification game like *Mortal Kombat* with them[28].

An entire paper could be written regarding the failures of SCAG as an effective and fair means of determining classification policy. As it stands, SCAG is an unelected, unrepresentative body and that is effectively unaccountable for its decisions – that is, when it can manage to make them in a timely manner. Worth noting is that the issue of an R18+ game classification has been on the committee's radar since at least 1995[29], while work on unifying the States' contradictory child pornography laws, first begun in 2005[30], looks to have been quietly canned; the states and territories retain conflicting definitions of such material.

While the Classification Board is intended to be representative of the Australian community, those responsible for setting the code and guidelines under which they operate are historically white, male, straight, over forty and conservative. Many have little to no practical, first-hand experience with new technologies they are expected to rule regarding. This has been especially true of video games, where they are more likely to have children that play than play themselves, as was the case with former South Australian Attorney General Michael Atkinson[31].

Mentions of Mr. Atkinson must inevitably bring up the single largest flaw of the co-operative agreement: the unanimity requirement. Under the current system, a single minister, operating at the behest of a single state electorate, may determine classification policy for the entire nation by exercising their unlimited veto right. For several years, Mr. Atkinson, a vocal opponent of the introduction of an adult rating for games, was able to easily stymie all efforts at games rating reform for years, going so far as to block a public consultation on the issue[32].

Mr. Atkinson's tenure on SCAG also serves to highlight the extreme difficulty in holding members to account for their decisions. Beholden only to his state electorate of Croydon, a safe seat he had held for some twenty years, Mr. Atkinson could and did easily ignore the concerns of residents of other Australian states – or even

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[28] http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:6628P/$FILE/CenshpAct1996_00-00-00.pdf?OpenElement (pg.63)

[29] http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~80000CPB+-+A+Review+of+the+Classification+Guidelines+for+Films+and+Computer+Games+%288+~+Commissioned+Research256802.pdf/$file/80000CPB+-+A+Review+of+the+Classification+Guidelines+for+Films+and+Computer+Games+%288+~+Commissioned+Research256802.pdf (p.4)

[30] http://www.coag.gov.au/coag_meeting_outcomes/2005-06-03/index.cfm#child

[31] http://uk.gamespot.com/news/6203703.html

[32] http://www.news.com.au/technology/michael-atkinson-gags-ratings-debate/story-e6frfro0-1111117900405

other South Australian electorates – as they had no effective means of applying pressure. Opponents of his position who did not reside in Croydon could not vote against him. Opponents who resided out of state could not even vote for opposition parties, and could expect to have any correspondence stating their concerns with his stance ignored by his party. The senator, well aware of his strong position, eventually went on to taunt R18+ proponents with this very lack accountability. In a letter sent to several members of the gaming community, he remarked:

> "*I think you will find this issue has little traction with my constituents who are more concerned with real-life issues than home entertainment in imaginary worlds"*[33]

This lack of accountability manifests itself in other ways throughout the committee. They have, for example, on at least three occasions, amended the Code and Guidelines without conducting any form of public consultation[34], most recently in 2005[35]. This is a direct violation of the Cooperative Agreement, which stipulates (emphasis added):

> *9. The Code or classification guidelines are not to be amended unless:*
>
> *(...)*
>
> *(b) that proposal, unless considered minor by the Ministers, is the subject of a process, as determined by the Ministers, of public consultation which at least involves the invitation of submissions by the public;*

The combination of unchecked power being given to an unrepresentative and effectively unaccountable body *should not be tolerated* by any democratic society.

Question 27. If the current Commonwealth, state and territory cooperative scheme for classification should be replaced, what legislative scheme should be introduced?

A single Act that lays out a national classification framework whose primary functions are

1) to provide tools and strategies that consumers may use to inform and educate themselves regarding media content
2) to provide advice regarding media content when such advice is not otherwise available
3) to provide light regulatory oversight

Question 28. Should the states refer powers to the Commonwealth to enable the introduction of legislation establishing a new framework for the classification of media content in Australia?

Yes.

As per question 26, in the interests of greater consistency and uniformity, the states should cede their powers to the Commonwealth. However, it is extremely important that limitations be imposed upon the Commonwealth's ability to exercise these powers to further restrict expression.

[33] http://www.slicedgaming.com.au/content_video/nov09/R18-Michael%20Atkinson.pdf
[34] http://libertus.net/censor/isp-blocking/rc-ncb-govclaims2010.html#glreview
[35] http://libertus.net/censor/classif-reviews.html

OTHER ISSUES

Question 29. In what other ways might the framework for the classification of media content in Australia be improved?

EXAMINE WAYS TO FUTURE-PROOF THE FRAMEWORK

As mentioned at the outset of this submission, Australia's media classification framework is a reactive, not pro-active, framework. As a result, it is constantly scrambling to adapt to an increasingly rapidly changing media landscape. Increasingly, it is failing to do so. Any classification framework going forward must seek to future-proof itself as much as is possible, by analysing current and future media and technology trends and striving to account for them.

DEVELOP WAYS TO EMPOWER USERS

It is now impossible for the government, industry or a combination of both to be the gatekeepers of content. For any new classification framework to be future-proof, it must ultimately focus on empowering users to take responsibility for their own content consumption.

RESEARCH TO ACCURATELY GAUGE COMMUNITY STANDARDS/VIEWS

If the government intends to form all or part of a classification or censorship framework around the idea that it must be in keeping with community standards/views, it must continually and objectively conduct research into what those views actually *are*. Historically, it has not done this; since 1995 there has been one singular examination of community standards, the results of which, indicating a desire for less onerous censorship, were ignored[36]. Incidental reviews of community standards conducted as part of inquiries into a singular part of the framework (again when conducted at all), have had their results skewed in favour of conservative views[37], or been, again, outright ignored. The recent R18+ consultation served no greater purpose than to destroy the faith of thousands of Australians in the objectivity of the classification framework when, in the face of a clear positive outcome, the SCAG determined that further consultation with the 'silent majority' was needed before a decision could be made[38]. The some fifty-eight *thousand* people who contributed in favour of an R18+ rating were evidentially aberrant.

ENSURE THERE ARE APPROPRIATE CHECKS AND BALANCES

Australians, somewhat infamously, have no constitutionally enshrined right to freedom of expression. Instead, we rely on a small body of case law primarily concerning political discourse to determine what does and does not constitute protected or legal speech, and what the limits to expression are[39]. Worth noting is that, while we have affirmed the principles of the *Universal Declaration of Human Rights* on two occasions (most recently in 1998[40]) and remain a signatory of the *International Covenant on Civil and Political Rights*, the freedom of expression Articles in both declaration and treaty have not been enshrined within Australian law, making their influence negligible[41].

[36] http://libertus.net/censor/isp-blocking/rc-ncb-govclaims2010.html#glreview
[37] http://www.efa.org.au/Publish/oflcpublrev989.html
[38] http://au.gamespot.com/news/6282460/silent-majority-views-needed-on-aussie-r18-minister
[39] http://www.aph.gov.au/LIBRARY/pubs/rn/2001-02/02rn42.htm
[40] http://www.aph.gov.au/hansard/reps/dailys/dr101298.pdf (p.6)
[41] http://www.aph.gov.au/LIBRARY/pubs/rn/2001-02/02rn42.htm

Without such a guarantee to free expression, the Commonwealth Parliament and other governing bodies can and do place restrictions on expression that would otherwise be lawful. This is also a power that both Federal and State governing bodies have consistently refused to consider relinquishing, and a power they are likely to continue to cling to for the foreseeable future. This is deeply problematic because the checks and balances need to prevent the power to criminalise speech from being abused are simply non-existent.

Making matters worse, when decisions are made to restrict expression, they are often made without consultation with the Australian populace (or, when consultation is undertaken, in *active defiance* of the wishes of most Australians), run contrary to received advice, completely lack foresight and are formed in a climate of misinformation. Indeed, when noted anti-censorship activist Irene Graham looks back upon landmark censorship decisions in the late 1980s she finds that "Political decision-making (…) was characterised by false information, distortion, exaggeration and vigilantism."[42]

The unsurprising result of this failure to check government power is a censorship regime that has consistently broadened in scope, leading to Australian becoming one of the most censorious nations in the Western World.

In order for Australians to have faith in their classification system, and in any attempts by government to restrict expression, they must be certain that neither process is subject to abuse.

REMOVE THE 'REASONABLE ADULT' AND SIMILAR TESTS

Currently, the framework makes repeated references to a hypothetical 'reasonable adult' as a fundamental basis for making classification decisions. These references are made in extremely board terms (emphasis added):

- *the standards of morality, decency and propriety generally accepted by reasonable adults*[43]
- *describe, 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 classified*[44]*;*
- *describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not);*
- *explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult*
- *explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult;*
- *describe or express in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult;*
- *contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult;*

[42] http://libertus.net/censor/rdocs/xrhoax1.html#key
[43] http://www.comlaw.gov.au/Details/F2008C00126/Html/Text#param3
[44] http://www.comlaw.gov.au/Details/F2005L01284

While the legal fiction of the 'reasonable adult/person' does have its place within our legislature, that place is not within the realm of media classification. Simply put, there is no such thing as a 'reasonable adult' when it comes to this arena. While any ten adults plucked from the street will likely agree that bludgeoning another person to death with no provocation is wrong, those same ten adults are almost certain to disagree as to how graphically it is reasonable for that scenario to be portrayed in our media, and in what contexts that portrayal should be allowed to take place. One of the very few cases called upon to examine an application of the reasonable adult test touched on this directly:

> *"The "reasonable adult" test must accommodate the community standards of Toorak and Newtown as well as those of Kunnanurra and Broken Hill. It must also accommodate the standards of various subgroups within a multi-racial, secular society which nonetheless includes persons of different ages, political, religious and social views."*[45]

The ongoing battle over the classification of the film *Salo,* repeatedly banned and unbanned, is a perfect example of the irresolvable tension the test engenders[46]. On one side of the debate, there are legions of adults who do not find the film offensive (or at least not so offensive that others can't see it). On the other, legions of adults who feel the film is so very offensive that screening the film should be a criminal offence. Which side is right? Should those who find it offensive be permitted to stop those who don't from seeing it?

Cultural differences, too, play a large part in rendering the "reasonable adult" test problematic. Japan, for example, is (in)famous for its liberal media laws, as are several Scandinavian nations. A Japanese expatriate may, for example, consider an explicit *yaoi* –homoerotic 'boys' love'- manga to be nothing of note, given that *yaoi,* written almost exclusively by women, it is one of the most popular genres of manga for young women in Japan. An Anglo-Saxon Australian, though, might find it repulsive, or even consider it to be child pornography.

ENSURE INTEROPERABILITY AND/OR PARITY WITH INTERNATIONAL SCHEMES

Australians currently have access to vast amounts of media that is not and likely never will be subject to Australia-based classification mechanisms; the amount of such material. Some of that media, however, is subject to classification mechanisms in other countries. Australian consumers should be encouraged to make use of the information and advice provided under those schemes by providing at least some measure of parity between them and an Australian framework, or providing advisory services that translate international classifications into Australian ratings.

EXAMINE WHAT CURRENTLY CONSTITUTES CRIMINAL MATERIAL

Any examination of media classification and censorship must examine the extent to which material is criminalised under those frameworks, and determine if that prohibition is appropriate, and working as intended. While the criminalisation of a great deal of this material is uncontroversial, there is a not insubstantial body of material that is subject to debate within the community. This is particularly true of:

- the current restrictions on media that "promote, incite or instruct in matters of crime or violence", which captures, among other things, *The Peaceful Pill Handbook*[47]

the definition of child abuse material, which is so broad that major publishers, retailers and libraries can be caught completely unaware by it[48]

[45] http://www.austlii.edu.au/au/cases/cth/FCA/2007/1871.html
[46] http://www.refused-classification.com/Films_Salo.htm
[47] http://www.lib.unimelb.edu.au/collections/special/exhibitions/bannedbooks/exhibition/nitschke.html

[48] http://www.perthnow.com.au/news/child-porn-book-the-pearl-still-being-sold-in-australia-after-tasmanian-man-convicted-for-downloading-it/story-e6frg12c-1226015301166?referrer=email&source=PN_email_nl&emcmp=PN&emchn=Newsletter&emlist=Member