

Chapter 1

Introduction and overview

Referral and conduct of the inquiry

1.1 On 25 June 2015, the Senate referred an inquiry into personal choice and community impacts to the Senate Economics References Committee (committee) for inquiry and report by 13 June 2016.¹

1.2 The committee's terms of reference require it to report on:

The economic and social impact of legislation, policies or Commonwealth guidelines, with particular reference to:

- a. the sale and use of tobacco, tobacco products, nicotine products, and e-cigarettes, including any impact on the health, enjoyment and finances of users and non-users;
- b. the sale and service of alcohol, including any impact on crime and the health, enjoyment and finances of drinkers and non-drinkers;
- c. the sale and use of marijuana and associated products, including any impact on the health, enjoyment and finances of users and non-users;
- d. bicycle helmet laws, including any impact on the health, enjoyment and finances of cyclists and non-cyclists;
- e. the classification of publications, films and computer games; and
- f. any other measures introduced to restrict personal choice 'for the individual's own good'.

1.3 In accordance with usual process, the committee advertised the inquiry on its website and wrote to relevant persons and organisations inviting submissions to the inquiry.

1.4 To date, the committee has received 485 public submissions and two confidential submissions. The public submissions are available on the committee webpage.

1.5 The committee has held seven public hearings. At its first public hearing, on 11 September 2015 in Canberra, the committee heard evidence on decision making generally. The other public hearings focused on specific matters in relation to the inquiry terms of reference as follows:

- on 3 November 2015, in Parramatta, the committee heard evidence on proposed restrictions on the activities of fans of the Western Sydney Wanderers Football Club;

1 *Journals of the Senate* No. 102, 25 June 2015, p. 2832.

- on 16 November 2015, in Melbourne, the committee heard evidence on mandatory bicycle helmet laws in accordance with inquiry term of reference (d);
- on 20 November 2015, in Sydney, the committee heard evidence relating to inquiry term of reference (b) concerning the sale and service of alcohol with focus on Sydney's lockout laws;
- on 9 March 2016, in Sydney, the committee heard evidence regarding inquiry term of reference (a) concerning tobacco, nicotine and e-cigarettes;
- on 11 March 2016, in Sydney, the committee heard evidence regarding the sale and service of marijuana in accordance with inquiry term of reference (c); and
- on 22 April 2016, in Canberra, the committee heard evidence in relation to the classification of publications, films and computer games in accordance with inquiry term of reference (e).

1.6 This report focuses on the evidence in relation to the term of reference (e) concerning classification of publications, films and computer games.

1.7 The committee thanks all those who have participated in the inquiry so far.

Classification under Australian law

1.8 The classification of publications, films and computer games is regulated predominantly by the National Classification Scheme, but is administered differently in each state and territory.²

1.9 The Commonwealth, states and territories are bound to the *Intergovernmental Agreement on Censorship* (Intergovernmental Agreement), first agreed to in 1996. The aim of the agreement is to 'make, on a cooperative basis, Australia's censorship laws more uniform and simple with consequential benefits to the public and the industry'.³

1.10 The Department of Communications and the Arts (the department) outlined the division of regulatory responsibilities:

Broadly, the Commonwealth is responsible for the classification of the films, publications and computer games in accordance with the *Classification (Publications, Films and Computer Games) Act 1995*. Within those arrangements, the states and territories are responsible for the enforcement of classification laws. In practice, that means that in each jurisdiction there is classification legislation which sets out, among other

2 The inconsistency in this approach was highlighted in the Senate Legal and Constitutional Affairs Committee's 2011 report into classification titled *Review of the National Classification Scheme: achieving the right balance*, June 2011.

3 *Intergovernmental Agreement on Censorship*, item B.

things, the offences and penalties for those in, for example, distributing refused classification material.⁴

1.11 The Australian Classification Board (ACB) is a statutory board established under the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act). Its role is to classify 'films, computer games and publications for exhibition, sale or hire in Australia'.⁵ The ACB is required to provide advice accompanying each classification to inform consumers 'which classifiable elements (that is themes, violence, sex, language, drug use and nudity) have led to the classification decision'.⁶

1.12 The Commonwealth and the states and territories have agreed to the National Classification Code (the Code) and the Classification Guidelines for publications, films and computer games (the Guidelines), which are tools to be used by the ACB and Review Board in making their decisions. The Intergovernmental Agreement requires that all non-minor amendments to the Scheme and any changes to the Code or the Guidelines must be considered and unanimously agreed to by all classification ministers.⁷

1.13 It would appear that the Intergovernmental Agreement serves as a challenge to establishing national consistency and to instituting reform. The Eros Association (Eros) informed the committee that there were contradictions between federal and state and 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.⁸

4 Ms Cathy Rainsford, Assistant Secretary, Classification Branch, Department of Communications and the Arts, *Committee Hansard*, 22 April 2016, p. 9.

5 Australian Classification, Classification Board, <http://www.classification.gov.au/About/Pages/Classification-Board.aspx> (accessed 4 May 2016).

6 Australian Classification, Classification Board, <http://www.classification.gov.au/About/Pages/Classification-Board.aspx> (accessed 4 May 2016).

7 Department of Communications and the Arts, *Submission 471*, p. 2.

8 The Eros Association, *Submission 443*, p. 2.

Classification process

1.14 Under state and territory classification laws, all films and computer games must generally be classified before they can be exhibited, demonstrated, sold or hired in Australia. There are a number of categories of films and a smaller number of categories of computer games that are exempt from classification, such as educational, business, professional and scientific films and games (as long as they would otherwise be classified G or PG).⁹

1.15 In contrast to films and computer games, only submittable publications need to be classified. Submittable publications are defined in the Classification Act as publications that contain depictions (ie. images) or descriptions (ie. text) that are:

- likely to be classified Refused Classification;
- likely to cause offence to a reasonable adult to the extent that the publication should not be sold or displayed as an unrestricted publication; or
- unsuitable for a minor to see or read.¹⁰

1.16 Publications, films and computer games are generally classified against six classifiable elements: themes, violence, sex, language, drug use and nudity. The ACB's classification decisions consider the impact of each of these elements, including their frequency, intensity and level of detail, and their cumulative effect. The ACB also considers the context of these elements, including the purpose and tone of the material and how it is treated.¹¹

1.17 The classification categories for films and computer games are set out below.

Table 1.1: Classification for films and computer games¹²

Advisory categories for films and computer games	G – General PG – Parental Guidance M – Mature
Restricted categories for films and computer games	MA 15+ – Mature Accompanied R 18+ – Restricted
Restricted categories of adult films	X 18+ – Restricted RC – Refused Classification

9 Department of Communications and the Arts, *Submission 471*, p. 2.

10 Department of Communications and the Arts, *Submission 471*, p. 2.

11 Department of Communications and the Arts, *Submission 471*, p. 3.

12 Australian Classification, Classification categories explained, <http://www.classification.gov.au/Guidelines/Pages/Guidelines.aspx> (accessed 4 May 2016).

Classification standards

1.18 The department explained that when classifying content, certain matters must be considered in accordance with the Classification Act, such as:

- the standards of morality, decency and propriety generally accepted by reasonable adults;
- the literary, artistic or educational merit (if any) of the content;
- the general character of the content, including whether it is of a medical, legal or scientific character; and
- the persons or class of persons to whom it is published or is intended or likely to be published (i.e. the audience).¹³

1.19 In addition to the requirements of the Classification Act and the Code, the Guidelines set out broadly what fits into each classification category. The requirements are assessed in accordance with a scale of 'classifiable elements' such as themes, violence and sex.¹⁴ As a case in point, the ACB has to determine the definition of 'offensive or abhorrent' practices in accordance with the requirements and how the definition applies to the content before it.¹⁵

Review of the National Classification Scheme

1.20 In February 2012, the Australian Law Reform Commission (ALRC) released its report into classification under the present legal framework. The ALRC found that there were a number of significant issues with the current regulatory framework that created confusion within the industry and for viewers, in addition to failing to meet the intended goals of the system. These issues included the:

- inadequate regulatory response to changes in technology and community expectations;
- lack of clarity about whether films and computer games distributed online must be classified;
- 'double handling' of media content, with films and television programs being classified twice for different formats (e.g., 2D and 3D) and different platforms (e.g., broadcast television and DVD);
- content prohibited online, including some content that may not be prohibited in other formats, such as magazines;
- inconsistent state and territory laws concerning restrictions and prohibitions on the sale of certain media content, such as sexually explicit films and magazines;

13 Department of Communications and the Arts, *Submission 471*, p. 3.

14 Department of Communications and the Arts, *Submission 471*, p. 3.

15 Ms Cathy Rainsford, Assistant Secretary, Classification Branch, Department of Communications and the Arts, *Committee Hansard*, 22 April 2016, p. 11.

- low compliance with classification laws in some industries, particularly the adult industry, and correspondingly low enforcement; and
- a need to clarify the responsibilities of the Classification Board, the Australian Communications and Media Authority (ACMA) and other Australian Government agencies and departments involved with classification and media content regulation.¹⁶

1.21 The ALRC recommended that a new classification scheme be designed to address both the changing media landscape and the current problems in the classification regulatory scheme. The key recommendations emanating from the review included the following:

- Platform-neutral regulation—one legislative regime establishing obligations to classify or restrict access to content across media platforms.
- Clear scope of what must be classified—that is feature films, television programs and certain computer games that are both made and distributed on a commercial basis and have a significant Australian audience.
- A shift in regulatory focus to restricting access to adult content—imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.
- Co-regulation and industry classification—more industry classification of content and industry development of classification codes, subject to regulatory oversight.
- Classification Board benchmarking and community standards—a clear role for the Classification Board in making independent classification decisions using classification categories and criteria that reflect community standards.
- An Australian Government scheme—replacing the current classification cooperative scheme with enforcement of classification laws under Commonwealth law.
- A single regulator—with primary responsibility for regulating the new scheme.¹⁷

Government response to the ALRC review

1.22 Following the release of the ALRC report in 2012, the Australian Government clarified that it would seek the views of all the states and territories on the report. Once those views were gathered, the intention was to use them to develop a

16 Australian Law Reform Commission, *Classification Content Regulation and Convergent Media*, Report 118, February 2012, Executive Summary, pp 22–23.

17 Australian Law Reform Commission, *Classification Content Regulation and Convergent Media*, Report 118, February 2012, pp 13–14.

Commonwealth position on the ALRC recommendations and thereafter finalise the Government response to the ALRC report.¹⁸

1.23 Some of the recommendations of the ALRC were implemented in 2014 by way of legislation introduced by the government which amended the Classification Act.¹⁹

1.24 However, in relation to the ALRC's recommendation on the establishment of a more co-regulatory or industry-based classification model, this change still requires the agreement of the Commonwealth, states and territories in accordance with the Intergovernmental Agreement. When questioned about a Commonwealth response to the ALRC report and possible implementation of the remainder of its recommendations, Ms Cathy Rainsford, Assistant Secretary at the Classification Branch, Department of Communications and the Arts explained the challenges relating to the 1995 accord:

I would say that the requirement that there needs to be unanimous agreement to reform across all classification ministers in the states and territories as well as in the Commonwealth is a challenge in the scheme. Classification of content—film, computer games and publications—can be a sensitive and controversial area and different jurisdictions take different views on what reform is necessary and how to progress that.²⁰

Personal choice and classification

1.25 Under the Code, one of the primary guiding principles of Australian classification is that 'adults should be able to read, hear, see and play what they want'.²¹ However, according to the department, this principle is to be equally weighed against three other key principles:

- the protection of underage viewers from material that is likely to harm or disturb them;
- that everyone should be protected from exposure to unsolicited material that they find offensive; and

18 Government response to the Senate Legal and Constitutional Affairs Committee Inquiry into the National Classification Scheme, 16 August 2012.

19 The *Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Act 2014* made amendments to the Classification Act in line with ALRC recommendations 6-3, 7-8, 8-1, 8-2 and 12-3. Australian Law Reform Commission, National Classification Scheme Review, Implementation, <http://www.alrc.gov.au/inquiries/classification/implementation> (accessed 3 May 2016).

20 Ms Cathy Rainsford, Assistant Secretary, Classification Branch, Department of Communications and the Arts, *Committee Hansard*, 22 April 2016, p. 10.

21 Department of Communications and the Arts, *Submission 471*, p. 3.

- the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence, and the portrayal of persons in a demeaning manner.²²

1.26 Evidence to the inquiry was divided into two main schools of thought - those who were supportive of the classification of media content, and those who argued that the classification regulations amounted to an infringement on the personal choice of consumers to access entertainment freely.

1.27 The primary argument against the current classification regulation scheme insofar as it applies to adult and restricted media was that it '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'.²³

1.28 Another concern related to a central tenet of the Code which is to ensure that adults can exercise personal choice in what kind of content they access. It was suggested to the committee that the current classification regime can potentially conflict with this concept by restricting the ability of people to freely access some types of content. The view was put that there remains an inherent tension in finding an appropriate and desirable balance between ensuring that adults can access content freely, while protecting those who may be negatively impacted by the content. This balance was at the core of the debate regarding personal choice in relation to classification.

1.29 The Arts Law Centre of Australia (Arts Law Centre) noted the importance of maintaining a 'balance between allowing adults to read, hear and see what they want, protecting minors from unsuitable material, and taking into account community views'.²⁴ However, they also argued that it was critically important to maintain freedom of speech and expression through the means of artistic mediums, which is impacted by classification.²⁵ The Arts Law Centre continued:

The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) has the potential to conflict with the common law freedom of speech. A well-tailored classification system, the purpose of which is primarily to enable adults to make an informed choice as to what they want to see, hear and read, and what to allow their children to have access to, is an effective mechanism to regulate freedom of expression provided it is not used as a means to censor material that is otherwise legal.²⁶

1.30 The Australian Council on Children and the Media (ACCM) provided a contrasting view, particularly with regard to children. It argued that classification is a

22 Department of Communications and the Arts, *Submission 471*, p. 3.

23 The Eros Association, *Submission 443*, p. 1.

24 The Arts Law Centre of Australia, *Submission 151*, p. 3.

25 The Arts Law Centre of Australia, *Submission 151*, p. 3.

26 The Arts Law Centre of Australia, *Submission 151*, p. 3.

social good carried out by government to ensure the community's safety and protection from harm.²⁷ ACCM held the view that:

Questioning the appropriateness of government intervention for people's 'own good' is based on a view that, we submit, tends to overlook the social nature of our species; our interconnectedness; and the pain we feel when others are hurt—even if they hurt themselves.²⁸

1.31 The ACCM related this issue to that of the relationship between children and classification, arguing that a societal approach to classification is required to ensure that parents are able to appropriately monitor and manage their children's consumption of media.²⁹

Impact of refusing classification

1.32 In accordance with the Guidelines, under the Refused Classification (RC) category, material that is refused classification is commonly referred to as being 'banned'. Classified RC material contains content that is 'very high in impact and falls outside generally accepted community standards'.³⁰

1.33 When the ACB assess whether content should be refused classification, the benchmark is set according to the Code. For example, films classified RC are defined under the Code as:

Films that:

(a) 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; or

(b) 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); or

(c) promote, incite or instruct in matters of crime or violence.³¹

1.34 Other types of content are similarly defined under the Code. Further advice is contained in the Guidelines, which suggest that content classified as RC will generally include material such as child abuse, sexual violence, extreme forms of violence, practices such as bestiality, and instructional or promotional content relating to crime

27 The Australian Council on Children and the Media, *Submission 169*, p. 2.

28 The Australian Council on Children and the Media, *Submission 169*, p. 2.

29 The Australian Council on Children and the Media, *Submission 169*, p. 2.

30 Australian Government, Australian Classification, Refused Classification (RC), <http://www.classification.gov.au/Guidelines/Pages/RC.aspx> (accessed 4 May 2016).

31 National Classification Code (May 2005).

or drug use.³² Content that advocates committing a terrorist attack must be classified RC under section 9A of the Act.³³

1.35 Films, computer games and publications that are classified RC cannot be sold, hired, advertised or legally imported into Australia. According to one submitter, a refusal to classify material 'effectively censors' that material because of the fact that it can't be bought, hired or sold.³⁴

1.36 Eros similarly argued that the 'current system of official classification in Australia, is now a system of censorship'.³⁵ It suggested that sexually explicit non-violent material should have a 'right to exist in society, free from the calls of those who feel offence at the fact that it exists'.³⁶

1.37 Eros put the view that the first principle of the Code-to ensure that adults should be permitted to read, hear, see and play what they want to-is 'not being upheld', particularly in relation to sexually explicit content.³⁷ It gave the following reasons to support its claim:

- the 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).³⁸

1.38 Additionally, it was noted that under current regulations, content can be refused classification when it depicts activities largely accepted in the community. Eros noted that certain sexual acts are prohibited and will not be granted classification under the 2012 Guidelines, which includes otherwise legal and consensual behaviour.³⁹ It claimed that this discriminates against those who participate in these acts, including members of the lesbian, gay, bisexual, transsexual and intersex community (LGBTI community).⁴⁰

32 Department of Communications and the Arts, *Submission 471*, pp 5–6.

33 Department of Communications and the Arts, *Submission 471*, p. 6.

34 Mr Michael Noack, *Submission 5*, p. 1.

35 The Eros Association, *Submission 443*, p. 1.

36 The Eros Association, *Submission 443*, p. 1.

37 The Eros Association, *Submission 443*, p. 1.

38 The Eros Association, *Submission 443*, p. 1.

39 The Eros Association, *Submission 443*, p. 3.

40 The Eros Association, *Submission 443*, p. 3.

1.39 The National LGBTI Health Alliance (Alliance) also raised concerns regarding the classification regime. It suggested that the 'discriminatory classification' of publications, films and computer games has adversely impacted the health of members of the LGBTI community.⁴¹

1.40 It argued that evidence has indicated that media exposure to realistic depictions of LGBTI populations can lead to 'improved understanding and prejudice reduction, by offering alternatives to stereotypical, negative and pathologising representations'.⁴² This factor and the lack of positive portrayals of the LGBTI community in classified media negatively impacts young people struggling with sexual identity, and can result in further alienation and negative mental health effects.⁴³

Technological change

1.41 Free TV argued that the rate of technological change was outpacing the classification regime, creating inconsistencies in how classification is applied.⁴⁴ It suggested that recent developments in media, such as the introduction of online streaming services, have significantly impacted the classification regime, as they do not adhere to the 'traditional' forms of media which underpin the current classification system.⁴⁵ Free TV made the point that this situation has resulted in an inconsistent approach to classification which creates confusion for both consumers and content providers. In fact, in 2012, the ALRC noted in its report on classification that technological innovation has taken place at such a rate that it has reduced the relevance of traditional distinctions between the types of content and the times or ways it can be accessed.⁴⁶

1.42 Free TV demonstrated this point with the example of classification zones on commercial free-to-air television programming. It argued that classification time zones, where programs under a certain classification can be shown within a certain timeframe, were originally designed to protect children from viewing 'inappropriate content'.⁴⁷ However, it suggested that this requirement was no longer applicable for two reasons. Firstly, children do not require protection in the same way as in the past, due to technological advances such as parental locks and children-specific television channels such as ABC2 and ABC3.⁴⁸

41 National LGBTI Health Alliance, *Submission 460*, p. 2.

42 National LGBTI Health Alliance, *Submission 460*, p. 2.

43 National LGBTI Health Alliance, *Submission 460*, p. 3.

44 Free TV Australia, *Submission 448*.

45 Free TV Australia, *Submission 448*, p. 2.

46 Australian Law Reform Commission, *Classification Content Regulation and Convergent Media*, Report 118, February 2012, p. 14.

47 Free TV Australia, *Submission 448*, p. 2.

48 Free TV Australia, *Submission 448*, p. 4.

1.43 Secondly, Free TV argued that the growth of on-demand streaming services has given rise to an expectation that content will be available at a time of one's choosing, without restrictions such as classification zones.⁴⁹ This effectively places different rules on content depending on the means by which it is accessed.

1.44 Furthermore, it was noted by Eros that the same content can be classified differently depending on the type of technology used to access it. Eros argued that content that is otherwise refused classification can easily be accessed online or via mail order.⁵⁰ Eros continued:

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.⁵¹

1.45 In response, Eros and Free TV argued for the need for the consistent application of classification standards across all forms of media.⁵² Furthermore, Eros indicated that implementation of the ALRC recommendations would go some way to addressing their concerns.⁵³

Committee view

1.46 The committee recognises that there have been substantial technological and other changes across the media landscape which have brought the adequacy of the current classification regulatory framework into question.

1.47 Submitters to the committee argued that the pace of innovation, particularly in relation to personal entertainment such as on-demand streaming, has fundamentally challenged the nature of classification laws. Questions were also raised about the role of classification in an environment where content is widely accessible regardless of the restrictions placed on it by regulatory bodies.

1.48 The committee recognises the need for government attention to this issue, particularly in light of current policy challenges such as online piracy. As highlighted in evidence to the committee, a regulatory system that meets community standards and effectively responds to current and future challenges regarding the control of content in Australia is fundamentally important.

Senator Chris Ketter

Committee Chair

49 Free TV Australia, *Submission 448*, p. 5.

50 The Eros Association, *Submission 443*, p. 2.

51 The Eros Association, *Submission 443*, p. 2.

52 Free TV Australia, *Submission 448*, p. 2; The Eros Association, *Submission 443*, p. 2.

53 The Eros Association, *Submission 443*.