



Classification (Publications, Films and Computer Games) Amendment (Advertising and Other Matters) Bill 2007

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Law and Bills Digest Section

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Classification (Publications, Films and Computer Games) Amendment (Advertising and Other Matters) Bill 2007

Date introduced: 22 March 2007

House: House of Representatives

Portfolio: Attorney-General

Commencement: Schedule 1 (the establishment of an advertising assessment scheme) commences 12 months after Royal Assent, unless commenced earlier by Proclamation.¹ Schedule 2 (the establishment of a television series assessment scheme) commences 6 months after Royal Assent, unless commenced earlier by Proclamation.

Purpose

The Bill amends the *Classification (Publications, Films and Computer Games) Act 1995* to enable an advertising assessment scheme and a television series assessment scheme to be established. Each scheme will be contained in a Commonwealth legislative instrument.

Background

The National Classification Scheme

The National Classification Scheme is a cooperative arrangement between the Commonwealth, states and territories established by the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act). The Classification Act provides that the Classification Board classifies films (including videos and DVDs), computer games and certain publications. As part of the national classification scheme, each state and territory has enacted classification enforcement legislation that complements the Commonwealth Classification Act. State and territory classification legislation prescribes penalties for classification offences and provides for enforcement of classification decisions in the particular jurisdictions.²

The **National Classification Code** exists as a separate document authorised by the Classification 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* and the *Guidelines for the Classification of Publications*, the latest versions of which came into operation on 26 May 2005.

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Current scheme for advertising³

The Classification Act defines ‘advertising’ broadly. The definition extends to still and moving visual images and audio material advertising films, computer games and publications. It encompasses trailers, print advertising such as posters or advertising in magazines, and advertising on items such as clothing and wrapping material.⁴

Under the National Classification Scheme, films and computer games cannot legally be advertised until classified. ‘Submittable publications’, defined as those publications containing depictions or descriptions likely to be ‘refused classification’, cannot legally be advertised in Australia.

Advertisements are not required to be classified by the Classification Board, although advertisements for classified films, computer games and publications may be submitted to the Board for approval or considered by the Board on its own initiative.⁵ The Board can approve or refuse approval to advertisements, although advertisements do not receive a classification. The fee for approval of advertisements by the Board is set at \$450. This approval process is rarely used.⁶

State and Territory legislation

State and territory legislation, complementary to the Commonwealth Act, prohibits advertising of films and computer games before they are classified. Similar provisions apply across all jurisdictions.⁷

Under state and territory legislation, it is an offence to publish certain advertisements including for:

- a film, computer game or publication that is not classified (unless in relation to an unclassified film where an exemption has been granted)
- a film classified X18+
- a film, computer game or publication that is classified ‘refused classification’, or
- an unclassified submittable publication.

Under state and territory legislation, classified films and computer games can only be advertised (for example by trailers in cinemas) with feature films or computer games of the same, or higher, classification. Markings and consumer advice must be displayed on advertising for films, computer games or publications.

Advertising exemption scheme

A limited number of exemptions can be granted by the Classification Board⁸ to allow for advertising prior to classification.⁹ Exemptions are only available for public exhibition

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films. In practice, these are used for major cinema releases where, in many instances, the film has not been completed when advertising begins.¹⁰

Exemptions are not available for other films (DVD/video), computer games, or publications.

The *Classification (Advertising for Unclassified Films) Instrument 2005* relates to these exemptions. It prescribes a limit of 110 exemptions per calendar year. The Board considers all applications for exemptions. The fee for the Board granting a certificate of exemption is set at \$510.

If an exemption is granted, an advertising message must be displayed reading ‘This film has advertising approval— check the classification closer to the release date’ or a short exemption message ‘TBC’ (to be classified). The Instrument prescribes the design and manner in which this message must be displayed. The exemption message must be displayed on all advertising with some limited exceptions including some print and Internet advertising.

If the Board decides that a film will be classified R18+, X18+ or is likely to be ‘refused classification’, it cannot grant an exemption.¹¹

Basis of policy commitment

Review of Advertising of Unclassified Material under the National Classification Scheme

In August 2006, the Attorney-General’s Department issued a discussion paper on a proposal to ‘update, simplify and clarify the advertising provisions for unclassified material within the National Classification Scheme’. The paper stated:

[...] the proposal balances the need to inform and protect consumers and the need to reduce the regulatory burden on industry and improve compliance. The proposal updates the scheme to account for rapid technological advances, changes in user preferences and changes in advertising and marketing practices.¹²

The Second Reading Speech and Explanatory Memorandum to the Bill do not indicate the level of response to this discussion paper, although public comment on the discussion paper was required by 18 September 2006.¹³

Amongst other things, the paper canvassed the following proposals.

- To update the current definition of advertising to specifically include the Internet and exclude product merchandising, including clothing, in recognition of where consumers get their classification information.
- To remove the anomaly that currently allows for films likely to be classified PG to be advertised during exhibition of a G rated film and remove the prohibition on

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advertising unclassified films likely to be classified R18+. This would apply to both public exhibition films and other films (DVD/video).

- To remove the current quota scheme that applies to cinema release films.
- To remove the prohibition on advertising unclassified films (such as DVDs/video) and unclassified computer games so the regulatory scheme is consistent across products to the same extent as possible. Industry would be able to advertise these products prior to classification.
- To provide that industry would assess the likely classification of products, to ensure advertising is shown to commensurate audiences.
- To provide that either a short or long message be included on all advertising material for unclassified products including all films and computer games. The short message would be check the classification ('CTC') and the long message would be 'Check the classification. This [product] has been advertised before being classified'. Advertising within the control of industry would require updating once a product is classified.
- To include safeguards to protect consumers and ensure consistency and quality of decisions by industry assessors on the likely classification of unclassified advertising material.

The discussion paper also proposed that publications would be excluded from the proposal and there would be no changes to the prohibitions on sexually explicit products (X18+) and products refused classification (RC).

Schedule 1 of the Bill implements some of these proposals directly and provides for the introduction of others via a legislative instrument. That is, all proposals are being implemented.

ALP/Australian Democrat/Greens/Family First policy position/commitments

The Bill was introduced on 22 March 2007. As at 28 March 2007, there appears to be no comment on the proposals contained in the Bill.

Financial implications

The Explanatory Memorandum states that the Bill will not result in any change to the net asset position for the Commonwealth.¹⁴

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Main provisions

Schedule 1 – Amendments relating to advertising

Items 1 and 2 amend the definition of ‘advertisement’ in section 5 of the Classification Act. They update the definition to clarify that it includes advertising on the internet and excludes product merchandising including on clothing.

Items 3 and 4 are consequential amendments. They amend the definition of ‘decision’ of the Classification Board and the definition of ‘exempt films or exempt computer games’ respectively to take account of the new advertising scheme for unclassified films and computer games.

Item 5 repeals and replaces subsection 22(1), the ‘commensurate audience’ provision. Its effect is that a film or computer game must not be classified if it contains an advertisement for an unclassified film or computer game unless the film or computer game has been assessed either by an authorised assessor or by the Classification Board and the assessment is that the unclassified film or computer game is likely to have the same or higher classification. The purpose of this amendment is to ensure that unclassified films and computer games are advertised with classified films or computer games (for example trailers on DVDs and trailers or demos on computer games), of the same or higher level. For example, likely ‘PG’ films are only to be advertised with classified films with a ‘PG’ or higher rating, and likely ‘M’ films are only to be advertised with classified films with an M or higher rating.

Advertisements are not required to be classified by the Classification Board, although under section 29 of the Act, advertisements for classified films, computer games and publications may be submitted to the Board for approval or considered by the Board on its own initiative. **Item 7** is a consequential amendment. It amends section 29 to reflect the changed policy that unclassified films and computer games can be advertised in accordance with the new legislative instrument. It also reinforces the existing policy that the Classification Board must not approve an advertisement for a film or computer game that is or is likely to be classified RC (Refused Classification).

Items 8 and 9 are consequential amendments reflecting the change in policy that unclassified films and computer games can be advertised.

Advertising of unclassified films and unclassified computer games

Division 2 of Part 3 of the Classification Act provides the existing advertising exemption scheme that applies to public exhibition films that are unclassified. **Item 9** repeals this Division and inserts a **new Division 2** that provides for the creation of a new advertising scheme for unclassified films and computer games.

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New subsection 31(1) is the key provision. It enables the Attorney-General to make a legislative instrument that determines the conditions for advertising unclassified films and computer games and provides for an industry self assessment scheme of the likely classification of unclassified films and computer games. The new section is notably broad in scope. The Explanatory Memorandum states that it will enable the Attorney-General to create a scheme similar to that in place for additional content. That scheme is to be implemented through the *Classification (Publications, Films and Computer Games) Amendment Act 2007*¹⁵. In contrast to this Bill, the additional content scheme is set out in some detail in the Act itself rather than through a legislative instrument.

The Government's stated rationale for including the advertising scheme in a legislative instrument is that it will ensure that the scheme is able to respond quickly and flexibly to developments in marketing approaches should this be required.¹⁶ Legislative instruments are subject to disallowance (unless the *Legislative Instruments Act 2003* applies to exempt them from the disallowance provisions, or unless Regulations under the LIA have introduced an exception to the principle that instruments are disallowable).

New subsection 31(2) enables the instrument to place conditions on advertising unclassified films and computer games, including conditions about:

- the display of a message about classification—a new message advising consumers to 'Check the Classification' is proposed to be included in the instrument¹⁷
- limitations on advertising unclassified films or computer games together with classified material, so that the instrument may contain a 'commensurate audience rule'
- time periods for industry to include classification information on advertisements after classification, and
- ensuring adequate safeguards against continued advertising of unclassified material by persons who have not complied with the scheme.

New subsection 31(3) deals with assessors and administrative matters regarding the scheme. By way of the legislative instrument, the scheme may:

- provide that an authorised and appropriately trained person is able to make an assessment of the likely classification of a film or computer game for the purpose of advertising that film or computer game before it has been classified (**new paragraphs 31(3)(a) and (b)**)
- set out the matters that must be considered when making an assessment of the likely classification. (**new paragraph 31(3)(c)**)
- enable the Director of the Classification Board to impose barring notices on assessors and applicants for unacceptable use of the assessment scheme (**new paragraph 31(3)(d)**)

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- provide that the consequences for an assessor of receiving a barring notice can include losing the authority to provide assessments (**new paragraph 31(3)(e)**)
- provide for review by the Administrative Appeals Tribunal of decisions made under the scheme (**new paragraph 31(3)(f)**)
- confer powers and functions on the Classification Board and its Director to exercise ancillary administrative functions for the proper operation of the scheme (**new paragraphs 31(3)(g) and (h)**).

New subsection 31(4) provides that the legislative instrument may specify circumstances in which an unclassified film or an unclassified computer game may not be advertised.

New subsection 31(5) requires the Attorney-General to consult with state and territory Censorship Ministers before making the legislative instrument determining the advertising scheme.

New section 31(6) clarifies that the advertising scheme does not apply to material that is likely to be classified X18+ or RC—meaning Refused Classification. Advertising this material will continue to be prohibited.

New sections 32–35 provide an alternate scheme for assessments of likely classifications for the purposes of advertising. The provisions would enable industry to request that the Classification Board provide an assessment of the likely classification of the film or computer game for the purposes of advertising the film or game. The Explanatory Memorandum states that it is envisaged that applicants would use this arrangement for an assessment in difficult cases, or where they want the assurance of the Board’s consideration, or where it is not feasible or cost effective to obtain an assessment from an authorised assessor.¹⁸

Schedule 2—Amendments relating to films of television series

Schedule 2 enables the establishment of a scheme for the classification of films that are episodes of a television series.

Television is not regulated under the Classification Act. Rather, the *Broadcasting Services Act 1992* establishes a co-regulatory scheme for broadcast services relying on codes of practice developed by industry and registered with the Australian Communications and Media Authority. For the purposes of classifying films screened on television, the Broadcasting Services Act requires that codes of practice apply the film classification system set out in National Classification Code.

Under existing arrangements, when a collection of episodes of a television series is put onto DVD, it is considered in the same way as a feature film and viewed by the Classification Board to determine its classification. The fee for classification is calculated

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by reference to the total running time of the film. A compilation of episodes of a television series may include many hours of running time making the classification of television series comparatively expensive for Australian industry and time consuming for the Board.¹⁹

The purpose of Schedule 2 is to address this issue. **Item 2** inserts **new section 14B**, the key provision. **New subsection 14B(1)** enables an authorised television assessor to submit an assessment together with an application for classification of a film that comprises a television series that has been broadcast in Australia. The assessment must satisfy the requirements specified in the scheme determined by the Minister under **new subsection 14B(3)**, be prepared by an authorised television series assessor and be signed by, or on behalf of the applicant.

The scheme determined by the Minister in the form a legislative instrument may do the following. It may:

- specify the requirements and the basis for making an assessment (**new paragraphs 14B(4)(a) and (b)**)
- specify requirements for authorising television series assessors (**new paragraph 14B(4)(c)**)
- enable the Director of the Classification Board to impose ‘barring notices’ on assessors and applicants for unacceptable use of the assessment scheme (**new paragraph 14B(4)(d)**)
- provide that the consequences for an assessor of receiving a barring notice can include losing the authority to provide assessments (**new paragraph 14B(4)(e)**)
- provide for review by the Administrative Appeals Tribunal of decisions made under the scheme (**new paragraph 14B(4)(f)**)
- confer powers and functions on the Classification Board and its Director to exercise administrative functions for the proper operation of the scheme (**new paragraphs 14B(4)(g) and (h)**), and
- specify circumstances in which an assessment is taken to be misleading, incorrect or grossly inadequate for the purposes of revoking a classification under new section 21AB (**new paragraph 14B(4)(i)**).

New subsection 14B(5) requires the Attorney-General to consult with state and territory Censorship Ministers before making the legislative instrument determining the scheme.

Item 3 inserts **new section 21AB**. It provides that the Classification Board must revoke a classification of a television series compilation in situations where the Board would have given the film a different classification if it had been aware that the assessment was misleading, incorrect or grossly inadequate.

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Concluding comments

The Bill would appear to be non controversial. It aims to streamline the classification process and reduce the regulatory burden on industry.²⁰

One observation relates to the method of implementing the two schemes in the Bill through legislative instruments rather than through the primary Act. By way of contrast, Parliament has recently enacted a similar scheme for additional content through the *Classification (Publications, Films and Computer Games) Amendment Act 2007*. The additional content scheme will recommend to the Classification Board the classification and consumer advice for additional content which is released with an already classified or exempt film. In contrast to this Bill, the additional content scheme, is set out in some detail in the Act itself.

The Explanatory Memorandum notes the similarity between this Bill and the additional content scheme. However, it does not indicate the reasons for the different treatment other than to say that including the advertising and the television series schemes in legislative instruments will ensure that the schemes are able to respond quickly and flexibly to developments in technology and marketing approaches should this be required.²¹ On this basis, arguably a similar arrangement could have been used for the additional content scheme set out in the *Classification (Publications, Films and Computer Games) Amendment Act 2007*.

Endnotes

1. The rationale for the extended period before commencement is to enable state and territory legislation to be enacted, Explanatory Memorandum, p. 2.
2. Office of Film and Literature Classification, *Annual Report for the Classification Board and the Classification Review Board, 2005–2006*, pp. 9–10.
3. The information in this section is extracted from the Attorney-General's Department, Review of Advertising of Unclassified Material under the National Classification Scheme: [Discussion Paper], August 2006, pp. 6–7.
4. Section 5 of the Classification Act.
5. Sections 29 and 30 of the Classification Act.
6. *ibid.*, p. 6.
7. For example, see *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), section 39.

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8. The Classification Board is a statutory body established under the Classification Act. Amongst other things, its role is to classify films (including videos and DVDs), computer games and certain publications.
9. See sections 32 and 33.
10. Attorney-General's Department, Review of Advertising of Unclassified Material under the National Classification Scheme: [Discussion Paper], August 2006, pp. 7.
11. *ibid.*
12. *ibid.*, p. 5.
13. Attorney-Generals Department, 'Review of advertising of unclassified material: discussion paper – August 2006', *Media release*, 6 September 2006.
14. Explanatory Memorandum, p. 1.
15. The Act has received Royal Assent, however to date, the relevant provisions have not commenced operation. The additional content scheme will recommend to the Classification Board the classification advice for additional content which is released with an already classified film.
16. *ibid.*, p. 4.
17. *ibid.*, p. 4.
18. *ibid.*, p. 5.
19. *ibid.*, p. 6.
20. Attorney-General, Classification (Publications, Films and Computer Games) Amendment (Advertising and Other Matters) Bill 2007, House of Representatives, *Hansard*, 22 March 2007, p. 1.
21. *ibid.*, p. 4 and p. 7.

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