

The ACMA Review

Project Office

Department of Communications and the Arts

GPO Box 2154

Canberra ACT 2601

Dear ACMA Review,

In reference to the draft report of the *“Review of the Australian Communications and Media Authority* (“the draft ACMA report”)”, the Australian Classification Board (“the Board”) wishes to make the following submission.

In making this submission, the Board also references the *Classification (Publications, Films and Computer Games) Act 1995* (“the Classification Act”); the Australian Law Reform Commission’s (“the ALRC report”) report into classification, *“Classification – Content Regulation and Convergent Media”* released in 2012; and research into classification matters undertaken by the Commonwealth Attorney General’s Department in 2014 and 2015, available on the Classification’s government website [Classification Government website link to public resources](http://www.classification.gov.au/Public/Resources).

The Board notes Draft Proposal 7 of the draft ACMA report, namely: “That the Department will undertake further work on the potential to expand the ACMA’s remit to include the functions of the Classification Board and the Classification Review Board Scheme.”

In its explanatory note to this proposal, the draft ACMA report states “internet and media convergence have eroded the traditional barriers between content delivery platforms to such an extent that the current fragmented approach to classification is no longer feasible”.

It further states that the ACMA’s role “could include taking on the functions of classification currently performed by the Classification Board and the Classification Review Board, in consultation with the States and Territories”.

The draft ACMA report notes the ALRC report recognised the need for a new classification framework that was responsive to technological change and focused on content rather than platform. The ALRC report recommended a single Commonwealth scheme for classifying content across all platforms, and noted there should be a greater role for industry.

The Board notes that, outside of the draft ACMA report, strong and compelling reasons have been put in support of the retention of the Classification Board. The Board offers the following points for consideration in relation to Proposal 7 of the draft ACMA report:

# **Point 1**

The Board agrees that the current classification scheme has been slow to keep pace with technology and the varied new ways that Australians now access content, and that reform of the scheme is required to better reflect a converged media environment.

# **Point 2**

The ALRC report recommended that an independent Board should be retained and, in addition to making classification decisions, its role should be expanded to include reviewing decisions upon application. It did not recommend that the core role of the Board should be delegated, as proposed by Proposal 7 of the draft ACMA report, nor that the role of the independent classification benchmark decision-maker and the role of the Regulator should be performed by the same body.

The ALRC report also recommended the introduction of one comprehensive Act to regulate classification matters, which should provide for the establishment of a single agency (“the Regulator”) responsible for the regulation of media content under the National Classification Scheme. It recommended that the Act should enable the Regulator to determine that, of the content that must be classified, what content must be classified by the Board. The Board agrees there are advantages to having one Act regulating classification, as currently there are inherent conflicts within Acts governing classification, such as the *Broadcasting Services Act 1992* and the *Classification (Publications, Films and Computer Games) Act 1995*.

The ALRC report stated that, in determining what content must be classified by the Board, the Regulator should have regard to such matters as the need for a classification benchmark; the need for content to be classified by an independent classifier; and the classification of similar content in other jurisdictions. The ALRC report then recommended certain content, including feature films for cinema release, computer games likely to be classified MA15+ or higher, and content that needed to be classified for the purpose of enforcing classification laws, including prohibited content, be classified by the Board.

While the ALRC research was undertaken in 2011/12 and the report finalised and published in 2012, the Board is of the opinion that the recommendations contained in that report have not been displaced by the effluxion of the past four years.

# **Point 3**

In relation to the proposal that the ACMA Australian Public Service employees absorb the role of the Board, the Board notes that the ACMA assessors possess expertise in assessing a limited range of content, namely broadcasting and internet content referred on complaint, not the full range of content currently handled by the Board. The Board also notes that the ACMA Australian Public Service employees do not make formal classification decisions but assess content. If classification decisions are required, this content is currently referred to the Board.

# **Point 4**

The Board notes that currently, some material must be classified by the Board, such as evidentiary requirement of legal proceedings, and seized imports of what are deemed likely to be objectionable and/or prohibited goods. Consideration should be applied as to whether statutory officers such as those that comprise the Board remain the most appropriate decision-makers in this regard.

# **Point 5**

The Classification Board notes the importance of its role as an independent benchmark decision-maker, where such benchmarks are publicly visible and transparent through the Board’s decisions and the reasons for its decisions published in decision reports.

In making content assessments, content assessors from the ACMA, TV classifiers, content classifiers from other agencies including the Department of Immigration and Border Protection, rely upon classification benchmarks (for example, the impact limits of classification categories, how consumer advice is to be used, etc) set by the Board. These benchmarks set by the Board are also the foundation of classification requirements under broadcasting codes of practice. Content assessors are trained in the classification benchmarks set by the Board.

The Board notes that, in Sections 7.33 to 7.48, the ALRC report states:

“The Board’s greatest value, relative to industry classifiers, lies in its role in providing an independent benchmark for classification standards and decisions. In line with the principle that communications and media services available to Australians should broadly reflect community standards, the independent Board, whose members are intended to be broadly representative of the Australian community, is suited to a benchmarking role.

“Benchmarked standards are far more important under a scheme that allows for more content to be classified directly by industry. As an independent body, the Board’s decisions should be objective and free of self-interest—it operates in the public interest. Hence there is a high level of confidence in the Board’s decisions.

“In the ALRC’s view, the new scheme should take full advantage of these unique features of the Board. Therefore, the Board should have a role in classifying mainstream media content that has potential for significant reach across Australian audiences. This should also include content that might raise particular concerns in the community. For example, new forms of content that provide for significantly different or unusual viewer/player experiences may warrant scrutiny by the Board until their particular effects are better understood and public concerns have been allayed. The Regulator might also be guided by the content classified by independent bodies in other jurisdictions.”

# **Point 6**

The Board notes the importance and value to the community of it being an independent, impartial statutory decision-making body, without conflict of interest, comprised of statutory appointees who are appointed under the Act to be “broadly representative of the Australian community” and who reflect community standards in decision-making.

In its role as classification decision-maker, the Board operates with the trust and confidence of the community it is engaged to represent. The Board notes that, in Sections 7.33 to7.48, the ALRC report states: “Given the support for industry classification, the need for an independent classification body at all may be open to question. Despite the limits of the Board to classify all content that may be subject to classification requirements under the ALRC model, some submissions asserted that ‘it is imperative that a government agency, rather than industry bodies, devise and apply the classifications’.

“Submissions variously referred to the importance of a ‘separate’, ‘impartial’ classification body, while others, such as the Australian Council on Children and the Media (ACCM), remarked that ‘classification is a highly technical process, and having one central body will ensure accuracy and consistency’. [A former Director of the Classification Board] John Dickie emphasised the need for an independent standard-setting body: ‘There needs to be a base classification decision-making body applying agreed upon criteria and with guidelines to assist in making the decision. In Australia that is most likely to be a government agency. That agency sets the standards and other agencies—government or industry—can take their cue from that.’

“Some submissions highlighted the importance of unbiased decision making, particularly in relation to the classification of content where there may be profit or market advantages in under-classifying. Family Voice Australia observed, for example, that lower classifications generally lead to increased market share, ‘which is why classification applicants sometimes appeal against the classification of a film for public exhibition because it is higher than the applicant would prefer’.

“Even if it might be pragmatic for industry to classify some media content, it is clear that a board or equivalent body, representative of the community with statutory independence from government, and financial independence from industry, remains highly valued…”

# **Point 7**

The Board notes the importance of quality, consistency, transparency and timeliness in decision-making, to industry and the community, which the Board delivers. Under the current Board management, in place since 2011, no statutory deadline has ever been missed. Further, the Board publishes comprehensive reasons for all of its decisions.

The ALRC report states in 7.73: “Public confidence in the classification process and classification decisions is founded upon decision makers consistently applying specified classification criteria, adhering to agreed standards, and employing sound decision-making practices.”

The Classification Board notes that the draft ACMA report discusses the importance of timely and well-informed decision-making in the increasingly complex and fast-paced communications regulatory environment, but that the report concludes these are areas the ACMA needs to improve upon. On page 15: “The Review finds improvements could be made to the ACMA’s timeliness of decision-making, transparency of Authority decision-making processes, consistency of process for major rule-making and planning activities, and approaches to continuous improvement of the regulatory framework.”

Quality, timeliness, transparency and consistency in decision-making are documented strengths of the Board.

# **Point 8**

The Board notes the importance to the community of a mechanism for reviewability of classification decisions, currently undertaken by the Classification Review Board, although it is noted that the ALRC proposes this role be undertaken by the Classification Board.

The draft ACMA report does not address reviewability of decisions under its proposed model in which the ACMA Australian Public Service employees would make classification decisions. However, by default, such decisions would fall into the remit of the Administrative Appeals Tribunal (AAT). When applications for review of Classification Board decisions are received, due to the impending commercial release date for product, these generally need to be considered and determined within 3-4 days of application. This timeframe may pose challenges for the AAT, which should be considered.

# **Point 9**

The Board notes that in research undertaken by the Attorney General’s Department into classification matters, there is broad support for the Board and it responsibility for classification. This research includes “*Classification Ratings: Stakeholder and Practitioner Consultation* (July 2015); *Classification Ratings: Research With the General Public* (July 2015); and *Efficacy of Film and Computer Game Classification Categories and Consumer Advice: A Comparative Analysis of Public Opinion* (November 2014).

The findings included that:

* stakeholders are supportive of the continued existence of a classification scheme but believe it needs to adapt to changes in the media environment;
* stakeholders view the role of classification as primarily the protection of children, and secondarily the empowerment of adult consumers;
* the independence of the Classification Board (and Classification Review Board) from government is viewed as a key strength of the current process for film and computer game classification in Australia.

When stakeholders were asked to list the key strengths of the current process for classification in Australia, the independence of the Classification Board (and Review Board) from government and industry was frequently mentioned. Other key strengths listed by stakeholders included: the utilisation of community members for classification decisions; provision for decisions to be reviewed; and the rigorous training and requirements for Board members.

The research also found there was broad backing for, and confidence in, classification systems, both in Australia and in comparable jurisdictions – the general model of age-restrictions or recommendations and content advice is an expected, and highly-valued, component of media distribution.

# **Point 10**

The Board agrees there are benefits in having a single regulator in classification. The ACMA draft report notes, on page 42, that “the ACMA would be well placed to administer a harmonised classification scheme, including associated industry self-classification arrangements and electronic classification tools, and that would unite online and offline classification functions within a modernised classification scheme for the benefit of consumers and the industry”.

The Board agrees that the ACMA may be well-placed to administer the role of Regulator in the area of classification, under a single Act.

The Board notes the Board has an extensive history of benchmarking of standards and in delivering and developing training of industry assessors alongside of the Classification Branch. Authorised industry assessors currently operate under the Authorised Television Series Assessor (ATSA) Scheme, Advertising of Unclassified Films and Computer Games Scheme, the Additional Content Assessor (ACA) Scheme and the Assessed Computer Games Training (CGA) Scheme. The Board reviews all applications submitted under these schemes, and has the power to amend or modify recommended classification and consumer advice (all decisions under these schemes are decisions of the Board), thereby maintaining standards, certainty and consumer confidence in the efficacy of the schemes.

# **For consideration:**

Whether the Board, remaining the key classification benchmark decision-maker and a statutory body comprising statutory officers, should be incorporated into a revitalised ACMA structure as part of reforms under consideration. Over and above this, to ensure continued consistency, confidence and integrity in classification decision-making and to minimise disruption to business, it would be important to incorporate in a considered manner the existing classification expertise held by the Board in any change to the existing scheme.

Noting Draft Proposal 14 of the draft ACMA report: “That the skill set to be covered by Authority members be outlined in legislation to ensure an appropriate and diverse mix of abilities to respond to the future needs of the ACMA.”, should broad classification expertise in films, computer games and submittable publications be included as part of the desired skillset to be represented in the ACMA Authority members?

The Board understands that it is recommended that there would be a comprehensive period of consultation and review prior to any changes being made to the current classification scheme, and further, that the introduction of any agreed reforms should be staggered.

The Classification Board is supportive of this approach and looks forward to taking part in any such consultation and review which may ensue from this report.

Yours sincerely,

Lesley O’Brien

Director

Australian Classification Board

9 June 2016