

1 February 2016

**Senate Standing Committee on Economics
Personal Choice and Community Impacts Inquiry**

**CLASSIFICATION OF PUBLICATIONS, FILMS AND COMPUTER
GAMES**

The Eros Association Inc is the industry association for the Australian adult retail and entertainment industry. The Australian adults-only industry is a growing force, expanding to a broader market of customers with a greater diversity of products. The modern Australian adults-only industry is a contemporary landscape of superstores, emporiums, industry suppliers and web stores. Our members include adult novelty stores, tobacconists, herbal shops, adult entertainment, tattoo parlours, body piercing studios, escort agencies, adult film makers, and industry wholesalers and distributors.

1. The National Classification Code

"Classification decisions are to give effect, as far as possible, to the following principles:

- 1. adults should be able to read, hear, see and play what they want;*
- 2. minors should be protected from material likely to harm or disturb them;*
- 3. everyone should be protected from exposure to unsolicited material that they find offensive;*
- 4. the need to take account of community concerns about:*
 - i. depictions that condone or incite violence, particularly sexual violence; and;*
 - ii. the portrayal of persons in a demeaning manner."*

It is the opinion of our members that the first principle of the National Classification Code is not being upheld due to a number of reasons:

- contradiction between federal and state classification legislation;
- the X18+ Licence in the ACT is no longer cost effective;
- the only wholesale business classifying X18+ films withdrew from the market due to the cost prohibitive nature of classifying such films, compounded by frequent abuse of power by customs and customs officials, as well as unfair market advantage when other businesses imported films that had been classified at the expense of the wholesaler; and
- the restrictive nature of X18+ classification and the number of consensual sex acts between adults that are refused classification (RC).

The Australian classification scheme, insofar as it applies to adult and restricted media, has completely collapsed, leaving many people exposed to prosecution from outdated official censorship laws and with limited personal freedom to read, see or hear, harmless erotic material. In addition, the Australian taxpayer is still being asked to fund an organisation and a scheme that delivers limited benefits and a lack of tangible results.

The current system of official classification in Australia, is now a system of censorship. Sexually explicit non-violent material is what we are arguing here and by any scale or moral compass, should have a right to exist in society, free from the calls of those who feel offence at the fact that it exists.

The Eros Association therefore proposes a number of recommendations, many which are in line with the recommendations of the Australian Law Reform Commission Report No 118 *Classification – Content*

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Regulation and Convergent Media (2012). These recommendations will be discussed later in this submission.

2. Classification Laws

a. Contradictions between federal and state/territory classification statutes

The sale of X18+ films are made legal through the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). However, each state in Australia, through their respective classification enforcement statutes, have ensured that the legal status of X18+ rated films remains in a grey area. Any adult can legally buy and possess X18+ rated films (with the exception of Western Australia) but it is illegal for an adult retail store (an age-restricted premises) to sell such a film in all states. This is all despite the fact that an adult is able to access via the internet or mail order material that is not classified but would likely to be classified X18+ or indeed RC given the relatively narrow scope of consensual sex acts between adults that is allowed within an X18+ classification.

The current act is outdated and does not reflect the reality of the decline in sales of DVDs generally, due to digital delivery and consumption models made possible by fast speed internet and the fact that adults can access content on the internet that has not been classified.

b. X18+ licensing in the Australian Capital Territory

Part 6 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) allows for the sale of X18+ under an annual licence currently issued by Access Canberra. The prescribed fee ranges from \$15,840 for sale only, to \$31,681 for businesses wishing to copy and sell X18+ films. This does not include the cost of classifying the film, which is addition to the prescribed licence fee.

The cost of the X18+ licence is cost prohibitive for adult retail businesses operating in the ACT. It is highly unlikely that the cost of the X18+ licence would be recovered through the sale of adult DVDs due to the significant decline in these type of sales.

Actions of customs and the Classification Board caused the shut down of the only major classifier of adult titles which was operating out of the ACT (see section 3, below). This has left the market flourishing in unregulated and unclassified adult material or retailers relying on old titles that have already been classified to a market disadvantage. In doing so, the Classification Board undermined the ACT's regulatory scheme for X18+ films which completely relied on new classified products. This scheme, which once boasted 14 license holders, now has only three and is about to have none.

3. Australia's only wholesale adult film classifier no longer operates

Ninety-five per cent of Australia's legal X18+ films were supplied to the market place by one of our members until recently. They imported adult films from overseas to supply the Australian market. For 20 years they imported a single master film and edited it to meet the tough Australian standards required in the X18+ category and then destroyed the imported master.

This member was the major classifier of X18+ films in Australia between 1998 and 2006. From around 2007 they became the only significant trader classifying these films at all. In 2011 they were informed by customs that they could no longer import an original master of an overseas film for editing purposes without an import permit signed by the Director of the Classification Board.

Subsequent deliveries of master films (and even Australian-classified finished DVDs) to our member were seized and held by customs for indefinite periods for varying reasons - some of which bordered on irrational. For example, the music score on one particular adult title was alleged to have infringed a Disney title but was then later released with no comment.

After many months and correspondence from our member's legal team, the permit issue was then finally refused in writing by the Classification Board on various grounds including the reputation of the company, it's alleged inability to comply with the draft import permit and a fear that the Classification Board would become flooded with import permit applications from other parties.

Our member subsequently applied through the courts to have the ability to receive an import permit. After many months of legal proceedings and under appeal, the courts ruled that the Classification Board did have the jurisdiction to grant our member an import permit, subject to the parties agreeing on the terms. Despite efforts by our member and officers of the Eros Association to meet with Classification Board officials to discuss the terms of the permit, for various reasons, members of the Classification Board were never available and clearly undermined the court's decision.

Due to plunging sales of classified DVDs in Australia and the inability to receive an import permit, our member finally decided to cease importing masters and classifying new adult titles. In Dec 2013 they closed their DVD editing suite, retrenched 18 staff in all and closed the Canberra distribution warehouse. The Adult Industry Copyright Organisation (AICO), was disbanded and ceased pursuing copyright infringement and film piracy in Australia on adult films.

Our member is no longer releasing any new titles into the Australian market and ceased all adult film sales entirely from June 30, 2014. The market is now completely unregulated and dominated by unclassified original versions of overseas adult films of every genre and persuasion.

4. The restrictive nature of X18+ classification means that some consensual sexual acts between adults are refused classification

According to the *Guidelines for the Classification of Films (2012)* (a legislative instrument of the Classification Act), there are a number of consensual sexual acts between adults that are disallowed under the X18+ classification. Not only does this contradict the idea of consent between adults, but it also unfairly discriminates against people who participate in the BDSM (bondage/discipline; dominant/submissive; sadism/masochism) community, and members of the lesbian, gay, bisexual and trans community (LGBT).

"Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted (in the X18+ restricted classification)."

"Films will be refused classification if they include or contain any of the following: ...Gratuitous, exploitative or offensive depictions of:

- a. activity accompanied by fetishes or practices which are offensive or abhorrent; ..."*

Guidelines for the Classification of Films 2012

The practice of these fetishes are not illegal, so why should the depiction of these consensual sexual acts be made illegal? Furthermore, for the guidelines to call these acts "offensive or abhorrent" is offensive to those people who engage in BDSM and other fetish play.

General members of the public are protected from viewing such films through restricted premises – meaning that in order to view adult material, a person must consent to entering an age-restricted premises. If an individual has an objection to such material, then they simple need not enter an adult retailer. Furthermore, there is no restriction on a person buying or possessing material that is likely to be refused classification (with the exception of child sexual abuse material and bestiality), similarly, one can access any content readily through the internet. The guidelines therefore establish a limited means through which adult media can be classified, allowing for punitive censorship of adult media and adding unnecessary constraints on legal, tax paying adult retail businesses.

5. The Australian Law Reform Commission report number 118

In 2011 and 2012, the then government through the Australian Law Reform Commission conducted a review into classification, regulation of content and convergent media. The ALRC made a number of recommendations, following considerable community consultation, many of which have yet to be introduced.

At the time, the Eros Association contributed to the public consultation. Eros continues to support a number of recommendations contained in the final report of the ALRC. Eros urges the government to reconsider these recommendations.

6. Recommendations

- a. A new classification scheme should be enacted that allows for the enforcement of such a scheme to occur at a federal level. States and territories would be absolved of responsibilities in relation to classification;
- b. The regulation of online content should only include content hosted in Australia or controlled by an Australian content provider.
 - i. The ALRC recommendation to include content directed at an Australian audience is too broad.
 - ii. Therefore, the definition of 'Australian connection' used for the RAS Declaration should be used as a basis for the regulation of online content.
- c. The new scheme should not mandate that all adult content must be classified; the sale of adult material should be permitted including unclassified material that is likely to be classified X18+;
- d. The new scheme should review material currently refused classification to allow for the depiction of sexual fetishes in film within the X18+ category;
- e. The industry should be allowed to establish an industry code and self-regulate the classification of X18+ films.

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