



Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004

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Law and Bills Digest Section

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Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004

Date Introduced: 17 November 2004

House: House of Representatives

Portfolio: Attorney-General

Commencement: Royal Assent

Purpose

This Bill amends the *Classification (Publications, Films and Computer Games) Act 1995* ('the Act') to ensure the validity of classification decisions made by the Classification Board (and decisions made on review (or appeal) of those decisions by the Classification Review Board) where those decisions were made on the basis of defective applications lodged by law enforcement agencies. As stated in the Explanatory Memorandum for the Bill:

The provisions do not operate to validate classification decisions that might be defective for reasons other than technical deficiencies related to the application, nor do they prevent any challenges to a Board or Review Board decision based on some defect in the decision making process (as opposed to the form of the application).¹

Background

The Classification Board (which is given administrative and logistical support by the Office of Film and Literature Classification) was established by section 45 of the Act. It is responsible for classifying every film, video and computer game that is legally available in Australia, whether produced in Australia or overseas, as part of the National Classification Scheme.² The Classification Board is also responsible for classifying certain publications and, importantly for the purposes of the Bill, also (among other things) provides advice to law enforcement agencies.

Section 22A of the Act provides for the making of an 'enforcement application'. That term is defined in section 5 of the Act as an application that is made by the Commonwealth or a state or territory (or an agency of the same) 'for the purpose of investigating or prosecuting an offence against a law of the Commonwealth, a State or a Territory'. Enforcement applications 'relate to offences, including under State or Territory classification laws and, and in some cases, child pornography offences'.³ Under the relevant state and territory legislation, a prosecution relating to seized material cannot

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usually occur until the material is classified—although the law is subject to review at present in some states.⁴ According to a statement dated 14 October 2004, the Classification Board ‘does not know what charges, if any, are being contemplated’ when it classifies material submitted by the police.⁵ In 2003–04, the Classification Board made decisions on 458 enforcement referrals.⁶

The requirements for making an enforcement application are set out in section 22A of the Act. The application must be in writing, in a form approved by the Director of the Classification Board, be signed by or on behalf of the applicant and be accompanied by a copy of the material to which the application for classification relates. The applicant must pay the prescribed fee, but the fee need not accompany the application.⁷

If the Classification Board determines that the material is child pornography, it will classify it as ‘RC’—meaning ‘Refused Classification’. According to the National Classification Code, publications will be classified as ‘RC’ if they (emphasis added):

- (a) 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; or
- (b) **describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not);** or
- (c) promote, incite or instruct in matters of crime or violence.⁸

Films and computer games are classified ‘RC’ according to similar, but narrower, standards. If material is classified ‘RC’, it cannot be sold, distributed or advertised in Australia.

Basis of policy commitment

According to the Attorney-General, the Bill is ‘designed to ensure that prosecutions for child pornography and related offences do not fail for technical reasons related to applications for classification’.⁹

In this regard, the Bill seems to have arisen in the context of recent child pornography investigations, including Operation Auxin.¹⁰ That investigation was coordinated by the Australian High Tech Crime Centre (which investigates internet and computer-based crime) and involved the Australian Federal Police, all state and territory police agencies, foreign police agencies, internet companies, child protection agencies and financial institutions. More than 400 search warrants were executed and about 200 people were arrested in what is considered to be Australia’s ‘largest ever crackdown on internet child pornography’. Particularly, more than 150 people were charged with offences such as child sex tourism, sexual abuse and downloading, possessing or distributing child

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pornographic images.¹¹ The examination by computer forensic experts of material seized during raids as part of Operation Auxin may take up to six months.¹²

In the course of child pornography (and similar) investigations, law enforcement officers may seize material. That material may then be submitted to the Classification Board for classification (according to the procedures and guidelines set out in the Act and the classification guidelines). It seems from the second reading speech for the Bill that applications by law enforcement agencies may not necessarily always meet the technical requirements set out in the Act—hence, in the words of the Attorney-General, the Bill is designed to ‘ensure that applications for classification from law enforcement agencies that have not met all the technical requirements ... will not result in a subsequent classification decision being invalid’.¹³

The Bill is regarded as a pre-emptive measure by the Government, which considers decisions made by the Classification Board to be valid even where there may be a technical deficiency in the application process. As the Attorney-General stated, the fact that an application may be flawed casts ‘no doubt whatsoever on the correctness of the classification decision, which rested on the examination of the relevant product, not the formalities of the application’.¹⁴ Particularly, Mr Ruddock stated:

There is no legitimate reason why a person should be able to escape prosecution, conviction and punishment for serious child pornography offences in those circumstances.¹⁵

Main provisions

Schedule 1 to the Bill contains two substantive amendments. All the validation provisions have both retrospective (or past) and prospective (or future) effect.

Item 1 amends the Act to insert **proposed section 22C**.

Proposed subsection 22C(1) validates decisions made by the Classification Board (referred to in the provision and the Act generally as ‘the Board’) where the decision (known as the ‘original decision’) is made on an application made by or on behalf of a ‘law enforcement agency’ and the application did not satisfy the requirements of the Act for making the application.¹⁶ As mentioned earlier, the requirements for an enforcement application are set out in section 22A of the Act.

Proposed subsection 22C(2) provides that any later decision made, or action taken, by the Classification Board, the Classification Review Board or the Director on the basis of the original decision is also taken to be as valid as it would have been if the requirements in the Act for making the application for the original decision had been met.

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Item 2 inserts **proposed section 44B** into Part 5 of the Act, which deals with the review of decisions made by the Classification Board.

Proposed subsection 44B(1) provides that where the Classification Review Board reviews a decision that was made on the basis of an application for classification by a law enforcement agency and the application for review did not satisfy the requirements in the Act for the making of the review application, then the decision of the Review Board is taken to be as valid as it would have been if the review application had met those requirements.

The persons who may apply for review are set out in section 42 of the Act. They are the Minister (the Attorney-General), the applicant for classification of the material, the publisher of the material, and a person aggrieved by the original decision. The requirements for an application for review are set out in section 43 of the Act and are similar to those for making an original application.

Proposed subsection 44B(2) provides that any later decision made, or action taken, by the Classification Board, the Classification Review Board or the Director on the basis of the review decision is also taken to be as valid as it would have been if the review application had met the requirements in the Act for making the review application.

Concluding comments

General

The Government's view is that the amendments merely seek to prevent persons accused of child pornography (and other) offences from evading conviction by virtue of the fact that the classification decision, which forms the basis for the prosecution to assert that material in the defendant's possession or control constitutes child pornography, was made on a technically deficient application.

However, the wording of the Bill is not limited in this way. The amendments refer more generally to an application 'that did not satisfy the requirements of [the Act] for the making of the ... application', which means that the amendments may apply to applications that are actually wrong and those that are not actually applications under the Act, and not just those that are technically deficient in a minor way. For example, the amendments may have the effect of validating an application where the wrong film accompanies the application. That is, the Classification Board makes a decision about Film X that law enforcement agencies sent to it in error instead of about Film Y that was actually seized by the agencies from the person whom the law enforcement agencies wish to charge with an offence. Also, the amendments could apply to a situation where there is an omission or misstatement of something substantial in the form mentioned in paragraph 22A(1)(b) and not a minor, technical deficiency.

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Thus, while it is important that a decision be deemed to be valid even where the application for the decision might not comply with the requirements in the Act in some minor or technical way, it may also be important to clarify the reach of the amendments. This is because the consequence of an application and classification decision may be a criminal conviction and penalty (including imprisonment). Alternatively, in some cases, extended application of the amendments may mean that persons who were definitely involved in child pornography may escape conviction.

Further, it should be noted that section 22A was introduced in 1998 to simplify the requirements in the Act for an enforcement application¹⁷—more stringent requirements continue to apply to applications that are not enforcement applications. There may therefore be good public policy reasons for ensuring that enforcement applications be as accurate and complete as possible.

One way to limit the reach of the proposed amendments, so as to confine them to instances where there are minor, technical deficiencies in enforcement applications, may be to use language of the sort used in section 75 of the *Telecommunications (Interception) Act 1979* (Cwlth). That provision says that ‘but for an irregularity’ in the issue of an interception warrant, the interception would not have been illegal and evidence of the intercepted communication can be given in evidence. It defines ‘irregularity’ in paragraph 75(2)(a) as a ‘defect or irregularity (**other than a substantial defect or irregularity**)’ in, or in connection with the issue of, a document purporting to be a warrant’ (emphasis added).

Retrospectivity and prospectivity

As mentioned earlier, the amendments have both retrospective and prospective application. That is, they apply to decisions made before and after the commencement of the amendments. In other circumstances, the retrospective application of legislation may be problematic and unfair, particularly in the area of general criminal law where the effect of the retrospectivity may be that a person is taken to have committed a crime when no such crime existed at the time the person did whatever it was that now constitutes an offence. Likewise, the effect of retrospectivity may sometimes be harsh and unreasonable.

However, here the retrospective application of the proposed amendments may not be an issue, primarily because the amendments do not seek, according to the Attorney-General, to validate decisions made *improperly* by the Classification Board or the Classification Review Board (that is, not according to the criteria for classifying material). Rather, the legislation seeks only to validate applications for such decisions where the application itself (and not the decision classifying the material to which the application relates) was defective. Nonetheless, the retrospective application of the proposed amendments may be problematic in some situations, depending on the reach of the amendments.

Equally important is the fact that the Bill seeks to validate all future enforcement applications that do not satisfy the requirements of the Act. Again, this may or may not be problematic, depending on the reach of the amendments.

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Endnotes

- 1 Explanatory Memorandum for the Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004, p. 1.
- 2 The national classification scheme comprises the *Classification (Publications, Films and Computer Games) Act 1995* Act (Cwlth) ('the Act'), the National Classification Code and the classification guidelines. The Act provides for the 'classification of publications, films and computer games for the Australian Capital Territory' and is intended to form 'part of a Commonwealth/State/Territory scheme for the classification of publications, films and computer games and for the enforcement of those classifications' (section 3). Definitions are set out in section 5. Classifications are set out in section 7. The states have passed legislation in similar terms. The scheme commenced on 1 January 1996. Annexed as a schedule to the Act is the National Classification Code, which exists as a separate document apart from the Act. It contains descriptions about the products which would fall within the classification types. For example, the Code sets out the level of depiction of sex and violence and other issues which would cause a film to be classified as G, PG, M etc. The criteria for classification are also contained in the Guidelines for the Classification of Films and Computer Games, which came into operation on 30 March 2003. The Guidelines were made under section 12 of the Act and are available electronically at: <http://www.oflc.gov.au/resource.html?resource=62&filename=62.pdf>. For further details see: Morag Donaldson, 'Classification (Publications, Films and Computer Games) Amendment Bill 2004', Bills Digest, no. 115, Parliamentary Library, Canberra, 2003–04, available electronically at: <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd115.pdf>.
- 3 Office of Film and Literature Classification, 'Role of the Classification Board in processing applications from enforcement authorities', Statement, 14 October 2004. See: <http://www.oflc.gov.au/resource.html?resource=345&filename=345.pdf> (at 17 November 2004).
- 4 See, for example, Edith Bevin, 'Child sex photos to bring tougher penalty', *Adelaide Advertiser*, 6 October 2004, p. 8 (South Australia) and Drew Warne-Smith, 'Law backdated to beat loophole on child porn', *The Australian*, 20 October 2004, p. 5 (New South Wales).
- 5 Office of Film and Literature Classification, 'Role of the Classification Board in processing applications from enforcement authorities', Statement, 14 October 2004. See: <http://www.oflc.gov.au/resource.html?resource=345&filename=345.pdf> (at 17 November 2004).
- 6 Office of Film and Literature Classification, 'About Us' at <http://www.oflc.gov.au/content.html?n=118&p=60> (at 17 November 2004).
- 7 Section 91A of the Act provides that the Commonwealth is not liable to pay a fee that is payable under the Act.
- 8 National Classification Code, available electronically at: <http://www.oflc.gov.au/resource.html?resource=60&filename=60.pdf> (at 19 November 2004).

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- 9 The Hon Philip Ruddock MP, Attorney-General, ‘Second reading speech: Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004’, House of Representatives, *Debates*, 17 November 2004, p. 3.
- 10 Senator Ian Campbell, ‘Classification (Publications, Films and Computer Games) Amendment Bill (No. 2)’ (which appears under the heading ‘Notices: Presentation’), Senate, **Debates**, 16 November 2004, p. 16.
- 11 For further details about Operation Auxin and the arrests, see various newspaper articles, late September–early October 2004. See also Australian Federal Police, ‘Hundreds netted in nationwide crackdown on childporn’, media release, 30 September 2004, at: <http://www.afp.gov.au/afp/page/media/2004/mr30092004opauxin.pdf> and Australian Federal Police, ‘Australian High Tech Crime Centre’, Fact Sheet, October 2004, at <http://www.afp.gov.au/afp/raw/factsheets/factsheetaustralianhightechcrimecentre.pdf> (at 18 November 2004).
- 12 Renee Campbell, ‘Check of child porn documents could take months’, *The Canberra Times*, 23 November 2004, p. 3.
- 13 The Hon Philip Ruddock MP, Attorney-General, ‘Second reading speech: Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004’, House of Representatives, *Debates*, 17 November 2004, p. 3.
- 14 *ibid.*
- 15 *ibid.*
- 16 The term ‘law enforcement agency’ is not defined in the Bill or in the Act. According to principles of statutory interpretation, the term would be accorded the plain and literal meaning of the words. In case of doubt, some assistance could be gleaned from the definition of ‘enforcement application’ in section 5 of the Act—although it is not clear why the amendments do not simply refer to enforcement applications.
- 17 Explanatory Memorandum to the Classification (Publications, Films and Computer Games) Charges Bill 1998 and the Classification (Publications, Films and Computer Games) Amendment Bill 1998, (House of Representatives), p. 1.

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