

SUBMISSION BY

THE AUSTRALIAN HOME ENTERTAINMENT
DISTRIBUTORS ASSOCIATION TO

THE REVIEW INTO AUSTRALIAN CLASSIFICATION
REGULATION

BY THE DEPARTMENT OF COMMUNICATIONS AND
THE ARTS

February 2020



ABOUT AHEDA

The Australian Home Entertainment Distributors Association (AHEDA) represents the \$800 million Australian film and TV home entertainment industry covering both digital content and packaged goods (DVD and Blu-ray).

Formed in 1983 as the Video Industry Distributors Association (VIDA), the Association has grown and adapted along with the industry. VIDA became the Australian Visual Software Distributors Association (AVSDA) with the incorporation of games. When games distributors set up their own association - coupled with the continual technological led shifts in the home entertainment landscape such as the rise of Blu-ray disc, 3D and digital - the Association became AHEDA on 1 February 2011.

The Association speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement, classification, media access, technology challenges, copyright and media convergence. AHEDA works closely with a range of stakeholders to achieve its aims including government, media and industry. AHEDA is also increasingly looking to work with members and broader industry participants to conduct relevant channel campaigns and activities to promote the home entertainment film and TV sector.

The Association currently has all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Screen Entertainment. The Association also has four associate members: Foxtel, Fetch TV, Technicolor and Telstra.

AHEDA is also proud to support the Starlight Children's Foundation.

SUMMARY

AHEDA welcomes this opportunity to respond to the Department of Communications and the Arts' review into classification regulation.

AHEDA has long advocated for reforms to the Australian classification scheme noting that the Classification Act is an analogue piece of legislation in a digital world; the Act was drafted before the internet and online media streaming. Australian's now view more video content online than any other way.

AHEDA members make up the vast majority of applications to and decisions made by the Classification Board so its importance to members cannot be understated.

Previous reviews into the Classifications Scheme by the [Australian Law Reform Commission](#) (ALRC) in 2011 and the 2012 [Convergence Review](#) said that:

There should be a flexible and technology-neutral approach to content regulation that reflects community standards. The Review broadly accepts the recommendations of the Australian Law Reform Commission's recent classification report and recommends that a common classification scheme apply to media content. Significantly, under this proposed scheme content would be classified once and that classification would be applied across all platforms.

The recent 2019 [ACCC Digital Platforms Inquiry Final Report](#) also supported previous recommendations made by the ALRC and Convergence Reviews.

AHEDA has been involved and supported these reviews and recommendations and has lobbied successive governments for their adoption – reforms that ministers from each side of politics and across multiple governments have all supported. However, disappointingly reforms have not eventuated.

We hope that this current review will lead to sensible and much needed changes to the scheme to make it workable now and into the future.

AHEDA members fully comply with the Classification Act with respect to their physical and transactional home entertainment distribution activities. As the ACCC Digital Platforms Inquiry Final Report noted in relation to digital platforms and content, those platforms and media businesses that are not required to comply [with the scheme] may have a competitive advantage and *“they can operate under fewer regulatory restraints and with lower regulatory compliance costs”* (page 192).

AHEDA members cover the physical and transactional digital distribution of film and TV content. This includes video content on DVDs and for digital download (electronic sell through or EST) or rental (video on demand or VoD). As Table 1 illustrates, physical disc sales have been declining each year since peaking in 2009 and 2019 saw further double digital declines to now match values from 2001. The drop in physical sales has not been matched by growth in transactional digital (EST or VoD) sales.

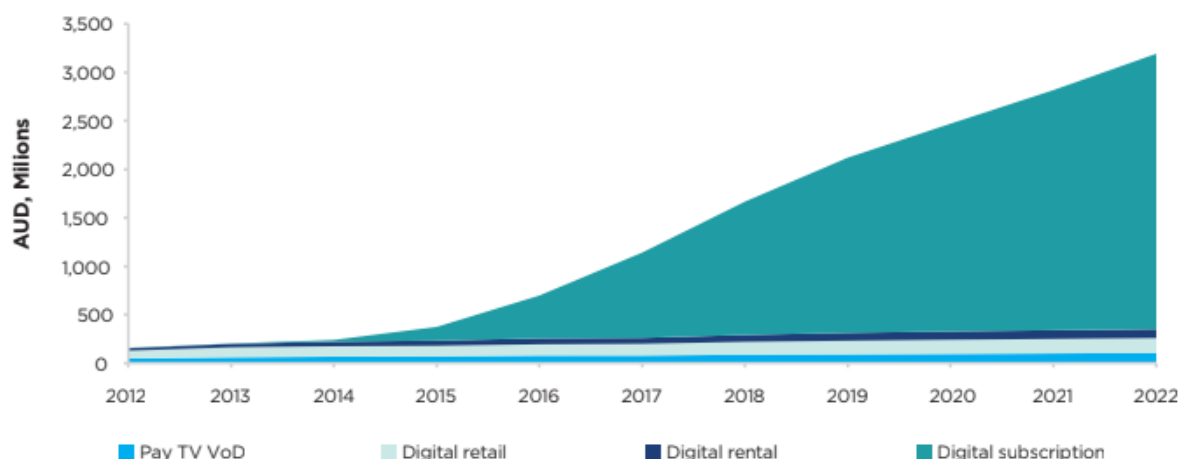
Table 1: Australian Physical Retail Market Size (source [AHEDA Yearbook 2018](#))



The area of the market that has seen rapid growth in recent years, however, is that of subscription video on demand (SVoD) services both in terms of subscribers and spending. There has been a rapid increase in new SVoD platforms launched globally and in Australia and during the second half of 2019 major new services such as Disney + and Apple TV launched into the Australian market joining Netflix, Stan, Amazon Prime and others.

AHEDA’s 2018 Yearbook published data which shows predicted growth of over 20 per cent in SVoD services (digital subscription).

Table 2: Australian Digital Video Spending, 2012-2022 (source AHEDA Yearbook 2018)



As the ACCC pointed out in its report, new media and platform entrants enjoy lower regulatory costs and burdens over traditional film and TV distribution businesses which are in decline and facing enormous costs pressures.

The quantum of the costs from fees to classify content is as follows (page 15 of Discussion Paper):

- Films and episodic series on DVD and Blu-Ray, in cinemas, and online streaming services apart from Netflix must be classified by the Board for a fee.
- **Example: 600-minute series on DVD, Blu-ray or a video on demand service:** the application cost is \$2530 and under statutory timeframes it can take up to 20 working days for a classification decision. An additional fee of \$420 can be paid for priority processing for a classification decision to be made within five working days.
- **Example: 125-minute film in cinemas:** the application cost is \$2760 and under statutory timeframes it can take up to 20 working days for a classification decision.
- **Review of a decision:** If an applicant does not agree with the classification decision by the Board, a review by the Review Board costs \$10,000 unless the fee is waived.

One member was recently charged \$900 for a 16 minute “making of” on a movie from 1940. It is increasingly the case that without a level playing field for physical home entertainment distribution to support the retail sector, those disc titles with niche or a limited market size will not be cost effective to be released in the Australian market.

We look forward to the Government supporting recommendations of previous reviews – and we hope of this review - and importantly see the recommendations implemented.

AHEDA strongly supports a move to self-classification by industry under oversight of an appropriate Government body (for example, the ACMA). As an interim reform, we also seek urgent adoption of the classification authorisation online tool for film that has been developed by the Department of Communications, with strong support including testing by industry. This will provide timely downward pressure in compliance and regulatory costs for AHEDA members.

INTRODUCTION

AHEDA fully supports the aims and ambitions of Australia's National Classification Scheme and the four code principles that:







1. adults should be able to read, hear, see and play what they want;
2. minors should be protected from material likely to harm or disturb them;
3. everyone should be protected from exposure to unsolicited material that they find offensive;
and
4. the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence, and the portrayal of persons in a demeaning manner.

AHEDA also supports the classification categories and supported previous changes to move to the "traffic light" system of colour coding the categories for easier recognition and awareness.

As the discussion paper makes clear on page 10, the categories which consumers see every time they consume film and TV content - where it is applied - changes depending on the platform in which they consume the content. DVDs and theatrical ratings for example can differ from what free and pay TV may show, sometimes for the same content. We support where possible, standardisation of categories and ratings.

We also support changes that make the classification rating once made - on the first platform on which it is released in Australia - be applicable across all platforms. A platform neutral approach to classification is desirable for professionally produced content.

Table 1. Classification categories and impact level

Symbol	Classification description	Impact level
	General	Very mild
	Parental Guidance – Parental guidance recommended for people under 15	Mild
	Mature – Recommended for mature audiences 15 years and over	Moderate
	Mature Accompanied – Not suitable for people under 15. People under 15 must be accompanied by a parent or adult guardian	Strong
	R 18+ – Restricted to adults 18 and over	High
	X 18+ – For films that contain sexually explicit activity between consenting adults (Film only)	N/A
No symbol	Refused Classification – prohibited	N/A

AHEDA RESPONSE TO THE DISCUSSION PAPER QUESTIONS

1) Are the classification categories for films and computer games still appropriate and useful? If not, how should they change?

AHEDA supports the current classification categories and members strictly adhere to their usage in advertising and on products.

AHEDA is aware of the desire including the MPDAA to change the categories to include further age based categories such as PG 13 to create another category between PG and M.

AHEDA has seen the MPDAA submission and supports its comments on PG13 category.

Our support is conditional on the confirmation that the new category would not be legally restricted.

AHEDA also notes the review into classification ratings conducted in 2015 by the government which found that:

High awareness of current ratings should be taken into account if changes are to be made to the current classification ratings. Changes should only be made if deemed necessary and would need to be supported by a comprehensive public education campaign (page 8).

2a) Do the provisions in the Code, the Films Guidelines or the Computer Games Guidelines relating to 'themes' reflect community standards and concerns? Do they need to change in any particular classification category or overall? Are 'themes' understood and is there sufficient guidance on what they mean?

AHEDA has considered question 2 and its five sub-questions related to classifiable elements and are of the view that the provisions in the code are working well and in practice and no changes are required as a result of this review. The guidelines and the themes are not static and should change as community expectations change over time.

3a) What aspects of the current Code, Films Guidelines or Computer Games Guidelines are working well and should be maintained?

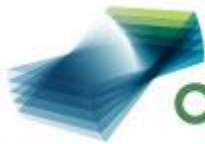
3b) Are there other issues that the Code, the Films Guidelines and/or the Computer Games Guidelines need to take into account or are there any other aspects that need to change?

The Code and Guidelines generally work well and are supported by AHEDA.

AHEDA Comments to Discussion Paper Part 2: Modernising classification legislation

One of the issues with the current "analogue" Classification Act existing in a digital environment is that film and TV content can be consumed in numerous formats on different platforms with increasingly online consumption via streaming becoming a preferred option for many.

As was noted back in 2011 by the ALRC, we need a classification system that classifies the content on the first platform that it becomes available, be that cinema, DVD, free or pay TV or online. This rating should then be able to be used consistently when available on other platforms.



This section (page 10) of the discussion paper proposes changes that seem to further complicate the classification system rather than simplify it. Further, creating a definition of “professional and commercial” formats to determine applicability could add complexity. For example, YouTube content covers both high and low production value content (whether it be professional as well as user uploaded). Creators can be remunerated directly from YouTube or by advertisers.

In other areas of law (such as copyright) definitions relating to what is “commercial” are contentious as someone is usually always making money even when offering content for free and who is making the content available - is it the platform as a host or the person who created and uploaded the content?

Therefore, a focus on formats (such as cinema, DVD, broadcast TV and catch up services and “commercial” SVoD services) runs the risk of baking in redundancy and creating legislation that is not format or technology neutral. For example, as we move to 5G, increasingly mobile carriers are offering content services that are free with their mobile plans. This does not seem to be covered in the paper definitions.

The ACCC Digital Platforms Inquiry Final Report also recommends a focus on content not platforms or format type:

Developing a coherent regulatory framework is important to competition and innovation in the media sector and the existing system requires reform. As noted in the ALRC Classification Report:

In the context of media 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. Failure to do so is likely to disadvantage Australian digital content industries in a highly competitive global media environment (page 202).

The other concern that needs to be addressed is that more content is being created by, or put on, digital platforms and streaming services with many hosted off-shore. There are hundreds of thousands of Australians using these services which are completely ignoring the Australian classification system. Media platforms are ignoring the current requirements in part as the current classifications system is unworkable and unviable, and partly because there is simply no enforcement for non-compliance.

A future scheme should have the following attributes:

- Easy to understand
- Easy to assess content via an online classification tool
- Cheap to comply (ideally a free online tool)
- Fast to get a rating (minutes not days and weeks via a Classification Board application process)
- Apply to all platforms and content and rate once covering all platforms

These attributes would lead to application of the classification categories in a consistent manner leading to greater understanding for parents and children.

4) Considering the scope of entertainment content available in a modern media environment, what content should be required to be classified?

The current requirements for which content should be classified are broadly still relevant. The challenge for government lies around user or uploaded generated content and creating definitions as you have attempted to do around “commercial and professional” as discussed previously.

Screen Australia in January 2020 announced funding for content exclusively on new digital platforms such as Snap Chat and You Tube. The delineation should be around “professionally” produced content with higher quality production values.

5) Should the same classification guidelines for classifiable content apply across all delivery formats (e.g. television, cinema, DVD and Blu-ray, video on demand, computer games)?

Ideally yes. We agree with previous reviews (ALRC and Convergence Reviews) that made this recommendation. The current mixed classification categories across platforms and under different pieces of legislation, often for the same content, is confusing for consumers. Standardisation of ratings and categories is necessary and should be done through industry codes regulated by ACMA as is the case for free and pay TV codes. AHEDA understands that TV networks have some additional requirements for in home consumption that may require some variations to the categories which we would support as exceptions.

6) Consistent with the current broadcasting model, could all classifiable content be classified by industry, either using Government-approved classification tools or trained staff classifiers, with oversight by a single Government regulator? Are there other opportunities to harmonise the regulatory framework for classification?

AHEDA strongly supports the principle of self-classification by industry under oversight of an appropriate Government body. We believe that industry members should have the flexibility to choose to classify content using trained and qualified in-house content assessors, the Classification Branch’s online classification tool, or some other approved bespoke tool the member may develop.

AHEDA has been working cooperatively with the Classification Branch of the Department of Communications and the Arts on an approved classification authorisation tool. As an interim measure that would deliver immediate benefits to industry, AHEDA urges the roll-out and adoption of the online tool as early as possible noting that it is not dependent on the outcome of this wider review.

AHEDA notes that the Netflix self-classification tool has been successfully operating for over a year with an extremely high accuracy rate. In fact, AHEDA understands that the few cases of differing decisions after a review, Netflix has erred by placing a higher rating than that given the Board. The games industry has also been successfully using its online tool ([IARC](#)) for many years.

AHEDA is supportive of previous recommendations of a co-regulatory or self-regulatory model of industry codes governed by ACMA.

However, the creation by government of an online classification assessment tool would make the logical move to a self-regulatory model simpler and lead to greater scheme compliance while driving down regulatory burdens and costs for distributors.

AHEDA further notes that 2015 Classification Branch of the Department of Communications research found that:

there is support among the general public for co-regulation of classification by industry and government (page 7).

7) If a classification decision needs to be reviewed, who should review it in a new regulatory framework?

The free and pay TV models would be illustrative in how to handle decision reviews. A model of self-classification by industry, including by the proposed online tool, should be adaptable in so far as it can be easily updated and amended to reflect changes in community expectations around contentious material or should the tool produce anomalous results. A decision of the tool should also be able to independently reviewed by the distributor.

A process by which the community and classification applicants can seek a review needs to be considered. This is an area that would require further consultation with industry should a new model be adopted and AHEDA would like to be involved.

8) Is the current co-operative scheme between the Australian Government and the states and territories fit for purpose in a modern content environment? If not, how should it be changed?

The short answer is no.

The federated classification model has proven to be inefficient, outdated and unworkable. The issues with the federated nature of the scheme have been well documented by the ALRC review. The Commonwealth is directly responsible for broadcasting and telecommunications laws and in a converged media environment with filmed content moving online, the role of the States is becoming redundant. There are also differences in the structure and application of the State and Territory enforcement regimes which add to the current potential for uncertainty and inconsistency.

The other area where States have obligations under the Scheme is around advertising. We currently have different advertising regulations in different States making the national advertising of products (films) for example in retail catalogues unworkable at certain classification category levels (for example South Australian has banned the advertising of R18+ rated films which has resulted in some major retailers withdrawing R content from sale not only in that state but also nationally).

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