Australian Communications and Media Authority Submission

Review of Australian classification regulation *and* online safety legislative reform

FEBRUARY 2020

Executive summary

The Australian Communications and Media Authority (ACMA) strongly supports the development of a contemporary, harmonised and consistent classification framework

The existing classification framework has played a pivotal role in guiding informed decisions by the Australian community in relation to audio-visual content consumption. The framework continues to resonate with the community who value the broad classification categories, symbols and consumer advice.

However, the changed and changing way that content is delivered and consumed, both online and offline, means reform is necessary to ensure this framework remains fit for purpose in meeting industry and consumer expectations into the future. Accordingly, the ACMA welcomes the development and implementation of a harmonised scheme that accommodates changes in types of content and delivery models.

Noting the clear inter-connectedness of the Australian Classification Regulation (ACR) and the Online Safety Legislative Reform (OSLR) discussion papers, the ACMA is providing a consolidated submission to these consultations.

In parallel with the issues considered by the ACR and OSLR papers, the ACMA is currently considering requirements for pre-school (P) and children's (C) material under the Australian Content Standard and the Children's Television Standard and their potential implications in a multi-platform environment.[1]

A single, federated and consistent classification framework could be efficiently implemented by more than one body

The ACR paper notes that, consistent with the ACCC's Digital Platforms Inquiry (ACCC DPI) final report, there is an opportunity for a new classification framework to enable industry to self-classify content across all platforms, overseen by an Australian Government regulator. We support this approach and propose that, within a single, federated classification framework, there is scope for more than one body to administer the scheme.

Under a new federated model, a consistent and contemporary classification code would be applied to content delivered over any platform. Industry would have greater ability to self-classify commercially provided content with government regulatory oversight of industry schemes and compliance.

To achieve this, the ACMA supports an approach that would see:

> industry manage self-classification of its own content across platforms (similar to the current broadcasting arrangements), including the ability to automate classification processes;

> the eSafety Commissioner continue to assess and take specialised enforcement action in relation to illegal and harmful online content; and

> the ACMA administer general online and offline content classification review functions, except for material considered as illegal and harmful. This role would include oversight of associated industry self-classification arrangements and electronic classification tools, as appropriate.

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[1] This forms part of the work announced in *the Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (12 December 2019) that the Government will release an options paper co-authored by Screen Australia and the Australian Communications and Media Authority that will look at how to best support Australian stories on our screens in a modern, multi-platform environment.

A federated model could also accommodate retaining the current Classification Board which has a limited role in the classification of films, games and publications. However, it would be more efficient for the classification of commercially provided content, regardless of platform, to have oversight by a single regulator, the ACMA. This would reduce the costs to industry and government of the current arrangements while retaining the features of the Board such as statutory independence. The Classification Review Board could also be dissolved with review rights being available through the ACMA, as is currently the case for many of its other regulatory functions.

Further consideration should be given to treatment of 'seriously harmful content' and RC, X18+ and MA15+ classified material

The OSLR paper contemplates a new 'Class 1' category of 'seriously harmful content'. The ACMA suggests that rather than creating a new category of content, it may be preferable to integrate the regulation of that type of content into the harmonised classification scheme. The eSafety Commissioner could retain responsibility for determining whether this content meets the definition of 'Class 1' content and take appropriate action without referring the content to the Classification Board. This would appear to address the key concern that such material needs to be dealt with more quickly than current arrangements allow.

The OSLR paper also contemplates that 'Class 2' content, including material classified as RC, X18+ and MA15+, would also be overseen by the eSafety Commissioner. In practice, this could lead to areas of duplication, with different agencies overseeing compliance for the same content on different platforms.

Context and discussion

The value of classification and consumer information

Contemporary consumers continue to see content regulation, including the classification of content, as a key safeguard in the modern communications environment. While consumers appear to have realistic expectations about the extent to which classification should apply to online content, a framework that makes distinctions about how content is treated based on the platform it is delivered on, is increasingly problematic.

Significant work has preceded the current consultations. As is noted in the ACR paper, ensuring Australia's content classification framework is fit for purpose in a converged media environment is an issue that has been considered by government and policy makers in various contexts from the Australian Law Reform Commission's (the ALRC review) in 2012[2] to the ACCC DPI in 2019.[3]

These reviews have confirmed that the major principles underpinning the classification framework in Australia (such as adults being free to make their own informed choices, and children being protected from material that may cause harm) continue to be relevant and important, but that achieving this in a convergent content environment presents significant challenges.

More recent reviews, particularly the 2016 review of the ACMA[4] by the Department of Communications and the Arts (the ACMA review),[5] have consistently highlighted a valuable and central role for the ACMA in the future of content classification in Australia. Given the rapid pace of change in content delivery and the changing community expectations and behaviours that flow from this, it is timely that the current approach to classification of content is re-examined to progress earlier recommendations and develop a framework for the classification of content in Australia that is adapted to the digital age.

A single federated content classification scheme for enhanced delivery

The challenge of meeting contemporary community expectations was considered in detail by each of the ALRC review, the ACMA review and the ACCC DPI.

Recommendation six of the DPI final report was for a new platform-neutral regulatory framework to be developed and implemented to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia. In relation to content, the ACCC recommended a nationally uniform classification scheme to classify or restrict access to content consistently across different delivery formats.

This reflected ALRC and ACMA review recommendations for a platform-neutral classification scheme. The ALRC report noted that 'in the context of media

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[2] Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media*, ALRC Report 118, 1 March 2012.

[3] Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report*, Canberra, 2019, pp. 202.

[4] Department of Communications and the Arts, *Review of the Australian Communications and Media Authority,* 22 May 2017.

[5] As a result of the Administrative Arrangement Order introduced on 5 December 2019, the functions that were previously the responsibility of the Department of Communications and the Arts were transferred to the Department of Infrastructure, Transport, Regional Development and Communications as of 1 February 2020.

convergence, there is a need to develop a framework that focuses upon media content rather than delivery platforms, and which can be adaptive to innovations in media platforms, services and content'.[6]

The ACMA agrees that a single classification system can accommodate changes within the media and regulatory environments, including changes proposed in the OSLR discussion paper.

The ACMA supports the same or largely similar guidelines for classifiable content broadly applying across all delivery formats. The ACMA's view is informed by its experience in developing and implementing the *Broadcasting Services (Online Content Service Provider Rules) 2018,* which demonstrated that ensuring regulatory parity, while still making allowances for the different operating environments for broadcasting and online content provision, leads to greater certainty and efficiencies for both industry and consumers.

A key role for self-assessment

The ACMA notes the recommendations from the ALRC review and the ACCC DPI final report that 'there is an opportunity for a new classification framework to enable industry to self-classify content across all platforms, overseen by an Australian Government regulator'.[7]

The ACMA agrees that industry should take primary responsibility for classifying content in line with established classification principles, with a regulator to perform oversight and review functions through a complaints-based system.

Among its other content roles, the ACMA is responsible for co-regulation of broadcasting codes that establish program classification requirements for broadcast television. These codes apply to the commercial free-to-air and subscription broadcasters, the national broadcasters and community television. In this role the ACMA ensures that the codes developed by industry provide appropriate community safeguards. Industry is primarily responsible for complaints handling under this arrangement, while the ACMA responds to complaints that are not resolved by broadcasters to a complainant's satisfaction and, where appropriate, investigates broadcasters' on-going compliance.

Under this co-regulatory scheme, broadcasters themselves are responsible for classifying all their broadcast television content in line with the classification guidelines in their specific code, with the exception of news and current affairs content and sporting events.

Based on the ACMA's experience with broadcasting classification, there is value in incorporating an appropriate mix of industry self-classification with oversight by a regulator in the new classification framework. This could also include the use of automated classification tools, particularly for commercially produced content delivered online, for example, by streaming services with extensive content libraries. Such an approach recognises the need for an enhanced framework that is adaptive and responsive to technological change.

Shared regulatory responsibilities

The ACMA considers that a harmonised scheme could be efficiently administered by more than one body. Currently, the Office of the eSafety Commissioner administers the Online Content Scheme under Schedules 5 and 7 to the *Broadcasting Services Act*

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[6] Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media*, ALRC Report 118, 1 March 2012, pp. 61.

[7] ibid., p. 15.

1992 (BSA), while the ACMA is responsible for overseeing broadcasters' self-classification of content under co-regulatory code of practice arrangements.

Given the specialist role of the eSafety Commissioner in addressing online harms, and the role of the ACMA in administering broader content regulation, it would seem both practical and efficient for a sharing of responsibility for classification regulation to continue under a single, harmonised framework.

This arrangement could see the ACMA focus on compliance with the classification framework for commercially provided content, regardless of platform. The ACMA's role would consolidate film, literature, computer games, broadcasting and online content classification functions, including oversight of new and existing industry self-classification arrangements and electronic classification tools.

The eSafety Commissioner would retain special responsibility for assessing seriously harmful online content within the same overarching classification framework, but without the need for referral to the Classification Board or ACMA and with review rights built into their enforcement arrangements.

The ACMA acknowledges that a new federated model could also accommodate retaining the current Classification Board with its limited role in the classification of films, games and publications. The Board consists of statutory appointees selected to represent a broad cross-section of the Australian community, supported by staff including professionally trained classifiers.

However, it would be more efficient for the classification of commercially provided content, regardless of platform, to have oversight by a single regulator, the ACMA. This would reduce the costs to industry and government of the current arrangements while retaining the features of the Board such as statutory independence. The Classification Review Board could also be dissolved with review rights being available through the ACMA, as is currently the case for many of its other regulatory functions.

Dissolving the Classification Board and Classification Review Board and transferring clearly defined oversight review enforcement responsibilities to the ACMA and eSafety Commissioner would also reduce administrative complexity and avoid potential double-handling for the classification of 'like-content' across platforms.

Treatment of seriously harmful content

In outlining potential reforms to the online safety framework, the OSLR paper proposes that the restrictions on harmful online content (RC, X18+ content, R18+ and MA15+ content) hosted by Australian online service providers will remain under the new Online Safety Act. The paper outlines that the new Act would create two classes of content:

> Class 1 Content: 'Seriously harmful content' such as child sexual abuse material, abhorrent violent material, incitement to violence, other seriously harmful material as determined by legislative instrument. The OSL paper indicates that under the new Act, Class 1 content would no longer be assessed under the National Classification Code. Instead, the eSafety Commissioner would be able to assess content to determine if it meets the definition of 'seriously harmful content'. The definition of 'seriously harmful content' would capture content considered illegal under the Commonwealth Criminal Code.

> Class 2 Content: Content that would be classified as RC, X18+ and MA15+ under the National Classification Code (e.g. ranging from pornography, high impact, realistically simulated sex and/or violence down to coarse language).

Instead of creating a new category of content for 'seriously harmful content' that sits outside of the National Classification Code, it would appear more efficient to integrate the regulation of that type of content into the harmonised classification scheme.

In the ACMA's submission to the Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme[8], it was noted that the Online Content Scheme (and any regulation that would replicate elements of it in new legislation) is fundamentally a classification and content regulation function, as it is concerned with regulating access to content by reference to 'community standards'. Therefore, in the interests of creating a harmonised approach to the classification of all Australian content, we suggest this content be assessed under a single framework, with enforcement tailored to the degree of harm. This would appear to address the key concern that such material needs to be dealt with more quickly than current arrangements allow without creating a separate scheme.

Regulatory oversight of Class 2 Content

The ACMA notes that the proposed new Online Safety Act may continue to create some regulatory duplication with respect to content classified RC, X18+ and MA15+ (or 'Class 2 Content'). In practice, it could potentially require both the Office of the eSafety Commissioner and the relevant classification regulatory body (such as the ACMA) to assess classification or determine compliance for the same content, particularly MA15+ material, where it is provided both online and offline (for example a film shown in cinemas, on broadcast television and internet catch-up services).

Some of this content may no longer fall into the illegal and harmful content category in a contemporary media environment. The ACMA notes that content classified at the MA15+ level is not illegal in other contexts and is currently available on other content delivery platforms, including broadcast television. Continuing to consider MA15+ content as prohibited when provided online, could create an impediment to platform neutrality.

To enable a clearer distinction between harmful and illegal material and classification of commercially provided content, the ACMA supports the proposal in the ACR paper for a new definition of classifiable content that would cover all professional and commercial formats made available in Australia, unless the content is exempt from classification.

Adopting a definition of this nature would exclude non-professional and non-commercial content from classification requirements. Such content could still fall within the scope of prohibited content dealt with by the eSafety Commissioner, where appropriate.

This approach would enhance consistency across platforms, and avoid duplication, as the question of which regulator would oversee classification of a piece of content would follow the nature of the content and not the platform on which it appeared.

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[8] Australian Communications and Media Authority, Submission to the *Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme*, August 2018.