

## Consultation Response – Leon Y. Xiao ( [REDACTED] )

1. This is a response to the Modernising Australia’s National Classification Scheme - Stage 2 Reforms consultation<sup>1</sup> by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts of the Australian Government (hereinafter, the ‘Department’).
2. I respond not to argue for any policy changes but to ask for more transparency and communication with newly adopted policies, including those that have already been adopted and those that will be adopted following this consultation.
3. Specifically, I refer to the decision to amend the classification regime to require that games with loot boxes are rated at least M and social casino games are rated 18+ from 22 September 2024 onwards.<sup>2</sup>
4. It is unclear whether the measures will apply retroactively (broadly defined).
5. Michelle Rowland MP, Minister for Communications, said: ‘These changes will apply to games that are released from September next year and will not apply retrospectively.’<sup>3</sup> (Source: [https://lnkd.in/eB9\\_UU4v](https://lnkd.in/eB9_UU4v))
6. That is the only piece of published information regarding retroactivity, to my knowledge.
7. I have been corresponding with the Classification Reform Policy Team (hereinafter, the ‘Team’) in charge of the implementation of this policy at the Department. My sincere appreciation is due to the Team for carefully responding to my inquiries and being willing to engage in a conversation about the application of this policy.
8. My understanding of the application of the law is as follows:
9. The updated Guidelines for the Classification of Computer Games 2023 (Cth) are actually silent as to whether or not the rules will apply retroactively. For that reason, we must turn to other, older regulations.
10. Subsection 21(1) of the Classification (Publications, Films and Computer Games) Act 1995 (Cth) declassifies games upon their modification (thus requiring reclassification), unless an exception applies (*e.g.*, the modification is minor/merely technical).

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<sup>1</sup> <https://www.infrastructure.gov.au/have-your-say/modernising-australias-national-classification-scheme-stage-2-reforms>.

<sup>2</sup> Guidelines for the Classification of Computer Games 2023 (Cth).

<sup>3</sup> <https://minister.infrastructure.gov.au/rowland/interview/transcript-press-conference-sydney>.

11. The relevant exceptions are found in section 6 of the Classification (Publications, Films and Computer Games) (Modifications of Computer Games) Instrument 2015 (Cth). Section 7 thereof provides some examples of the operation of section 6 but does not bind it.
12. What we care about is item (d) under the list in section 6: in order not to cause the game to be declassified, the modification must not be 'likely to cause the game, as modified, to be given a different classification to the original game.'
13. However, as we know, the 2023 Guidelines require games with loot boxes to be given a minimum M rating (so the condition of being given a different, or rather higher, classification is not just LIKELY to be satisfied but CERTAIN as a result of the modification if it involves loot boxes), thus any modifications involving loot boxes will cause any games rated below M to be declassified and then have its rating changed to at least M under the new rating rules.
14. The Team has confirmed this interpretation regarding modifications as likely correct. However, the Team insists that the measure is NOT retroactive.
15. I respectfully disagree. Technically, the measure indeed does not apply retroactively. However, in practice, the law would effectively cause the measure to apply retroactively because popular games monetised with loot boxes will be updated/ modified with new loot boxes that would cause the game to be declassified and thus requiring a new classification from September 2024 onwards.
16. The floodgate will open unless a new exception is created (and I do not believe one will be). For now, I believe companies must be prepared to increase the age ratings of their older games with loot boxes (currently rated below M).
17. If my interpretation is correct, and I am more than happy to be corrected, then I believe it is of utmost importance to promptly communicate this to relevant companies so that they can have ample time to comply.
18. Similarly, if the above is correct, the Australian Classification Board and the International Age Rating Coalition (IARC) should also be promptly informed. They will in due course be tasked, I believe, to compare two different versions of the game (prior to and after the update) to assess whether the modifications are excepted or not. This must be done in relation to every game that is updated rated below M, which means tens of thousands of mobile games, amongst others.
19. As mentioned, I respond only to underscore the importance of transparent and clear communication of any policies with relevant stakeholders.

8 May 2024  
LEON Y. XIAO