

CHAPTER 8

Convergence of media in a digital age

8.1 One of the major issues which arose in the course of this inquiry is the growth of digital media and the ramifications for a classification system that was established over 15 years ago. This issue relates directly to the following terms of reference: (l) the interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority (ACMA) in supervising internet content; and (m) the effectiveness of the National Classification Scheme in dealing with new technologies and new media, including mobile phone applications, which have the capacity to deliver content to children, young people and adults.

8.2 The treatment of online content by the National Classification Scheme is of particular note. The evidence provided to the committee reflects significant confusion over the classification requirements for online-based or distributed publications, films and computer games. This confusion is also evident in relation to publications, films and computer games provided through mobile devices.¹

Interaction between the National Classification Scheme and new media

8.3 The National Classification Scheme deals with the classification of publications, films and computer games. However, in the 15 years since the establishment of the National Classification Scheme, the means by which publications, films and computer games are accessed has changed significantly. As a result, the National Classification Scheme in its current iteration is not keeping pace.

8.4 The ability of a national classification system to adequately deal with new media content is extremely important given the growth of these industries. In particular, children and young Australians are avid consumers of content delivered through new media. Accordingly, a scheme that adequately protects children will need to adapt to new media forms.

Use of online and mobile services by children

8.5 A significant proportion of the media accessed and utilised by Australian children is done through the internet or using mobile phones.

1 Digital convergence is affecting the television and recorded music industries as well. These industries are discussed in Chapter 9.

Online activity

8.6 According to the ACMA, online activity is the second most time-consuming media activity for Australian youth, behind watching television.² In 2007, eight to 17 year-olds reported spending an average of one hour and 17 minutes per day accessing and using the internet.³

8.7 Young Australians spent the most time using instant messaging services (23 per cent of internet time for eight to 17 year olds), followed by gaming online (19 per cent), homework (17 per cent), and social networking (14 per cent).⁴ A report by Screen Australia also noted that online activities including video streaming, social media and online gaming are dominated by the 14–17 and 18–29 year old demographic.

8.8 More generally, Screen Australia noted that the proportion of people viewing films on DVD or Blu-ray fell over the last five years, but was offset by online video.⁵ Importantly, films on DVD and Blu-ray are subject to classification under the National Classification Scheme, while online video may not be.

8.9 In 2010, 20 per cent of Australians had used a computer to watch video online, and two per cent had done so using a mobile phone.⁶ Australians are increasingly engaging with online content, as noted by Screen Australia:

At current growth rates, by the end of 2011 more than 50 per cent of Australians will be engaging with Facebook at least once every four weeks, and more than 30 per cent with YouTube. This has not only prompted new considerations in marketing methods but also highlights the broadcasting power of the internet.⁷

2 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 39, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

3 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 39, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

4 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 41, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

5 Screen Australia, 'Beyond the Box Office' 2011, answer to question on notice, received 5 May 2011.

6 Screen Australia, 'Beyond the Box Office' 2011, answer to question on notice, received 5 May 2011.

7 Screen Australia, 'Beyond the Box Office' 2011, answer to question on notice, received 5 May 2011.

Mobile phone activity

8.10 The use of mobile phones by children to access media is increasingly prevalent. By 2007, 75 per cent of Australian 12–14 year-olds and 90 per cent of 15–17 year olds owned a mobile phone.⁸

8.11 This reflects a similar statistic in the United States, where, in 2009, 66 per cent of eight to 18 year olds owned a mobile phone. Twenty per cent of all media consumption among American youth occurred using mobile devices, including mobile phones, iPods or handheld video game players,⁹ and the committee expects that the Australian experience is likely to be similar in this regard.

8.12 A 2007 Australian study found that the use of a mobile phone for other media activities by young Australians was also starting to emerge:

Over three diary days, 22 per cent of eight to 17 year olds reported using a mobile phone to take photographs, 16 per cent played games, 10 per cent listened to music/radio, seven per cent recorded video footage, and three per cent reported using their mobile phone to watch TV shows/clips/videos.¹⁰

8.13 Fourteen per cent of eight to 17 year olds reported playing games on a mobile phone over three diary days.¹¹

8.14 However, the increasing uptake of more advanced phones is likely to have boosted these figures since the survey period.¹² The committee expects that the consumption of media through mobile devices is likely to continue to increase.

Regulation of online content

8.15 Online content is regulated through the Online Content Scheme under Schedules 5 and 7 of the *Broadcasting Services Act 1992*.¹³

8 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 4, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

9 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 2, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

10 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 27, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

11 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 35, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

12 The Australian Communications and Media Authority, *Trends in media use by children and young people*, June 2010, p. 27, http://www.acma.gov.au/WEB/STANDARD/pc=PC_312210, (accessed 31 May 2011).

8.16 The ACMA administers the co-regulatory Online Content Scheme, including internet and mobile-phone content. The Online Content Scheme aims to address community concerns about offensive and illegal material online and, in particular, to protect children from exposure to material that is unsuitable for them.¹⁴

8.17 The ACMA investigates complaints about online content and encourages the development of codes of practice for the online-content service-provider industries, as well as registering and monitoring compliance with such codes.¹⁵

8.18 Under Schedule 7 of the *Broadcasting Services Act 1992*, prohibited content includes content that has been classified or is likely to be classified:

- RC (Refused Classification);
- X18+;
- R18+ unless it is subject to a restricted access system; or
- MA15+ and is provided on a commercial basis (that is, for a fee) unless it is subject to a restricted access system.¹⁶

8.19 The determination of whether online content is prohibited is made by reference to the classification categories established under the National Classification Scheme. The ACMA refers Australian-hosted content that is substantially likely to be prohibited to the Classification Board for classification. The ACMA may also refer content hosted overseas to the Classification Board. In 2010, the Classification Board made 148 decisions on content referred to it by the ACMA.¹⁷

8.20 If the online content is prohibited and is hosted in or provided from Australia, the ACMA will direct the content service provider to remove or prevent access to the content (that is, it will issue a take-down notice). If the prohibited internet content is hosted outside Australia, the ACMA will notify suppliers of approved filters of the content. Approved filters are updated regularly to block content that the ACMA has found to be prohibited. If the content is sufficiently serious (for example, child

13 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

14 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

15 The Australian Communications and Media Authority, *Online Regulation*, http://www.acma.gov.au/WEB/STANDARD/pc=PC_90154, (accessed 26 May 2011).

16 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

17 Attorney-General's Department, *Submission 46*, p. 14.

pornography or terrorist-related material), the ACMA will refer the content to the appropriate law-enforcement agency for criminal investigation.¹⁸

8.21 In addition, since 2004, the *Criminal Code Act 1995* (Cth) has included offences relating to the possession and distribution of offensive material. Such material includes child pornography or child-abuse material on, for example, the internet, radio and television.¹⁹ From 2005, the *Criminal Code Act 1995* (Cth) has similarly prohibited the distribution of suicide-related material.²⁰

Online content: Classification Act 1995, Broadcasting Services Act 1992 or both?

8.22 As described above, online content is regulated through sections 5 and 7 of the *Broadcasting Services Act 1992*. The Online Content Scheme thus falls under the *Broadcasting Services Act 1992*, not the *Classification Act 1995*, and is not technically part of the National Classification Scheme. There are, however, links between the two systems, including harmonised classification categories and the roles of the Classification Board and the Classification Review Board in classifying content under the provisions of the *Broadcasting Services Act 1992*.

Definitions of publications, films and computer games

8.23 One particular area where submitters highlighted ambiguity is the distinction between publications, films and computers games that are available both offline and online.

8.24 The National Classification Scheme provides a definition for publications, films and computer games. A publication is defined as any written or pictorial matter, that is not a film, or a computer game, or an advertisement for a publication, film or computer game.²¹

8.25 A film is 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 soundtrack).²²

8.26 A computer game is a computer program and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display,

18 Department of Broadband, Communications and the Digital Economy, *Online content regulation*, http://www.dbcde.gov.au/broadband/online_content_regulation, (accessed 10 May 2011).

19 *Criminal Code Act 1995*, s. 474.19 and s. 474.22.

20 *Criminal Code Act 1995*, s. 474.29A.

21 *Classification Act 1995*, s. 5.

22 *Classification Act 1995*, s. 5. This does not include a computer game or advertisement for a publication, film or computer game.

or similar medium that allows the playing of an interactive game.²³ 'Interactive game' is further defined as a game in which the way the game proceeds and the result achieved at various stages of the game is determined in response to the decisions, inputs and direct involvement of the player.²⁴

8.27 The broad nature of these definitions creates some ambiguity about what is included under the National Classification Scheme and what is not, resulting in industry and consumer confusion. Telstra, which considered the National Classification Scheme to include the provisions of both the *Classification Act 1995* and the *Broadcasting Services Act 1992*, highlighted this uncertainty:

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. While many aspects of the National Classification Scheme are operating effectively, regulatory complexity has created areas of overlap, inconsistency and uncertainty that have the potential to be confusing for consumers and costly for industry participants implementing the scheme.²⁵

8.28 Telstra informed the committee that the Internet Industry Association developed an industry code of practice for commercial content providers, which was approved by the ACMA in 2008:

Section 8 of the Content Services Code [of Practice] 2008 provides that commercial content providers must ensure that all content that is considered likely to be classified as MA15+ or above must be assessed and categorised against the *Guidelines for the Classification of Films and Computer Games 2005* by a trained content assessor. Content that is classified as, or is determined by trained assessors to be likely to be classified as MA15+ by the Classification Board must then be placed behind a Restricted Access System in accordance with the requirements set out in the Restricted Access Systems Determination 2007. This content assessment process mirrors the 'in house' classification arrangements in place for both the free to air and subscription television sectors.²⁶

8.29 Telstra noted, however, that online content provided in accordance with Schedule 7 of the *Broadcasting Services Act 1992* and the Content Services Code of Practice may also remain subject to the provisions of the *Classification Act 1995*:

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

23 *Classification Act 1995*, s. 5A. A computer program that is capable of generating new elements or additional levels of an original game is also defined as a computer game.

24 *Classification Act 1995*, s. 5.

25 Telstra, *Submission 26*, p. 2.

26 Telstra, *Submission 26*, p. 3.

online content provided by Australian content providers need to be formally classified by the Classification Board.²⁷

8.30 The Australian Home Entertainment Distributors Association (AHEDA) agreed that the proliferation of separate legislation governing classification is increasingly out of date:

However, AHEDA also sees limitations in the Scheme and the way it is governed through legislation such as the Classifications, Broadcasting and Telecommunications Acts which regulate different platforms but the same content. The Classifications Act is an analogue piece of legislation in a digital world.²⁸

8.31 AHEDA informed the committee that, in its view, trying to understand the legal scope of the *Classification Act 1995* and how it relates to online content remains the subject of confusion:

AHEDA has been advised by the Attorney-General's Department...that the [Classification] Act 'does not exclude' classifying content on the internet but can only consider such content if a valid application is received. This matches evidence given to a Senate Estimates Committee hearing by [the] Classifications Board Director...

AHEDA has previously been advised by the Classifications Board, its former Director and the former [Office of Film and Literature Classification] that it does not have a mandate to classify and assess content made available via the internet. In this matter, the only thing that is clear is that there are many confused people both in industry and government proving that the system needs urgent reform.²⁹

8.32 This confusion extends to the online distribution of computer games. The Interactive Games and Entertainment Association (IGEA) noted that, while the computer game industry understands and complies with the application of the National Classification Scheme for traditional content distribution methods, its application to digitally-distributed content is unclear and creates a number of challenges to establishing effective models for digital distribution.³⁰ This issue is not limited to the *Classification Act 1995*, but also extends to state and territory enforcement legislation:

While it is arguable that the definition of computer games is broad enough to include Digitally Distributed Games and Online Games, there are no provisions within the [state and territory] Enforcement Laws that clearly

27 Telstra, *Submission 26*, p. 5.

28 Australian Home Entertainment Distributors Association, *Submission 31*, p. 3.

29 Australian Home Entertainment Distributors Association, *Submission 31*, p. 5.

30 Interactive Games and Entertainment Association, *Submission 38*, p. 3.

specify that Digitally Distributed Games and Online Games should be subject to the Scheme.³¹

8.33 IGEA informed the committee that, under the provisions of the *Broadcasting Services Act 1992*, publishers are able to internally assess unclassified computer games released online, such as unclassified 'Add On Content', and release such computer games in accordance with the provisions of the *Broadcasting Services Act 1992*. Further:

If the [National Classification] Scheme was to apply to content distributed over the internet, the publishers of such content would be subject to two regulators (the Classification Board and ACMA) and two regulatory regimes (the Scheme and the [Broadcasting Services Act]). Publishers and game developers would be unable to benefit from the reactive enforcement provisions of the [Broadcasting Services Act]; instead they would be subject to the compliance burdens of the Scheme. Such regulation undermines the purpose of the [Broadcasting Services Act and] has the potential to stifle innovation and industry progression within the online environment.³²

8.34 This ongoing confusion led a number of witnesses and submitters to call for a uniform approach to content, regardless of the platform used to access that content. For example, the Australian Mobile Telecommunications Association (AMTA) submitted:

[W]hile some content can now be accessed more readily in a converging and increasingly mobile environment, the regulations relating to content should remain focussed on the content itself, and not the means or technological platform used to access it. Content regulation must be platform neutral. It should make no difference which "screen" a consumer uses to view content, the regulation of that content must be equitably applied to each platform.³³

8.35 Mr Bruce Arnold explained this issue further:

In the digital age, where there is increasing convergence of previously separate infrastructure and media streams and where content is delivered across a range of platforms, implementing an effective classifications scheme that will cross platforms and that will be future proof poses a great challenge, regulators and parliament should be wary of simplistic solutions and of unsubstantiated claims regarding harms. We recommend that classification should be tied to media content rather than a platform, and that it should apply across platforms. It is desirable to have a cross-jurisdictional system of classifying content... This should include standard

31 Interactive Games and Entertainment Association, *Submission 38*, p. 8.

32 Interactive Games and Entertainment Association, *Submission 38*, p. 11.

33 Australian Mobile Telecommunications Association, *Submission 42*, p. 2.

classifications on uniform criteria and a common approach to displaying classified and restricted publications and films.³⁴

8.36 Electronic Frontiers Australia (EFA) went a step further, arguing that the National Classification Scheme will soon have 'outlived its usefulness'.³⁵ EFA argued that the National Classification Scheme system would be difficult to apply to online material for a number of reasons, including the sheer volume and globalised nature of content, and the increasing amount of content generated by individual citizens rather than commercial publishers.³⁶

8.37 The Cyberspace Law and Policy Centre argued that caution should be exercised in any application of offline classification regimes to online content:

[I]t cannot be assumed that parity between on-line and off-line classification and censorship schemes in terms of how laws are formulated or what outcomes are sought is appropriate or cost-effective. In particular, achieving similar outcomes for on-line and off-line censorship is not practicable. The sheer size and constant evolution of internet content makes it impossible to achieve similar classification outcomes off-line and on-line cost-effectively, especially given the subjectiveness of classification criteria. Complete or partial automation of classification or censorship through filtering has its own problems...³⁷

The ACMA's online content role

8.38 Term of reference (l) refers to the interaction between the National Classification Scheme and the role of the ACMA in supervising internet content. The ACMA refers Australian-hosted content that is substantially likely to be prohibited to the Classification Board for classification, and may also refer content hosted overseas to the Classification Board.

8.39 In the 2009–10 financial year, the ACMA made 266 applications for individual classifications to the Classification Board. In 78 of these cases, the Classification Board determined the material should be Refused Classification. In the 2010–11 financial year, to 15 April 2011, there have been 131 applications made by the ACMA to the Classification Board, of which 39 were Refused Classification.³⁸

8.40 The ACMA informed the committee that the vast majority of these applications to the Classification Board were made as the result of a complaint:

[The] ACMA has own-motion investigative powers under the [*Broadcasting Services Act 1992*]. They would normally be referred

34 *Committee Hansard*, 25 March 2011, p. 79.

35 Electronic Frontiers Australia, *Submission 13*, p. 3.

36 Electronic Frontiers Australia, *Submission 13*, p. 2.

37 Cyberspace Law and Policy Centre, *Submission 54*, p. 2.

38 *Committee Hansard*, 27 April 2011, p. 33.

investigations from a complaint. So, while they are not technically investigations triggered by complaint, they are associated material with a complaint and, in the normal course of opening these investigations, they would be around serious content, sufficiently serious content and basically offensive depictions of children.³⁹

8.41 The ACMA also explained that the kinds of decisions where it would refer overseas hosted content to the Classification Board would be threshold classification issues, where the ACMA is unclear about the Classification Board's views on a particular issue. In the course of an investigation, the ACMA has a discretionary power to submit any online content hosted overseas to the Classification Board, but must refer anything determined as being hosted in Australia.⁴⁰

Prohibited content

8.42 Submissions outlined a number of concerns in relation to the ACMA's powers with respect to prohibited content. The Arts Law Centre of Australia (Arts Law Centre) highlighted the inconsistency in the treatment of 'prohibited content', compared with similar material available offline:

'Prohibited content' is defined in Schedule 7 of the *Broadcasting Services Act 1992* as being content classified by the Classification Board as refused classification, X18+, R18+ and MA15+ material not subject to an age verification system. The ACMA may also make determinations as to potential prohibited content, namely content that has not been classified by the Classification Board but if the content were to be classified there is a substantial likelihood that the content would be prohibited content. This requires the ACMA to essentially make classification decisions over content that should be made by the Classification Board by guessing as to what the Classification Board would decide. Such decisions by ACMA are problematic because unlike the Classification Board where a publication, film or computer game is banned within Australia if it is refused classification, the ACMA is able to blacklist or take down not only material that is illegal or refused classification, but material rated X18+, R18+ and MA15+ if not restricted behind an age verification system. Such material is legitimately available in Australia in an offline format, and should not be treated differently simply because it is on the internet.⁴¹

8.43 Ms Irene Graham also referred to the problems arising from the ACMA exercising classification powers:

There have been a number of instances in recent years where the ACMA has guessed that particular internet [content] is 'prohibited content' but on subsequent referral to the Classification Board, the same content has been classified as not 'prohibited'. The ACMA has demonstrated that it is not

39 *Committee Hansard*, 27 April 2011, p. 34.

40 *Committee Hansard*, 27 April 2011, p. 34.

41 Arts Law Centre of Australia, *Submission 33*, p. 15.

capable of accurately guessing how particular content would be classified by the Classification Board (and nor would be any other government agency). Hence ACMA should not have the power to order take-down, or blacklist, any internet content prior to having obtained a classification decision from the Classification Board.⁴²

8.44 Further, Ms Graham questioned whether the Classification Board should have the power to classify content on the internet, given the volume of content on the World Wide Web.⁴³

8.45 The Arts Law Centre also noted inconsistencies in decision-making between the ACMA and the Classification Board:

Arts Law is concerned that the ACMA has in the past made decisions as to 'prohibited content' that are in conflict with decisions of the Classification Board. For example, in March 2009 it was reported in the news media that several images by artist Bill Henson which had been already cleared by the Classification Board were included on the ACMA blacklist thus considered 'prohibited content' not to be viewed online in Australia.⁴⁴

8.46 The Arts Law Centre submitted that, although the inclusion of Mr Henson's material on the ACMA's list of prohibited, and potentially prohibited, overseas-hosted content (or 'blacklist') was an error, this merely emphasised concerns in relation to the non-publication of the ACMA's blacklist:

...[I]t is worrying that such an error is capable of being made in the first place, especially since the contents of the ACMA blacklist are not released to the public. Such secrecy undermines any confidence in the ACMA's decision-making and its ability to judge content...and creates the very real potential of scope creep where the list of prohibited content or potential prohibited content expands to include material beyond its original intention. Officials of the ACMA, while perhaps trained by the Classification Board, do not have the expertise or experience of the Classification Board which grant the Classification Board legitimacy. Furthermore, whereas decisions from the Classification Board can be applied for review by the Classification Review Board, there does not appear to be a similar obvious method of appeal for content added to the confidential ACMA blacklist.⁴⁵

8.47 Similarly, the Cyberspace Law and Policy Centre noted that the ACMA's blacklist of prohibited content is not public, giving rise to the possibility of 'overreach' by the ACMA in relation to making determinations about prohibited content. This can be contrasted with decisions of the Classification Board, which are public, meaning

42 Ms Irene Graham, *Submission 20*, p. 4.

43 Ms Irene Graham, *Submission 20*, pp 4-5.

44 Arts Law Centre of Australia, *Submission 33*, pp 15-16.

45 Arts Law Centre of Australia, *Submission 33*, pp 15-16.

that any 'overreach of the [Refused Classification] classification can be avoided through appeal and reclassification processes'.⁴⁶

Mandatory filtering of Refused Classification content

8.48 In December 2009, the Minister for Broadband, Communications and the Digital Economy announced further details of the Australian Government's cyber-safety measures, including the introduction of mandatory internet service provider (ISP) level filtering of Refused Classification content.⁴⁷

8.49 Collective Shout expressed strong support for the implementation of a mandatory filter for RC content and criticised those who objected to such a filter:

Those who oppose filtering on the grounds of free speech, civil liberties or an alleged right of adults to see anything they want are best described as sexual assault or child porn libertarians rather than 'civil' libertarians. There is nothing 'civil' about the material that gets Refused Classification under the national classification scheme.⁴⁸

8.50 The Cyberspace Law and Policy Centre argued that the introduction of such a filter would need to be supported by 'a better empirical understanding' about public concerns and 'in particular attitudes of children and their parents towards risks associated with on-line content'.⁴⁹

8.51 Mr Bruce Arnold and Dr Sarah Ailwood highlighted that internet filtering needs to be complemented by parental responsibility and educational initiatives:

In a globally networked environment, irrespective of technological fixes such as national broadband filters and geolocation restrictions, effective content regulation requires the participation of parents. It is not something that can or should be shrugged off as a matter for the state...Parental responsibility should be underpinned through an express content regulation component in the national curriculum and its state/territory counterparts.⁵⁰

8.52 The committee also notes advice it received from an officer of the Department of Broadband, Communications and the Digital Economy about the status of the introduction of mandatory filtering for RC content:

...[T]he minister indicated...that the next step with respect to the commitment to introduce mandatory filtering of refused classification

46 Cyberspace Law and Policy Centre, *Submission 54*, pp 2-3.

47 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Measures to improve safety of the internet for families', Media Release, 15 December 2009.

48 Collective Shout, *Submission 65*, pp 20-21. See also Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, 25 March 2011, p. 3.

49 Cyberspace Law and Policy Centre, *Submission 54*, p. 2.

50 Mr Bruce Arnold and Dr Sarah Ailwood, *Submission 37*, p. 10.

material was dependent upon a consideration or a review of the 'refused classification' classification...That is being conducted as part of the ALRC review of the National Classification Scheme...[Therefore] the next step in the introduction of mandatory ISP filtering is tied to the ALRC activity.⁵¹

National Classification Scheme and mobile devices

8.53 Developments in the field of mobile telephony have led to increasingly sophisticated mobile devices which are capable of functioning as miniature computers. Such devices can be used to access online content. In addition, many are capable of running software applications of increasing sophistication, including applications which are computer games.

8.54 The Attorney-General's Department (Department) informed the committee that mobile phone and online games are regulated by both the *Classification Act 1995* and the *Broadcasting Services Act 1992*. State and territory enforcement legislation makes it an offence to sell or distribute these games to the public without classification.⁵²

8.55 However, at present, the majority of these games are not classified prior to being made available. This has led to concerns from the Classification Board, industry and consumers about adherence to classification requirements.⁵³

Confusion about mobile phone applications

8.56 The committee received evidence from a number of organisations suggesting widespread confusion over whether mobile phone games and applications require classification prior to sale.

8.57 The number of games and applications (apps) for mobile devices is growing rapidly, as described by Research in Motion (RIM):

There are now over 500,000 apps and games available for Australian consumers to download onto their phones. Consumers spent an estimated \$6.2 billion in 2010 in mobile application stores and games remain the number one most popular apps, ahead of mobile shopping, social networking, utilities and productivity tools.⁵⁴

8.58 While developers would appear to be responsible for having their applications classified under the National Classification Scheme, relatively few are apparently

51 *Committee Hansard*, 27 April 2011, p. 34.

52 Attorney-General's Department, *Submission 46*, p. 15.

53 Attorney-General's Department, *Submission 46*, p. 15.

54 Research in Motion, *Submission 17*, p. 5.

doing so at present.⁵⁵ RIM is only aware of five games for mobile devices that have been classified, which are its own.⁵⁶

8.59 The Australian Mobile Telecommunications Association (AMTA) noted that it was increasingly unclear how to distinguish between computer games as they have traditionally been known, and the increasing number of mobile applications.⁵⁷ The AMTA maintained that the vast majority of mobile applications, including many games, consist of content that would not be considered 'submittable' under the National Classification Scheme:

...[I]t is hard to define a 'game' that may cause concern from the many 'games' that would not, such as a Sudoku application for a mobile. They both may be available for download to a mobile device.⁵⁸

8.60 RIM pointed out that, while a Sudoku application may have to be classified, those same Sudoku puzzles could be published in a newspaper without classification.⁵⁹

8.61 Both AMTA and RIM informed the committee that most application developers are individual hobbyists or small enterprises.⁶⁰ As a result, the classification fee can be onerous for such developers, reducing competitiveness for smaller market participants.⁶¹ AMTA also noted that Australia is perceived as a small market, meaning additional costs of regulation may lead to developers avoiding the release of their products in Australia.⁶²

8.62 AMTA submitted that mobile applications are already subject to self-regulation by online stores:

The providers of such online stores have already implemented their own guidelines and safeguards with respect to applications available in their stores. AMTA maintains that the vast majority of these applications are not 'submittable' material in nature and that, in any case, the industry is successfully self-regulating in this market.⁶³

55 Research in Motion, *Submission 17*, p. 5.

56 Research in Motion, *Submission 17*, p. 1.

57 Australian Mobile Telecommunications Association, *Submission 42*, p. 4.

58 Australian Mobile Telecommunications Association, *Submission 42*, p. 4.

59 Research in Motion, *Submission 17*, p. 3.

60 Australian Mobile Telecommunications Association, *Submission 42*, p. 4; Research in Motion, *Submission 17*, p. 5.

61 Research in Motion, *Submission 17*, p. 5.

62 Australian Mobile Telecommunications Association, *Submission 42*, p. 5.

63 Australian Mobile Telecommunications Association, *Submission 42*, p. 5.

8.63 Finally, RIM observed that, if all applications are in fact sent to the Classification Board for classification, given the number of applications developed each year, the Classification Board would have a significantly increased workload.⁶⁴

Mobile phone premium services

8.64 As noted above, many mobile devices are capable of accessing the internet and any content contained thereon. In addition, phone users may be able to access mobile premium services through a Short Message Service (SMS) or Multimedia Message Service (MMS), or a proprietary network. The mobile premium services fall under Schedule 7 of the *Broadcasting Services Act 1992*, and therefore adopt classification definitions linked to the National Classification Scheme.⁶⁵ As a result, many of the same arguments raised above in relation to online content apply to mobile premium services.

8.65 In addition, FamilyVoice Australia made the point that, while parents may be able to exert some control over the use of a family computer to access online content, this may be less true of mobile devices. Mrs Roslyn Phillips from FamilyVoice Australia stated:

Now that there are mobile phones with internet access, all that my child has to do is to go to school and see the pornography on a friend's phone. Parents cannot control that. I do think there is a strong case for the government to step in when I believe, as in this case, there is proven harm from the freely available pornographic and violent sites.⁶⁶

8.66 Mobile premium service content is subject to the same prohibitions applying to other forms of online content services. In addition, it is prohibited to provide MA15+ content through a mobile premium service unless it is subject to a restricted access system.⁶⁷

8.67 Telstra noted that the mobile content it provides is subject to age restriction where required, whether the mobile service is provided through a post-paid account or pre-paid service.⁶⁸

8.68 Under Schedule 7 of the *Broadcasting Services Act 1992*, Telstra engages Trained Content Assessors to categorise the likely classification (for example G, PG, MA15+, R18+) of relevant content that has not been classified by the Classification

64 Research in Motion, *Submission 17*, p. 7.

65 *Broadcasting Services Act 1992*, Schedule 7, clause 15.

66 *Committee Hansard*, 25 March 2011, p. 76.

67 *Broadcasting Services Act 1992*, para. 20(1)(d).

68 Telstra, *Submission 26*, p. 4.

Board. Telstra then restricts access to this content in different ways, depending on the nature of the service being provided.⁶⁹

8.69 In order to obtain a post-paid service with Telstra, a person must be 18 years of age or older, which is verified at the time of activation. Only account owners may request access to age-restricted services, in a process outlined in Telstra's submission:

A customer who wishes to access age-restricted content can do so by calling Telstra customer service who will verify the caller as the account owner by asking for the account password and other information that only the account owner would know. Once verified as the account owner, the customer is by definition verified as being 18 years or older and a confirmation letter is sent to the account owner's address.⁷⁰

8.70 Pre-paid customers wishing to access age-restricted content must apply for the service and provide proof of age. Once a post-paid or pre-paid account has been age-verified in this manner, the user can access age-restricted content.⁷¹

69 Telstra, answer to question on notice, received 21 April 2011.

70 Telstra, *Submission 26*, p. 4.

71 Telstra, *Submission 26*, p. 4.