



Australian Government  
Classification Board

# REVIEW OF AUSTRALIAN CLASSIFICATION REGULATION

Classification Board Submission

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## EXECUTIVE SUMMARY

The Board is supportive of the harmonisation of the classification of media content regardless of media type or delivery. This includes support for:

- A single set of statutory guidelines for the classification of all media content. This would necessitate the same classification categories and classifiable elements being applied to all content and remove the current differences and anomalies that exist between the *Guidelines for the Classification of Films*, the *Guidelines for the Classification of Computer Games* and the *Guidelines for the Classification of Publications*.
- The clarification of the G, PG, M and MA 15+ classification categories.
- The addition of a new classification category for content that sits between the PG and M categories.
- The clarification and simplification of consumer advice.

The Board recognises the need for further industry self-classification and is broadly supportive of a move towards establishing a multi-faceted classification process. Oversight by a single, independent Government regulator is required, in order to protect the Australian public from content that may harm or disturb them. The Board's current functions and future role would form part of this entity. This would include:

- Setting the standards of Australian classification and driving consistency in decision-making by industry and digital tools, thereby maintaining public confidence across a harmonised classification system.
- Undertaking the classification of some content at first instance, for commercial and law enforcement applicants.
- Undertaking auditing and benchmarking of classification decisions made by industry classifiers and digital tools, and varying and revoking these classification decisions and classifying this content.
- Directing the development and refinement of digital tools in order to generate classification decisions that are applicable and consistent with Australian classification standards and the expectations of Australian consumers.
- Providing training and accreditation of industry classifiers and assessors and auditing their performance and directing remedial action.
- Undertaking the current role and functions of the Classification Review Board, as well as operating as the review body for all other decisions made under any new scheme.

Any increased use of industry self-classification will require greater emphasis to be placed on governance and risk mitigation. An independent Board would undertake auditing of classification decisions prior to them gaining force of law. This necessitates future workflow processes providing sufficient lead time to allow for the Board to audit and amend classifications as necessary, prior to the public being exposed to content that has been incorrectly classified.

The Board supports the expectation of Australian consumers that there will be restrictions on the publishing of some content, with access to some content restricted by age. The Board supports the retention and enforcement of action for offences in relation to selling, screening, distributing or advertising certain categories of material whether classified or unclassified.

Accordingly, any new Commonwealth classification legislation should provide penalties for failure to classify content or for failure to adequately apply the classification laws and Guidelines.

## RECOMMENDATIONS

- 1.1 That a single set of statutory guidelines be created for the classification of all media content, irrespective of its 'type' or mode of delivery. This would necessitate the same classification categories and classifiable elements being applied to all media.
- 1.2 Remove the reference to 15 years of age in the Code, and Film and Games Guidelines for PG and M classifications and simply refer to the impact of the material.
- 1.3 Change the notes in the Guidelines that accompany the G, PG, M and MA 15+ impact test for films and games to read as follows:
  - G:** Content classified G may not be of interest to a child. Some content may contain material which some children could find confusing or upsetting and parental guidance may be required.
  - PG:** Content classified PG may not be of interest to a child or young person. Some content may contain material which some children and young people may find confusing or upsetting and parental guidance is recommended.
  - M:** Content classified M is not suitable for children. Parental guidance may be required for young people.
  - MA 15+:** Content classified MA 15+ is legally restricted to people aged 15 years and over. However, young people aged under 15 years can legally access this content when accompanied by an adult who may need to provide guidance.
- 1.4 In recognition of the broad spectrum of material accommodated in the existing PG and M classification categories, and in recognition of entertainment media targeted specifically at young people, a new classification category should be inserted between the existing PG and M classification categories, with the new classification category having an impact level of 'mild+'.
- 1.5 That consideration be given to naming the new PG-13-type classification level, YP (Young Person).
- 1.6 That the new YP classification is not applied retrospectively; only applying prospectively.
- 2.1 That any future Guidelines for media include a definition of themes that is expanded from the current definitions in the existing Guidelines to include a broad array of social issues, events and content.
- 2.2 That consumer advice for themes be confined to only the most impactful thematic material determining the classification category of the content, and that 'trigger' or content warnings for other thematic material not be included.
- 2.3 That games using a loot box mechanic not automatically be classified a specific classification, but be assessed for impact and context and classified accordingly.
- 2.4 That social gambling games not automatically be given a specific classification, but be assessed for impact and context and classified accordingly.

- 2.5 That any future Guidelines for content include the definition of 'violence' in the List of Terms that is currently contained within the Film and Games Guidelines.
- 2.6 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of violence for each classification category, eliminating existing variations between media types.
- 2.7 That any future Guidelines for content remove the blanket prohibition on depictions of violence in films containing sexually explicit activity ('pornographic films'), relying instead upon consideration of context and the prohibitions contained in the Refused Classification category.
- 2.8 That any future Guidelines for content include the definition of 'sexual activity' in the List of Terms that is currently contained within the Film and Games Guidelines.
- 2.9 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of sex for each classification category, eliminating existing variations between media types.
- 2.10 That any future Guidelines for content remove the prescriptive list of impermissible fetishes and references to 16- and 17-year-olds in the X 18+ classification.
- 2.11 That the element currently named 'Language' be re-named 'Coarse language' to reflect the content being assessed.
- 2.12 That any future Guidelines for content include a definition of 'Coarse language' that distinguishes it from other thematic language, and that it includes spoken language and gestures.
- 2.13 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of 'coarse language' for each classification category, eliminating existing variations between media types.
- 2.14 That an indicative coarse language list for each classification level be published on the Classification Website.
- 2.15 That the element currently named 'Drug use' be re-named 'Drugs' to reflect the content being assessed.
- 2.16 That any future Guidelines for content include a definition of 'Drugs' that includes both proscribed drugs and the misuse of legal drugs (but does not extend to caffeine, alcohol and tobacco).
- 2.17 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of 'Drugs' for each classification category, eliminating existing variations between media types.
- 2.18 That any future Guidelines for content include the definition of 'nudity' in the List of Terms that is currently contained within the Publications Guidelines.
- 2.19 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of 'nudity' for each classification category, eliminating existing variations between media types.

- 3.1 That any future Guidelines for content position interactivity as part of the essential principles which include considering context and assessing impact in relation to the six classifiable elements, rather than interactivity being treated as a separate consideration.
- 3.2 That consumer advice be standardised for all media types and be used by all classification processes (digital tools and industry classifiers).
- 3.3 Amend sections 37-41 of the Classification Act to allow for the re-classification of content by the Board, either upon the Board's own motion, or upon application, or implied request (arising, for example out of an enquiry or a complaint).
- 4.1 That the exemption from classification for News, Current Affairs and Sports Programs be retained and made consistent across all delivery platforms.
- 4.2 User-generated content should be informally classified, for example, by the You Rate It tool (or similar).
- 4.3 That the current definition of "*submittable publication*" in the Classification Act be deleted and replaced with:
- Any written or pictorial matter, the content of which:*
- *should not be sold or displayed as an unrestricted publication (as it unsuitable for a minor to see or read); or*
  - *should be legally restricted to adults; or*
  - *should be Refused Classification.*
- 4.4 That the current publication classification categories of Unrestricted, Category 1 – Restricted and Category 2 – Restricted be abolished and be replaced respectively with the M, R 18+ and X 18+ equivalent classification categories.
- 4.5 That any future Guidelines for content include provisions relating to the display and wrapping of restricted publications.
- 4.6 That all classifiable content is classified in accordance with Australian classification laws and standards.
- 6.1 That there should be a single government regulator whose responsibilities cover the classification processes of all media types (films for theatrical release and home entertainment, streaming services, free to air television, user-generated video content, computer games, and publications) for all applicants (commercial and law enforcement).
- 6.2 This regulator should assimilate the functions relating to classification processes and complaints handling currently carried out by the Classification Board, Free TV, ASTRA, ACMA and the Office of the eSafety Commissioner.
- 6.3 That the Board forms part of the new regulator and:
- 6.3.1 sets the standards of Australian classification;
- 6.3.2 undertakes auditing and benchmarking of classification decisions made by industry classifiers and digital tools, and can vary or revoke these classification decisions and can classify this content;



- 6.3.3 undertakes auditing and benchmarking of digital tools, and can direct the refinement of the tools in order to generate classification decisions that are applicable and consistent with Australian classification standards;
- 6.3.4 participates in the development and testing of algorithms in the creation of any new digital tool and its ongoing testing and future refinements;
- 6.3.5 is responsible for the functions under section 22CA of the Classification Act recommending or otherwise to the Minister a proposed classification tool;
- 6.3.6 provides the training and accreditation of industry classifiers and assessors and monitors their performance and directs remedial action;
- 6.3.7 undertakes classification of content at first instance, upon receipt of a valid application, for both commercial and law enforcement applicants;
- 6.3.8 undertakes the review of classification decisions currently performed by the Classification Review Board, as well as operating as the review body for all other decisions made under any new scheme; and
- 6.3.9 that the Board's new functions and roles are enshrined in the legislative instruments establishing the new government regulator.
- 6.4 That the Board, as part of the Government regulator, undertakes thorough and regular processes of audit and review of classification decisions in order to ensure consistency of standards and outcomes.
- 6.5 That future workflow processes involving greater industry self-classification must provide sufficient lead time to allow for the Board to audit and amend the classification and/or consumer advice, as necessary, prior to the public being exposed to content that has been incorrectly classified.
- 6.6 That the Board, as part of the Government regulator, be responsible for the ongoing training and authorisation of industry classifiers and assessors.
- 6.7 That all users of digital classification tools undertake initial and structured refresher training in the classification of media in Australia, prior to using digital classification tools.
- 6.8 That the National Classification Database becomes the repository of all classification decisions.
- 6.9 That the Board undertakes auditing and benchmarking of digital tools, and can direct the refinement of the tools in order to generate classification decisions that are applicable and consistent with Australian classification standards.
- 6.10 That the Australian Government dedicate resources to developing an international SIMO tool for the digital classification of content.
- 6.11 That the Board undertakes classification at first instance, upon receipt of a valid application, for both commercial and law enforcement applicants.
- 6.12 That in a new classification regime, the Board continues to be the setter of benchmarks and standards for Australian classification.

- 6.13 That the Board, as the setter of benchmarks and standards, should continue to be involved in classification at first instance across different content types, genres and range of classification categories, in addition to auditing and review.
- 6.14 That the onus be on industry classifiers to identify content that warrants classification by the Board in the first instance, because it may be Refused Classification.
- 6.15 That the Board be the only authority that may determine a 'Refused Classification' classification decision.
- 6.16 The existing conditional cultural exemption provisions in the Classification Act be reviewed and rectified, so that there is consistency in the training of people seeking to register an event in order to restore harmony to the regulatory framework around the publishing of unclassified content.
- 7.1 Under a unified classification system, the Board undertakes all reviews of classification decisions, including its own.
- 8.1 That new classification laws should be enacted pursuant to the legislative powers of the Parliament of Australia, and that all state and territory legislation pertaining to classification should cease to operate.
- 8.2 That any new classification laws should require media content providers to have certain content classified and to provide offences and penalties for failure to do so. These powers should vest in the new single government regulator of classification.
- 8.3 That any future harmonisation of classification require the adoption and implementation of 'Best Interest Duty' made up of the following norms of conduct:
- obey the classification laws, codes and standards;
  - act fairly and do not mislead or deceive;
  - undertake classification of content with reasonable care and skill;
  - ensure that classification decisions are fit for purpose; and
  - act in the best interests of the Australian public.
- 9.1 That an education campaign be developed by the Board in consultation with the new government regulator about the classification categories and the impact of the classifiable elements in each category, and certain common consumer advices.
- 9.2 That the Classification website be enhanced to include information in relation to the type of material that may be visually depicted or verbally referenced within each classification category for each of the classifiable elements.
- 9.3 That the Classification website be enhanced to provide additional information in relation to the lodging of complaints or enquiries by consumers about classification decisions for the various media types, including decisions made by digital classification tools (IARC and Netflix to date).
- 9.4 That relationships be established between the Board, the new regulator and academic institutions for the conduct of research into classification-related matters and issues.
- 9.5 That future accommodation provided for the Board enables the viewing for classification and auditing purposes of all media types.

# INTRODUCTION

## About the Australian Classification Board

The Classification Board (Board) is an independent statutory body established under the *Classification (Publications, Films and Computer Games) Act 1995*. This independence and impartiality from government and industry is an important feature of the current Classification system.

The Board is responsible for classifying films, computer games and certain publications in Australia. The Board is required to give effect to the principles and criteria from the National Classification Code (the Code) and guidelines for the classification of films, computer games and publications when making classification decisions.

The Code requires that classification strike a balance between matters including:

- enabling adults to choose what they read, hear, see and play;
- respecting people who may not want to see material they find confronting; and
- protecting children from inappropriate content.

The Classification Act requires the Board to consider matters including community standards, the nature of the content and whether it has any artistic or educational value, and the intended audience.

The *Guidelines for the Classification of Publications* (Publications Guidelines), *Guidelines for the Classification of Films* (Film Guidelines), *Guidelines for Classification of Computer Games* (Games Guidelines) are more detailed tools for classifying content and explain the different categories and the scope and limits of content suitable for each category.

The Board consists of a Director, a Deputy Director, Board Members and temporary board members as required. The Director of the Classification Board is responsible for the management and oversight of the Classification Board and its decision-making processes. The Director reports to the Australian Parliament on the activities of the Classification Board.

Board members are appointed, by the Minister, for a maximum term of up to seven years and are required to be broadly representative of the Australian community. This provides an important safeguard, ensuring that contemporary community standards and values are represented in classification decisions over time.

The Board administers a number of assessor schemes including:

- Additional Content Assessor (ACA)
- Authorised Television Series Assessor (ATSA)
- Authorised Games Assessor (ACGA)

Under these schemes, the Board receives a report from an authorised assessor, who recommends a classification and consumer advice for the film or game. The Board then reviews the report and/or media and will either accept, reject or amend the classification and/or consumer advice. Under this current model, the Board determines the classification and consumer advice, maintaining a level of consistency with Board decisions and standards across these schemes. The Director of the Board

monitors the performance of authorised industry assessors and can direct that further training be undertaken or that accreditation be revoked.

The Director also oversees the Authorised Advertising Assessor (AAA) scheme wherein accredited industry assessors assess the likely classification of films or games which are unclassified at the time industry wishes to advertise them. The assessor must have regard to material and information provided by the publisher or distributor of the film or game. Under the scheme, both the assessor and the distributor must retain the assessor's Record of Assessment and the information and materials on which the assessment was based, for at least 12 months after the date of the assessment. In the event of a breach of the conditions of use of the scheme, the Director of the Board may revoke, or suspend an authorised assessor for a specified period and the Director may prohibit the distributor from using the scheme for up to three years.

The various legislative instruments establishing these schemes provide that the Director of the Board must determine the training of industry assessors. Accordingly, the Board has been integral in the development and testing of online classification training modules for Film and Games.

The Board either does or has classified internet content, publications, films and games which are submitted by:

- state, territory and federal Australian police
- Australian Border Force
- the e-Safety Commissioner

The Director has a number of other functions that have been delegated in relation to the importation and exportation of prohibited material and also considers applications for Conditional Cultural Exemptions (eg. film festivals and games' expos).

The Classification Board sets and updates classification practice and precedent, reflecting community standards and concerns. Many of the Board's former Members are employed subsequently within industries classifying media.

The Minister responsible for the administration of the Classification Act has approved the use of two classification tools under the *Classification (Publications, Films and Computer Games) (Approval of Classification Tools) Guidelines 2014*. These are:

- The International Age Rating Coalition (IARC) Global Rating Tool for classifying online and/or mobile games – a SIMO (single input, multiple output) tool which generates classifications for multiple jurisdictions; and
- The Netflix Classification Tool for classifying unclassified films available on Netflix Australia – which relies on 'tagging' technology.

Pursuant to section 22CF of the Classification Act, the decisions of these tools are deemed to be decisions of the Board. Under current resourcing the Board monitors and audits these decisions on an ad-hoc basis. This results in an erratic level of consistency with Board decisions and standards.

# PART 1: CLASSIFICATION CATEGORIES AND STANDARDS FOR FILMS AND COMPUTER GAMES

## CLASSIFICATION CATEGORIES

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

The Board raises the following matters in response and discusses below:

- A. Differences between the classifiable elements within the Film and Games Guidelines and the need to harmonise the Guidelines at all classification categories.
- B. The current level of confusion for consumers regarding an understanding of the appropriate audience for PG, M and MA 15+ films and games, which is caused by each of these classification definitions revolving around 15 years of age.
- C. An additional classification category to sit in between the existing PG and M categories.

### Issue A: Differences between the classifiable elements within the Film and Games Guidelines and the need to harmonise the Guidelines at all classification categories.

#### Current Challenges

One of the immediately identifiable differences between the current Film and Games Guidelines is the lack of correlation between the stringent list of restrictions imposed upon the classifiable elements in the Games Guidelines at all classification levels, the most notable being at the R 18+ classification category. The differences between the Guidelines are stark, particularly in relation to the classifiable elements of violence, sex and drug use – refer Table 1. These differences result in the Board having to Refuse Classification to games that could otherwise, without certain restrictions contained in the Games Guidelines, be accommodated in a lower classification.

**Table 1 – Comparison of Film and Games Guidelines at R 18 +**

R 18+	FILM GUIDELINES	GAMES GUIDELINES
Violence	Violence <u>is</u> permitted.  Sexual violence <u>may be</u> implied, if justified by context.	Violence is permitted. <b>High impact violence that is, in context, frequently gratuitous, exploitative and offensive to a reasonable adult will <u>not</u> be permitted.</b>  <b>Actual sexual violence is <u>not</u> permitted.</b>  <b>Implied sexual violence that is visually depicted, interactive, not justified by context or related to</b>

R 18+	FILM GUIDELINES	GAMES GUIDELINES
		incentives or rewards is <b><u>not</u></b> permitted.
Sex	Sexual activity <u>may be</u> realistically simulated. The general rule is “simulation, yes – the real thing, no”.	<p>Depictions of actual sexual activity are <b><u>not</u></b> permitted.</p> <p>Depictions of simulated sexual activity <u>may be</u> permitted.</p> <p>Depictions of simulated sexual activity that are explicit and realistic are <b><u>not</u></b> permitted.</p>
Drug use	Drug use <u>is</u> permitted.	<p>Drug use <u>is</u> permitted.</p> <p>Drug use related to incentives and rewards is <b><u>not</u></b> permitted.</p> <p>Interactive illicit or proscribed drug use that is detailed and realistic is <b><u>not</u></b> permitted.</p>

Three games, *The Bug Butcher*, *We Happy Few* and *DayZ*, illustrate the difficulties the Board has faced when applying the current Games Guidelines.

Like many games, *The Bug Butcher*, uses performance-enhancing ‘power ups’ that become available as the player progresses through the game. The first power up is an item called a “Speed Injection”. It is depicted as a silver syringe icon, filled with aqua-coloured liquid, with a needle at the bottom and a plunger at the top. Although the player is *not* visually depicted injecting the syringe, its use is implicit by its appearance in the bottom right corner of the screen, with its plunger pressed down.

“Speed” is a common street name for stimulant drugs, particularly those from the amphetamine drug family (including methamphetamine (MDMA)). They are proscribed drugs, as specified in Schedule 4 of the *Customs (Prohibited Imports) Regulations*. It is these regulations, referred to in the Publications Guidelines, which provide the definition of ‘proscribed drugs’ which is then applied to all content.

The Games Guidelines state that “*interactive illicit or proscribed drug use is **not** permitted*” within the G, PG, M or MA 15+ classification. The Guidelines further state, “*drug use is permitted*” within the R 18+ classification, **provided** any “*interactive illicit or proscribed drug use*” is **not** “*detailed or realistic*”.

Pursuant to the Games Guidelines, “*drug use related to incentives and rewards is **not** permitted*” at *any* classification level. ‘Incentives’ or ‘rewards’ may include, but are not limited to: the awarding of additional points; achievement unlocks; new skills or increases in attributes such as strength; making tasks easier to accomplish; accumulating rare forms of game equipment; plot animations and pictures as rewards following an event/action.

Because the “*illicit or proscribed drug use*” in *The Bug Butcher* was inherently “*related to incentives or rewards*”, the game was Refused Classification.

*We Happy Few* was Refused Classification based on information supplied by the applicant for classification who stated:

*Players have the option to conform with NPCs and take Joy pills when exploring the Village or Parade District areas of the game. If a player has not taken Joy, NPCs become hostile towards the player if they perform behaviours including running, jumping and staring. An NPC character called the Doctor can detect when the player has not taken Joy and will subsequently raise an alarm. A player who takes Joy can reduce gameplay difficulty, therefore receiving an incentive by progressing through the game quickly. Although there are alternative methods to complete the game, gameplay requires the player to take Joy to progress.*

Joy is an illicit drug within the context of the game, with properties similar to the real-world drug MDMA. As the game's drug-use mechanism made game progression less difficult (constituting an incentive or reward for drug use), the Board was compelled to refuse classification.

In the case of the game, *DayZ*, the player was given the option to restore their character's health by using a marijuana joint, labelled "cannabis". This was denoted by a depiction of a cannabis bud in the player's inventory. When the player character smoked the cannabis, the character's vital statistics of food and water increased and their temperature decreased, boosting overall health and allowing the player to continue progressing through the game. Accordingly, the Board was forced to refuse classification, although it noted that *if* the use of cannabis within the context of this game did *not* act as an incentive or reward, its impact could have been accommodated within the R 18+ classification.

The Games Guidelines, which prohibit drug use by an adult *player* if that use is linked to an incentive or reward, are not consistent with the Film Guidelines, which allow the same adult to *watch* drugs being used as an incentive or reward. For example, *The Wolf of Wall Street*, was classified R 18+ by the Board with consumer advice of high impact sex scenes and drug use. Throughout the film, explicit drug use was depicted as Jordan, a self-confessed 'lover of drugs', frequently indulged his cocaine and Quaalude addiction.

The frequency and treatment of the drug use/abuse was found to impart a high viewing impact and included depictions of Jordan implicitly blowing cocaine into a woman's anus via a glass tube, explicitly snorting cocaine off a woman's naked breast, and pouring cocaine into a man's nostrils to counter the effects of a Quaalude overdose.

While this material is able to be viewed in an R 18+ film, a game like *DayZ* is refused classification because the player uses cannabis, with that use resulting in a health boost which allows the player to continue the game. These decisions highlight the incongruity of the Film and Games Guidelines.

The heavy prohibition around drug use as an incentive or reward in games at the R 18+ classification level appears to stem from when the Games Guidelines were last reviewed. There may perhaps also have been a misunderstanding that computer games were predominantly played by young boys. This should not be of concern at the R 18+ classification level as it is a legally restricted category for adults.

The perception that it is predominately young boys who play computer games is repudiated by the empirical research developed since 2005 by the Interactive Gaming and Entertainment Alliance (IGEA) and Bond University<sup>1</sup>:

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<sup>1</sup> <https://igea.net/category/research-2/igea-research-reports/>

**In 2005: (inaugural year of research and current iteration of the Publications Guidelines)**

- 76% of households had a device for playing games and PCs dominated consoles,
- 38% of gamers were female and the average age was 24,
- 66% of parents played video games,
- 88% said Australia should have an R18+ for games.

**By 2012: (the current iteration of the Games Guidelines)**

- 92% of households had a device for playing games and consoles lead and phones outflanked handhelds,
- 47% of gamers were female and the average age was 32,
- 83% of parents played games.

**By 2019:**

- 78% of Australian video game players are aged 18 years or older,
- 42% aged 65 and over play video games,
- The average Australian adult has been playing video games for 12 years,
- Almost ½ of video game players are female,
- 59% of parents play with their children in the same room and 43% of parents play online games with their children,
- 25% play with partners online.

It is clear from as long ago as 2005, that games are an integral part of social and entertainment landscapes and that they are not played by a wide variety of Australians.

The Board is acutely aware of media convergence in the current digital age and the resultant blurring of distinctions between different forms of media particularly publications, audio, films and computer games, with such convergence being evidenced by the creation of new technological devices as well as the development of new forms of interactive content. For example, *Black Mirror: Bandersnatch*, is neither a traditional film nor a computer game. It has been variously described as a “*sprawling fantasy novel*” merged “*into a video game*”<sup>2</sup>; and “*an immersive, nonlinear film that uses the ‘branching narrative’ storytelling format and allows viewers — through touch screen or their remotes, depending on the device — to pick between a series of two choices as they go along, giving them control over how the plot unfolds*”.<sup>3</sup>

*Black Mirror: Bandersnatch* is an example of the new type of interactive content being developed by content creators and distributors, that fails to sit neatly in either a film or computer game category and it begs the question as to which set of current statutory guidelines should be applied when

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<sup>2</sup> [https://www.rottentomatoes.com/tv/black\\_mirror/52530](https://www.rottentomatoes.com/tv/black_mirror/52530)

<sup>3</sup> <https://www.hollywoodreporter.com/live-feed/black-mirror-bandersnatch-netflixs-interactive-film-explained-1171486>



assessing it for classification. **It demonstrates a pressing need to eliminate the separation of media guidelines into the traditional formats of Publications, Films and Games.**

Accordingly, the Board supports the creation of a single set of statutory guidelines for the harmonisation of classification of all media content, irrespective of its 'type' or mode of delivery. The new Guidelines could be called '**Guidelines for the classification of media content**'.

The creation of a single set of statutory guidelines would give effect to Clause 1(a) of the National Classification Code which states that, "*adults should be able to read, hear, see and play what they want*". The Board strongly supports this principle.

In relation to publications, the Board believes that the current guidelines and classification categories are unnecessarily convoluted and inappropriate for the digital world. The Board proposes the adoption of the equivalent Film and Games classifications of M, R 18+ and X 18+ for publications:

Current Publications Classification	Proposed Equivalent Classification
Unrestricted Publication classification	M
Category 1 – Restricted Publication classification	R 18+
Category 2 – Restricted Publication classification	X 18+

Regarding the concept of interactivity, the Board notes that both the Film and Games Guidelines refer to this, but in a different manner. Interactivity will need to be taken into consideration when harmonising the Guidelines. The Board considers this issue in response to Question 3 (Issue A).

## Recommendation

- 1.1 That a single set of statutory guidelines be created for the classification of all media content, irrespective of its 'type' or mode of delivery. This would necessitate the same classification categories and classifiable elements being applied to all media.

## Issue B: PG, M and MA 15+ and the reference to people aged 15 years

### Current Challenge

In the Board's experience, based upon consumer complaints and enquiries, and industry interaction, consumers have *an awareness generally* of what constitutes PG, M and MA 15+ media material. There is, however, *some* level of confusion which is caused by each of the categories referring to a 15-year-old and both the PG and M classifications not recommending viewing for persons under 15 years. The current notes in the Film and Games Guidelines are as follows:

- PG (impact is mild) – it is **not recommended** for viewing by persons under 15 **without guidance** from parents or guardians.
- M (impact is moderate) – is **not recommended** for persons under 15 years of age.
- MA 15+ (impact is strong) – is **considered unsuitable** for persons under 15 years of age.

When you view the definitions above, they lack clarity for parents and guardians and beg certain questions such as, why an M level film can still be viewed by a person under 15 years of age (although not recommended), without guidance as it is not a legally restricted category, when in fact the impact of material is higher than at PG.

The real separation between these categories comes from the *impact test* which is applied under the Guidelines of mild (PG), moderate (M) and strong (MA 15+).

## Options

In the current Film and Games Guidelines, there are notes inserted under the impact test for the unrestricted classification categories of G to M, that refer to children and/or those aged 15 years. The Board is of the opinion that these references are of limited utility as they make no allowance for different levels of emotional intelligence between children or young people; nor do they acknowledge the role of parents and guardians who are the most suitable persons to select films and games with which their child or young person may appropriately interact. Accordingly, the Board is of the opinion that changes should be made to the notes accompanying the impact tests for the unrestricted classifications, G, PG and M.

The current note accompanying the G impact test specifically states that for some films and games there may be “*themes or storylines*” that “*do not interest children*”. The Games Guidelines also refer to “*game play*” that may “*not interest children*”. The Board is of the opinion that these statements are too limiting and unnecessarily restrict consideration of appropriateness of material to themes and storylines, when in fact, it was never the intention that the G classification be indicative of its suitability for children regarding genre or plot.

The G classification level is about an impact level of classifiable elements that is very mild and this impact applies to *all* film and game genres and storylines. Parents and guardians must be mindful of all six classifiable elements *and* plot when selecting material appropriate for a child or young person to view or play.

If the current statement in the G classification note about themes and storylines not being of interest to children is to remain, then it applies equally to the PG classification for children and to the M classification for young people.

The current note under the impact test for the M classification should be amended to remove the following statement: “*There are no legal restrictions on access.*” This statement does not appear under either the G or PG classifications, which are also not legally restricted. Alternatively, the statement must appear under all unrestricted classifications (ie, G, PG and M).

## Recommendations

- 1.2 Remove the reference to 15 years of age in the Code, and Film and Games Guidelines for PG and M classifications and simply refer to the impact of the material.
- 1.3 Change the notes in the Guidelines that accompany the G, PG, M and MA 15+ impact test for films and games to read as follows:

**G:** Content classified G may not be of interest to a child. Some content may contain material which some children could find confusing or upsetting and parental guidance may be required.

- PG:** Content classified PG may not be of interest to a child or young person. Some content may contain material which some children and young people may find confusing or upsetting and parental guidance is recommended.
- M:** Content classified M is not suitable for children. Parental guidance may be required for young people.
- MA 15+:** Content classified MA 15+ is legally restricted to people aged 15 years and over. However, young people aged under 15 years can legally access this content when accompanied by an adult who may need to provide guidance.

## Issue C: Introduction of an additional classification category between PG and M

### Current Challenges

The current classification categories are predicated on protecting consumers as expressed in the *National Classification Code* (the Code), which speaks solely of ‘adults’ and ‘minors’. There is no contemplation of ‘minors’ being divisible into ‘children’ (ie: those not yet in their teenage years) and ‘young people’ (ie: predominantly those in their teenage years). Nor is there any contemplation of the way each of these groups may react to the impact of the material they are viewing or playing and the fact that young people are at a different developmental stage from children and adults.

When the term ‘minors’ is not contemplated as two groups (children and young people), there is no acknowledgement of how ‘minors’ are today viewed in Australian government and society. For example, the majority of Australian state and territory public sectors have a Commissioner for ‘Children and Young People’, in recognition of the different levels of pro-social and emotional development between children and young people.

Within the entertainment media sectors of films and games, there is clear evidence that content creators are deliberately developing material for young people. This material often exceeds the mild impact level of the PG classification and is causing material, upon classification, to be pushed into the M (moderate impact) classification level, even though the material does not require a mature perspective (as is intended for the M – Mature category).

Modern cinema and film streaming has evolved greatly in the past 25 years since the Code was developed and the Code no longer reflects the way in which society is categorised (adults, young people and children), nor does it reflect the vast spectrum of films and computer games that sit in the PG and M classifications. This same phenomena of exponential change was recognised in America in the 1980s, and it responded at the time by developing a PG-13 classification to address its then-deficit in classification categories.

As at October 2019, the United Nations records that adolescents (between the ages of 10 and 19 years) number 1.2 billion in the world, making up 16 per cent of the world’s population.<sup>4</sup> It is therefore important that the Australian classification system acknowledges this significant world population of young people, particularly when content creators are making entertainment media specifically for this market. In the 2016 Australian census, 2,818,778 people were aged between 10 and 19 years, accounting for just over 12% of Australia’s population. When those aged 0 – 9 years are added to this group, the number of children and young people totals 2,967,425 which is just

<sup>4</sup> <https://data.unicef.org/topic/adolescents/demographics/>

under 25% of Australia's population.<sup>5</sup> Hence, some of the reasons why the Board has suggested previously the adoption of a PG-13-type classification category.

It is for the foregoing reasons that the Board supports the creation in Australia of a classification category aimed at young people that sits between PG and M, as this is pertinent and would address the **mild+ impact level** material which is being created specifically for young people. Such a development is, in the Board's opinion, overdue.

In its Annual Reports for the years ending 30 June 2018 and 30 June 2019, the Board has referred to this new category as "PG-13". The Board is not wedded to this nomenclature and this is discussed below under 'options'. Further it has not been the contention of the Board that the suggested creation of a PG-13-type classification is to emulate the American classification system; the American classification system bears no relation to Australian classification standards and cultural mores.

There are well-established international film markets and festivals aimed specifically at children and young people, one of the most notable being Berlinale. Berlinale includes the award sections called *Generation Kplus* and *Generation 14plus*. Both programs include comprehensive contemporary films exploring the lives and worlds of children and young people. Berlinale *Generation 14plus* is renowned for enjoying "*a unique position as the instigator of a convention-breaking young people's cinema and is the section which accommodates narratives and cinematic languages that take young people seriously*" and "*hold up a mirror to the adult world*".<sup>6</sup>

Currently, such films generally exceed what can be accommodated in the Australian PG (mild impact) category and are artificially having to be pushed up into an M (moderate impact) category. For example, the film, "**Le Voyage de Fanny**," (AKA "Fanny's Journey"), a French-Belgian film following a group of Jewish children who flee the Nazis during World War II, was rated by the Board as **M, Mature themes**. It could and would have been more appropriately placed in a PG-13-type classification.

Further to the above, the Board has been tracking a trend, particularly in theatrical release films, of an increasing level of pervasive dark themes, or a sense of peril, threat and menace in content which would attract a young person demographic. Examples include films such as *Mowgli*, *Miss Peregrine's Home for Peculiar Children*, and *Maleficent*. The impact test for the classifiable element of themes has exceeded mild for the PG category and has resulted in these films being classified M (moderate impact level). If another classification category with an impact of 'mild+' existed, these films could have been accommodated within it.

The trend regarding thematic content has been matched by a trend to a greater level of violence, particularly action violence, which exceeds what can be accommodated at PG and has caused certain films, such as the recently released, *My Spy*, to be classified M on its first and second classification viewings, with consumer advice of 'Action violence'.

The applicant for *My Spy* elected to further edit the film prior to theatrical release and to submit it for classification a third time. This modified version of the film had been edited suitably by significant modifications to the four scenes noted in the Board's report to the original film, to enable it to have

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[https://quickstats.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/communityprofile/036?op=endocument](https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/communityprofile/036?op=endocument)

<sup>6</sup> <https://www.berlinale.de/en/festival/sections/generation.html>

a mild impact level and to be accommodated in the PG classification category with consumer advice of ‘Mild themes, action violence and coarse language’.

Other films, such as the recently released, award-winning *Jojo Rabbit*, use a decidedly adult backdrop to tell a story that allows older children and young people to explore issues (for example, war and genocide) in a safe space. The film is an adaptation of the novel, *Caging Skies*, by Christine Leunens. It is a satire set in World War II about a lonely, 10-year-old member of the Hitler Youth named Jojo, who discovers his mother is hiding a young Jewish woman in their attic. Notwithstanding the storyline, this film too, was classified M with consumer advice of ‘Mature themes, violence and coarse language’.

If a PG-13-type classification (with an impact level of “mild+”) existed, these types of films (and games) could be more suitably placed within the new category. It would also act as an additional, instantly identifiable form of consumer notice and ensure that both parents and young people are given a more accurate indication of the impact level of the material.

Not only have theatrical film distributors chosen to edit such films in order to achieve a lower classification rating than M, inevitably in order to maximise box office takings upon theatrical release, but another result of the lack of a PG-13-type classification is that such films have had to be edited and re-classified in order to be broadcast on television to reach their target audience, within the mandated PG classification time zones.

The Board acknowledges that any changes to current classification categories would have impacts on commercial television and public broadcasters, particularly with respect to classification time zone requirements. If, for example, a PG-13-type classification category is adopted, it would either need to exist within current PG time zones, or sit at the beginning strata of the M time zone. It would of course be open for television and other broadcasters to edit PG-13-type material to bring it out of the PG-13-type category and into a conventional, more restrictive PG classification.

The Board is not suggesting that the new classification category would be applied retrospectively. The Board is proposing that the new category would only apply prospectively, as was the case when the MA 15+ category was introduced, for films and games, and when the R 18+ classification was applied for games.

It is noted that the ALRC<sup>7</sup> did not endorse changing the existing classification categories in 2012. While the Board acknowledges the research undertaken in order to reach this position, the Board is not convinced that the ALRC’s conclusion still has relevance, as in the intervening decade since its research was undertaken, there has been an exponential explosion in digital content available to consumers and content creators are specifically targeting the young person market.

## Options

The Board is **not** wedded to the nomenclature of PG-13 for the new classification category. In fact, it is preferable to **not** use a classification category title that references an age, instead using “**YP**” for Young Person (or possibly “**T**” for teenager). This would then create the following, non-legally-restricted classifications:

- G – General (very mild impact)
- PG – Parental Guidance (mild impact)

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<sup>7</sup> ALRC Classification—Content Regulation and Convergent Media Final Report 118 (February 2012), 9.26

- YP – Young Person (mild+ impact)
- M – Mature (moderate impact)

This would then result in the age restrictive numbers (15 and 18) being used solely for the legally restricted categories of MA 15+, R 18+ and X 18+.

If the PG-13-type classification is adopted, then the Board would propose the following:

- The impact level of material would be **mild+**. In other words, it would exceed the mild impact level, but not so significantly as to require a mature perspective (the M classification). This would be particularly, but not exclusively, relevant, to the classification of certain films with a greater amount of action or fantasy violence, which often forms the basis of their stories.
- A review of the current restrictions around coarse language in the PG and M classifications is required. The Board proposes that the new **YP** category should accommodate existing coarse language in the PG classification *and* a modest number of uses of M-level language.
- Those films which currently exceed a mild impact level would no longer automatically receive an M classification, but would instead be assessed for suitability to receive a **YP** classification (with its 'mild+' impact level).
- This would result in the classification markings looking something like the following:



## Recommendations

- 1.4 In recognition of the broad spectrum of material accommodated in the existing PG and M classification categories, and in recognition of entertainment media targeted specifically at young people, a new classification category should be inserted between the existing PG and M classification categories, with the new classification category having an impact level of 'mild+'.
- 1.5 That consideration be given to naming the new PG-13-type classification level, YP (Young Person).
- 1.6 That the new YP classification is not applied retrospectively; only applying prospectively.

## CLASSIFIABLE ELEMENTS

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

The Board is broadly supportive of the continuation of the six classifiable elements that are currently used (subject to the suggested variations discussed below), in conjunction with the consideration of context, when determining the impact of material. Despite minor variations and codifications, these elements – themes, violence, sex, language, drug use and nudity – are well established and utilised by the Board, content classifiers and media/entertainment industries in Australia. They are also widely used and understood in many other jurisdictions, including the UK, the USA, New Zealand and South Korea.

The six classifiable elements are discussed individually below. Some of the recurring issues raised therein include:

- the current names of some of the elements;
- the current definitions contained in the existing Guidelines;
- the manner in which content is assessed;
- the resulting limitations on classifying certain content; and
- the unnecessary application of Refused Classification to certain content that could otherwise be accommodated at a lower classification level but for certain current restrictions.

Various recommendations are proffered to address these issues and to create harmonisation in the classification of content.

#### **a) 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?**

‘Themes’ are defined identically in the Film and Games Guidelines (2012) as, “*Social issues such as crime, suicide, drug and alcohol dependency, death, serious illness, family breakdown and racism*”. This is not, nor can it ever be, an exhaustive list. There is a variation of this definition contained in the Publications Guidelines (2005) where the term “*Adult themes*” is defined. The Board believes that the definition of themes must be identical across all media types.

In practice, the Board considers ‘themes’ to encompass any impactful subject, issue, concern, phenomena, event or idea, which may include the following kinds of social issues, events or content:

- Crude humour
- Scary or horror content
- Supernatural or fantastical creatures or events
- Abuse or excessive use of alcohol or tobacco
- Drug and/or alcohol dependency
- Misuse of prescription medication
- Non-drug addiction and dysfunction (for example, gambling)



- Medical treatments and surgical procedures
- Anti-social or criminal acts (for example, hooliganism, abduction, blackmail, robbery, torture, murder, paedophilia)
- Sexual infidelity
- Abortion
- Family breakdown
- Injury or illness and recovery
- Suicide
- Death
- Discrimination of any sort
- Bullying
- Warfare and destruction
- Dangerous stunts or imitable behaviour
- Animal treatment (for example, hunting, killing or harming animals, including animal slaughter)
- Predatory animal behaviour (for example, in wildlife films)
- Historical events
- Natural phenomena (for example, tsunamis, earthquakes and bush fires).

The Board understands that other guidelines, such as the *Commercial Television Industry Code of Practice*, specify elements such as suicide or dangerous imitable activity, while the British Board of Film Classification (BBFC) lists dangerous behaviour, discrimination, and threat and horror as specific classification elements. In the Board's opinion, however, these concerns all fall comfortably under the broader umbrella of themes, and the flexibility of the current approach, in conjunction with considerations of context and impact, is sufficient to accommodate current and future thematic issues and concerns.

The Board does acknowledge, however, that **consumer advice** for themes needs to be carefully formulated and applied to be useful for consumers. Consumer advice of 'mild themes', for example, may not carry enough meaning. In practice, the Board strives to provide specific consumer advice where there is an overriding or particularly impactful theme, identifying fantasy, supernatural, science fiction and horror themes, as well as animal treatment, surgical procedures, suicide themes and injury detail.

For example, when the Board classified the 2015 film, *Bridgend*, a dark and suspenseful drama based on the true events of numerous youth suicides that occurred in the Welsh town of Bridgend between 2007 and 2012, it determined that an MA 15+ classification with consumer advice of *strong suicide themes*, sex scenes and coarse language to be the most informative and relevant for consumers.

When classifying the 2018 film, *A Star is Born*, notwithstanding a scene of implied suicide, the Board determined an M classification with consumer advice of *mature themes*, coarse language, drug use and sex scenes to be the most appropriate. This film is about the relationship between two musicians and the issue of suicide is a part of a storyline and not the central story of the film. Because of its treatment in the film, the Board was satisfied that the implied suicide was able to be accommodated at a lower impact level (PG) and did not warrant the disclosure of a climactic plot point by using consumer advice of 'suicide'.



Classification information, including rating and consumer advice, is intended to be a guide for people when choosing a film (or other media) for themselves or those in their care. However, neither the classification, nor the consumer advice, relate to plot points or storylines. This is because the policy platform underpinning the classification system is to *forewarn* potential viewers, players or readers, of the most impactful content (relating to the six classifiable elements) and not to *foretell* plot or storylines. Information about the plot or storylines may be obtained from sources such as specific film or game websites, or film or game review websites aimed at parents, or conducting a film or game title search through an internet search engine such as Google.

There has been commentary about possibly including ‘trigger’ or content warnings<sup>8</sup> prior to viewing theatrical release films or downloading digital games. Consideration needs to be given to what relationship, if any, should exist between classification of media and ‘trigger’ or content warnings relating to mental disorders, illnesses or sensitivities, particularly when these are not contributing to the most impactful content in a film or game.

While the Board acknowledges that certain mental illnesses, disorders or topics are, at times, of heightened concern to the community (for example, bushfires), the Board is not convinced that they should determine either the classification category or the scope of consumer advice attached to classified media. There are many films, for example, that contain fleeting verbal references to suicide that are not related to any thematic content of impact in the film. To include consumer advice of ‘reference to suicide’ would give a completely false indication about the content of the film overall, overstating the impact of material that could amount to nothing more than a peripheral verbal reference, ultimately misleading consumers about the most impactful content.

### **Gambling and Loot Boxes**

Many games incorporate ‘micro-transactions’, which is a broad concept extending to what many colloquially refer to as a ‘loot box’. Micro-transactions may in fact extend beyond a ‘loot-box’ and include using game points, real-world money, or both to purchase specific in-game content or features, for example, skins, weapons or inventory and new game modes. Loot boxes are commonly understood to involve the purchase of a virtual item that contains a variable selection of other virtual items (chance-based items).

In November 2018, the Senate Environment and Communications References Committee tabled their report called, *“Gaming micro-transactions for chance-based items”*. The Director of the Board gave evidence before the committee in which she had noted that, the *“whole construct of a loot box is incredibly broad and...there is no easy clear definition”*<sup>9</sup>. The Director told the committee that whether or not a loot box was akin to gambling, they should be kept separate from other kinds of games that involved *“very clear simulated real life gambling taking place”*<sup>10</sup>.

Further, the Director expressed concern regarding any proposal for ‘blanket or sweeping’ requirements that games containing loot boxes be classified at a particular rating: *“I think the nuance and innuendo that sits in games is huge. I would be very concerned, if we were to suddenly go from having a degree of flexibility that we have in our current classification system to replacing*

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<sup>8</sup> ‘Trigger’ or content warnings may be understood within the framework of mental disorders. The DSM-5 (*Diagnostic and Statistical Manual of Mental Disorders*) is the handbook used by health professionals to help identify and diagnose mental illness. The current edition lists nearly 300 mental disorders.

<sup>9</sup> Senate Environment and Communications References Committee *“Gaming micro-transactions for chance-based items”* November 2018, p. 51

<sup>10</sup> Ibid.

*that with a very black and white direction that all games with any kind of direct or simulated gambling content or reference in any shape, manner or form to gambling would automatically be R 18+.”<sup>11</sup>*

The Director concluded her evidence by suggesting that while it may be appropriate for some styles of loot box mechanisms *'to be in some kind of age-restricted classification'*, this is *'very fertile ground for further discussion and research'*.<sup>12</sup>

This further discussion and research is in its infancy and accordingly, the Board, at this point in time, does not support all games containing loot boxes having to be classified at a specific classification level as context is crucial to assessing impact and determining an appropriate classification.

The Board has, however, begun to use consumer advice of ‘in-game purchases’ in order to alert consumers to the fact that playing the game may necessitate further expense. This consumer advice is consistent with that used by the Pan European Game Information (PEGI), the European video game content rating system, and the Entertainment Software Rating Board (ESRB), the US-based self-regulatory body for the video game industry.

It is noted that the Board reserves the use of consumer advice of ‘simulated gambling’ for those computer games that mimic real world gambling environments (social gambling games), for example, Texas Hold ‘em Poker or Roulette.

## **Recommendations**

- 2.1 That any future Guidelines for media include a definition of themes that is expanded from the current definitions in the existing Guidelines to include a broad array of social issues, events and content.
- 2.2 That consumer advice for themes be confined to only the most impactful thematic material determining the classification category of the content, and that ‘trigger’ or content warnings for other thematic material not be included.
- 2.3 That games using a loot box mechanic not automatically be classified a specific classification, but be assessed for impact and context and classified accordingly.
- 2.4 That social gambling games not automatically be given a specific classification, but be assessed for impact and context and classified accordingly.

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<sup>11</sup> Op cit. p. 61

<sup>12</sup> Id.

**b) Do the provisions in the Code, the Films Guidelines or the Computer Games Guidelines relating to ‘violence’ reflect community standards and concerns? Do they need to be changed in any particular classification category or overall?**

While the Board acknowledges community concerns relating to violence in games, the Board’s position is that the Film Guidelines and the Games Guidelines should be identical, resulting in consistent classifications across different media formats, which is especially important at a time when media is converging and the boundaries between film and games are becoming increasingly blurred. This is true from a technological perspective as much as from a narrative perspective, with games such as *Detroit Become Human*, *Red Dead Redemption 2* and *Death Stranding*, employing sophisticated narrative techniques, similar to a traditional film.

There is a variation of the definition of ‘violence’ contained in the Publications Guidelines where the term still refers to acts of violence but is thereafter limited to an *obvious* threat of violence or its result. The Board advocates for a single definition of ‘violence’ across all media types.

The Board acknowledges the community’s concern about the presentation of ‘sexual violence’ in films and games, but questions the community’s understanding of the distinction between it and the term, ‘sexualised violence’.

The current Film and Games Guidelines contain the following identical definitions:

Violence:	<i>“Acts of violence; the threat of effects of violence”</i>
Sexual Violence:	<i>“Sexual assault or aggression, in which the victim does not consent.”</i>
Sexualised Violence:	<i>“Where sex and violence are connected in the story, although sexual violence may not necessarily occur.”</i>

In the Board’s experience, despite these definitions, there is misunderstanding of their application for some parts of industry – both by assessors and digital tools.

While the Board provides consumer advice currently for both ‘sexual violence’ and ‘sexualised violence’ when these acts or references appear in a film or game, it questions the need to do so with the greater push for industry-self classification and the use of digital tools.

Although acts of sexual assault or sexual aggression involve sex, they are in fact acts of violence and therefore, are assessed under the classifiable element of violence and not sex. The Board uses consumer advice of ‘**sexual** violence’ to describe these acts or references.

The difference with ‘**sexualised** violence’ is that *both* the elements of *sex and violence* are connected in the content and therefore, are *assessed concurrently*. The Board uses consumer advice of ‘sexualised violence’ to describe these acts or references.

An example of sexualised violence occurred in the film, *Gone Girl*. In an extended scene which starts as consensual sexual intercourse between two adults, it concludes with the female protagonist slashing her male partner’s throat, causing an arterial blood burst. Blood continues to gush throughout the scene, which ends with an overhead shot of the lifeless bloody body.

While the Board gave consumer advice of ‘strong sexualised violence, blood, sex scenes and coarse language’ for the most impactful content, it is arguable that the majority of the Australian public would struggle to identify the difference in meaning between ‘sexual violence’ and ‘sexualised violence’. It is likely that this ‘technical distinction’ between the terms and the intended differences in meaning are lost on Australian consumers.

While the generation of consumer advice is a matter for the Board, it is one of significance for digital tools that need to generate advice from prescribed libraries of words and terms. As a tool is unable to differentiate between nuance and context, it is recommended that the digital tools be limited in their creation of consumer advice and that 'sexualised violence' not be consumer advice that they can generate. An alternative consumer advice for the film, *Gone Girl*, is 'strong sex scenes, bloody violence and coarse language'. This advice is succinct and still conveys pertinent information for the viewer about the most impactful content in the film.

To clarify, the Board would still use consumer advice of 'violence' and 'sexual violence', and it is fundamental that classifiers understand and can appropriately identify and distinguish between 'sexual violence' and 'sexualised violence', so that they answer questions accurately in digital tools in order to generate appropriate consumer advice so that the public is protected from material likely to harm or disturb them.

The importance of correctly identifying types of violence in media content highlights the need for people to undertake training prior to using Australian digital classification tools and this issue is further discussed in response to Question 6 (Issue B).

The bolded entries in Table 3 identify the current differences that are required to be taken into consideration when assessing violence in films and games (noting that there are differences also in relation to sex, nudity and drug use). These additional requirements and restrictions for games result in many of them being arbitrarily pushed into higher classification categories, resulting in consumer confusion regarding the impact of classifiable content, across media types.

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**Table 3: Comparison between Film and Games Guidelines for the element of Violence**

	FILM GUIDELINES	GAMES GUIDELINES
G	<p>Violence should have only a <b>low</b> sense of threat or menace, and be justified by context.</p> <p>Sexual violence is not permitted.</p>	<p>Violence should have only a <b>low</b> sense of threat or menace, and be justified by context.</p> <p>Sexual violence, <b>implied or otherwise</b>, is not permitted.</p>
PG	<p>Violence should be <b>mild</b> and infrequent, and be justified by context.</p> <p>Sexual violence is not permitted.</p>	<p>Violence should be <b>mild</b> and infrequent, and be justified by context.</p> <p>Sexual violence, <b>implied or otherwise</b>, is not permitted.</p>
M	<p>Moderate violence is permitted, if justified by context.</p> <p>Sexual violence should be very limited and justified by context.</p>	<p>Moderate violence is permitted, if justified by context.</p> <p><b>Sexual violence, implied or otherwise, is not permitted</b></p>
MA 15+	<p>Violence should be justified by context.</p> <p>Sexual violence may be implied, if justified by context.</p>	<p>Violence should be justified by context.</p> <p><b>Strong and realistic violence should not be frequent or unduly repetitive.</b></p> <p><b>Sexual violence, implied or otherwise, is not permitted.</b></p>
R 18+	<p>Violence is permitted.</p> <p>Sexual violence may be implied, if justified by context.</p>	<p>Violence is permitted. <b>High impact violence that is, in context, frequently gratuitous, exploitative and offensive to a reasonable adult will not be permitted.</b></p> <p><b>Actual sexual violence is not permitted.</b></p> <p><b>Implied sexual violence that is visually depicted, interactive, not justified by context or related to incentives or rewards is not permitted.</b></p>

The Board notes with concern the inconsistent use of descriptors for the classifiable elements in that themes, sex and language all refer to the impact test of 'very mild', however, in violence the impact is described as 'low'. At best this should have been described as 'very low' to be consistent with a G classification impact of 'very mild'. Any future Guidelines need to redress this inconsistency.

The restrictions in the current guidelines around 'sexual violence' are an unnecessary impediment to classification of content. For example, *This Is the Police* and *This is the Police 2*, are management simulation games, in which the player dispatches emergency services and law enforcement to randomised events. The player is graded on the timeliness of response and the appropriateness of the resources allocated.

The games contain references to sexual violence that are *not* visually depicted, interactive or related to incentives or rewards, *however*, as the current Guidelines state that "*sexual violence, implied or otherwise, is not permitted*" within the G, PG, M or MA 15+ classifications, both of these games had to be classified **R 18+** with consumer advice of references to sexual violence. Without these restrictions in the Guidelines, these games could have been accommodated at an M classification level.

In the Board's opinion, community concerns in games (and films) can be addressed and safeguarded through the proper consideration of context and the effect of interactivity (including inducements, incentives and rewards), which may increase the impact of *any* of the classifiable elements. An additional safeguard is provided by the ability to Refuse Classification for material which offends against community standards to the extent that it should not be classified, as provided by the Classification Act and the Code.

The consideration of the impact of interactivity is discussed in response to Question 3 (Issue A).

The current Film Guidelines under **X 18+** state, in part, "*No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category.*" In the Board's experience, this blanket prohibition has resulted in the inability to classify certain categories of 'pornographic' films in the X 18+ classification category, as they are parodies of mainstream feature films and have included, for example, scenes of violence. In the film, *Star Wars XXX A Porn Parody Feature*, there are intermittent scenes of violence when Obi Wan uses a light saber to implicitly cut down an alien and a male with a scarred face. Given that the film contained real depictions of actual sexual activity *and* violence, it could *not* be accommodated within either the R 18+ or X 18+ classifications and had to be Refused Classification pursuant to item 1(a) of the films table of the Code.

Removing restrictions on violence within the X 18+ category would enable certain pornographic films with discrete and contextually appropriate depictions of violence to be classified X 18+. This change would not 'open the floodgates' to the legalisation of *all* pornographic films containing violence, because those films with depictions of sexual violence, sexualised violence or coercion would still be Refused Classification, as these depictions would be excluded from the X 18+ category pursuant to item 1(a) in the various tables of the Code.

## **Recommendations**

- 2.5 That any future Guidelines for content include the definition of 'violence' in the List of Terms that is currently contained within the Film and Games Guidelines.
- 2.6 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of violence for each classification category, eliminating existing variations between media types.
- 2.7 That any future Guidelines for content remove the blanket prohibition on depictions of violence in films containing sexually explicit activity ('pornographic films'), relying instead upon consideration of context and the prohibitions contained in the Refused Classification category.

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c) Do the provisions in the Code, the Films Guidelines or the Computer Games Guidelines relating to 'sex' reflect community standards and concerns? Do they need to be changed in any particular classification category or overall?

The Board is generally of the opinion that the existing Guidelines relating to the element of sex, which includes depictions of sexual activity, sexual references, sexual innuendo and sexualised imagery, broadly reflect community standards and concerns. However, again there are additional restrictions in the Games Guidelines, particularly the prohibition of "*sexual activity related to incentives or rewards*" in all but the R 18+ classification category, which should be removed.

**Table 4: Comparison between Film and Games Guidelines for the element of Sex**

	FILM GUIDELINES	GAMES GUIDELINES
G	Sexual activity should be very mild and very discreetly implied, and be justified by context.	Sexual activity should be very mild and very discreetly implied, and be justified by context.  <b>Sexual activity must not be related to incentives or rewards.</b>
PG	Sexual activity should be mild and discreetly implied, and be justified by context.	Sexual activity should be mild and discreetly implied, and be justified by context.  <b>Sexual activity must not be related to incentives or rewards.</b>
M	Sexual activity should be discreetly implied, if justified by context.	Sexual activity should be discreetly implied, if justified by context.  <b>Sexual activity must not be related to incentives or rewards.</b>
MA 15+	Sexual activity may be implied.	Sexual activity may be implied.  <b>Sexual activity must not be related to incentives or rewards.</b>
R 18+	Sexual activity may be realistically simulated. The general rule is "simulation, yes – the real thing, no".	<b>Depictions of actual sexual activity are not permitted.</b>  <b>Depictions of simulated sexual activity may be permitted.</b>  <b>Depictions of simulated sexual activity that are explicit and realistic are not permitted.</b>



As with the element of violence, in the Board's opinion, these additional restrictions are inconsistent and unnecessary. Community concerns can be addressed and safeguarded through the proper consideration of context and the effect of interactivity (including in-game inducements, incentives and rewards) in games, which can increase the impact of any of the classifiable elements, as well as the ability to Refuse Classification for material which offends against community standards and exceeds the R 18+ impact level.

The current inconsistencies between the element of sex for films and **games** would be resolved if the Games Guidelines were harmonised with the Film Guidelines. This would enable the current restrictions in the Games Guidelines on "*Depictions of actual sexual activity*" and "*Depictions of simulated sexual activity that are explicit and realistic*" to be accommodated within the **X 18+** classification category which is restricted to adults.

In the **Film Guidelines** for the **X 18+ classification category** which allows for depictions of consensual sexually explicit activity, there is a sample list of impermissible sexual fetishes ("*such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting*"), which in the Board's opinion is unnecessarily prescriptive and should be removed. The Board is of the opinion that depictions of legal sex acts between consenting adults should not be subject to an immediate prohibition and instead should be assessed like all other content in regards to context.

The Code, in clause 1 (d)(ii), requires that classification decisions are to take account of community concerns about "*the portrayal of persons in a demeaning manner*". Consideration of this principle in part informs application of Item 1 (a) of the Refused Classification category in the various tables in the code which requires that media which depicts, expresses or otherwise deals with "*matters of sex ... or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by a reasonable adults ...*" must be Refused Classification.

In addition, the Guidelines also contain confusing restrictions regarding sexual activity by 16- and 17-year-olds:

*"As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age or over to be portrayed as minors."*

These statements are redundant and need to be removed as Item 1(b) of the Refused Classification category in the Films table states that films will be Refused Classification if they:

*"describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)."*

## **Recommendations**

- 2.8 That any future Guidelines for content include the definition of 'sexual activity' in the List of Terms that is currently contained within the Film and Games Guidelines.
- 2.9 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of sex for each classification category, eliminating existing variations between media types.
- 2.10 That any future Guidelines for content remove the prescriptive list of impermissible fetishes and references to 16- and 17-year-olds in the X 18+ classification.

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d) Do the provisions in the Code, the Films Guidelines or the Computer Games Guidelines relating to ‘language’ reflect community standards and concerns? Do they need to be changed in any particular classification category or overall?

As this classifiable element relates only to coarse language, it is preferable that it is retitled to reflect this. The Board acknowledges that there is discriminatory language (eg. racial slurs), but this kind of language is currently assessed under the element of themes. It is important to clearly delineate the kind of material which needs to be assessed under this element, that is, Coarse Language only. The Board is conscious that ‘language’ consists not only of verbal statements but also gestures. For example, the film *Hetalia the World Twinkle Season 6* contains coarse language in the form of the multiple uses of crude gestures. The Board classified the film M with consumer advice of crude gestures.

Therefore, the ‘List of Terms’ in the Guidelines should include a definition of Coarse Language: “Coarse language is not limited to spoken utterances (dialogue) but includes gestures (which are a form of sign language).”

Because of the need to adjust to community standards over time and the importance of context, it is impossible as well as undesirable to set out a comprehensive list of words and gestures which may cause offence at each classification category. The Board would, however, support the publication of an *indicative* coarse language list of words and expressions in order to inform consumers. This is in addition to the ‘More information about the content of this film’ field on the Classification website, which only exists for public exhibition films. There is no capacity for parents or others to inform themselves about the coarse language content of any other media.

The Board notes that the only differences in the descriptions relating to coarse language between the Film and Games Guidelines are in the M and MA 15+ classifications and are shown in Table 5 below.

**Table 5: Comparison between Film and Games Guidelines for the element of Language**

	FILM GUIDELINES	GAMES GUIDELINES
<b>M</b>  Impact: Moderate	Coarse language may be used.  Aggressive or <b>strong</b> coarse language should be infrequent and justified by context.	Coarse language may be used.  Aggressive or <b>strong</b> coarse language should be infrequent, justified by context, <b>and not gratuitous, exploitative or offensive.</b>
<b>MA 15+</b>  Impact: Strong	<b>Strong</b> coarse language may be used.  Aggressive or <b>very strong</b> coarse language should be infrequent.	<b>Strong</b> coarse language may be used.  Aggressive or <b>strong</b> coarse language should be infrequent, <b>and not exploitative or offensive.</b>

The Board is concerned about the confusion generated by the use of the terms ‘strong’ and ‘very strong’ in the M and MA 15+ categories respectively, to euphemistically refer to two offensive

words. By using 'strong' and 'very strong' as attempts to describe these two words, it has generated conflict with the impact qualifiers for these classifications.

At the M classification, the impact qualifier is 'moderate', so the sentence in the table above needs to be re-worded to read, "Aggressive or *moderate* coarse language should be infrequent and justified by context." Similarly, at the MA 15+ classification, the impact qualifier should be 'strong', and the sentence needs to read, "Aggressive or *strong* coarse language should be infrequent."

The Board further notes that the Film Guidelines currently neglect to state that coarse language at MA 15+ needs to be "*justified by context*" (as is the requirement for the classifiable elements of themes, violence, drug use and nudity at MA 15+, and the requirement for language at M). By inserting this requirement at MA 15+ it then negates the requirements in the Games Guidelines that language not be "*exploitative or offensive*". There is a similar requirement at M which is equally redundant.

## **Recommendations**

- 2.11 That the element currently named 'Language' be re-named 'Coarse language' to reflect the content being assessed.
- 2.12 That any future Guidelines for content include a definition of 'Coarse language' that distinguishes it from other thematic language, and that it includes spoken language and gestures.
- 2.13 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of 'coarse language' for each classification category, eliminating existing variations between media types.
- 2.14 That an indicative coarse language list for each classification level be published on the Classification Website.

**e) Do the provisions in the Code, the Films Guidelines and the Computer Games Guidelines relating to ‘drug use’ reflect community standards and concerns? Do they need to be changed in any particular classification category or overall?**

This classifiable element currently only relates to proscribed (illegal) ‘drug use’. The only definition of ‘drug use’ currently available to the Board is that in the Glossary of Terms in the Publications Guidelines, which defines drug use as, *“The use of proscribed drugs. Proscribed drugs are those specified in Schedule 4 (referred to in Regulation 4A (1A) (e)) of the Customs (Prohibited Imports) Regulations.”*

Despite the element being called ‘drug use’, the Board does not limit its assessment of this element simply to ‘use’, but extends it to include references, both verbal and visual. Therefore, its current title is inconsistent with other elements such as ‘sex’, which equally relates to both activities and references.

The Board, therefore, recommends that this element is re-titled ‘Drugs’. This element would continue to address proscribed drug use and references, depictions of drug paraphernalia, visual symbols, and depictions of drug-induced states or effects.

In order to align with common sense consumer expectation, the Board recommends that this element be extended to incorporate the misuse of *legal* drugs such as prescription medications, which are currently assessed under the element of themes. This expanded definition of ‘drugs’ needs to state that it does **not** extend to caffeine, alcohol or tobacco, which are not assessed in Australia, except where, for example, there is excessive alcohol consumption wherein it is considered under the element of themes.

By way of contrast, the Commercial Television Industry Code of Practice refers to *“depictions of, or verbal reference to, illegal drugs”*, while the classification guidelines in the ABC Code of Practice state, at the G classification category, *“The depiction of the use of legal drugs should be handled with care. Illegal drug use should be implied only very discreetly and be justified by context.”* At the PG classification category, the ABC Guidelines state, *“Discreet verbal references and mild, incidental visuals of drug use may be included, but these should not promote or encourage drug use.”*

As with the elements of violence and sex, there are additional restrictions in the Games Guidelines, particularly the prohibition of *“drug use related to incentives or rewards”* at every classification category and the prohibition of *“interactive illicit or proscribed drug use that is detailed and realistic”*.

**Table 6: Comparison between Film and Games Guidelines for the element of Drug use**

	<b>FILM GUIDELINES</b>	<b>GAMES GUIDELINES</b>
G	Drug use should be implied only very discreetly, and be justified by context.	<p>Drug use should be implied only very discreetly, and be justified by context.</p> <p><b>Drug use related to incentives or rewards is not permitted.</b></p> <p><b>Interactive illicit or proscribed drug use is not permitted.</b></p>
PG	Drug use should be justified by context.	<p>Drug use should be infrequent and justified by context.</p> <p><b>Drug use related to incentives or rewards is not permitted.</b></p> <p><b>Interactive illicit or proscribed drug use is not permitted.</b></p>
M	Drug use should be justified by context.	<p>Drug use should be justified by context.</p> <p><b>Drug use related to incentives or rewards is not permitted.</b></p> <p><b>Interactive illicit or proscribed drug use is not permitted.</b></p>
MA 15+	Drug use should be justified by context.	<p>Drug use should be justified by context.</p> <p><b>Drug use related to incentives or rewards is not permitted.</b></p> <p><b>Interactive illicit or proscribed drug use is not permitted.</b></p>
R 18+	Drug use is permitted.	<p>Drug use is permitted.</p> <p><b>Drug use related to incentives and rewards is not permitted.</b></p> <p><b>Interactive illicit or proscribed drug use that is detailed and realistic is not permitted.</b></p>

As discussed in response to Question 1 (Issue A), it is the Board's conviction that the additional restrictions on drug use related to incentives and rewards in games be removed. This is because community concerns will be addressed and safeguarded through the proper consideration of context and the effect of interactivity (including in-game inducements, incentives and rewards) on drug use, as well as through the ability to refuse classification to material which offends community standards to the extent that it should not be classified.

Similarly, the prohibition on interactive illicit or proscribed drug use also needs to be removed from the R 18+ classification to give effect to clause 1(a) of the Code, which states that, "*adults should be able to read, hear, see and play what they want*". It is noted that other media, eg. films, permit interactive, illicit or proscribed drug use to be depicted or discussed at an R 18+ classification. In this regard, the Board notes the commentary by the ALRC in its classification review at paragraphs 11.87 – 11.94 and supports the Australian government reviewing current prohibitions around "*detailed instruction in the use of proscribed drugs*"<sup>13</sup>.

## **Recommendations**

- 2.15 That the element currently named 'Drug use' be re-named 'Drugs' to reflect the content being assessed.
- 2.16 That any future Guidelines for content include a definition of 'Drugs' that includes both proscribed drugs and the misuse of legal drugs (but does not extend to caffeine, alcohol and tobacco).
- 2.17 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of 'Drugs' for each classification category, eliminating existing variations between media types.

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<sup>13</sup> ALRC Final Report, Op cit. p. 278-279.

**f) Do the provisions in the Code, the Films Guidelines or the Computer Games Guidelines relating to ‘nudity’ reflect community standards and concerns? Do they need to be changed in any particular classification category or overall?**

In the Board’s opinion, the element of nudity is adequately addressed in current Guidelines and accurately reflects community standards and concerns. However, additional restrictions are again placed on the Guidelines for Computer Games so that nudity *“must not be related to incentives or rewards”*, causing computer games that otherwise might be classified at the PG classification category to be classified as R 18+.

The Board is conscious of the widely varying graphics engines used in games. Not all games utilise graphics that are ‘photo-realistic’. Certain styles of games still employ only 8-bit graphics engines, which are deliberately ‘blocky’ and naïve in pictorial style.

**Table 7: Comparison between Film and Games Guidelines for the element of Nudity**

	FILM GUIDELINES	GAMES GUIDELINES
G	Nudity should be justified by context.	Nudity should be infrequent and justified by context.  <b>Nudity must not be related to incentives or rewards.</b>
PG	Nudity should be justified by context.	Nudity should be infrequent and justified by context.  <b>Nudity must not be related to incentives or rewards.</b>
M	Nudity should be justified by context.	Nudity should be justified by context.  <b>Nudity must not be related to incentives or rewards.</b>
MA 15+	Nudity should be justified by context.	Nudity should be justified by context.  <b>Nudity must not be related to incentives or rewards.</b>
R 18+	Nudity is permitted.	Nudity is permitted.

The Board’s conviction is that these additional restrictions for games need to be removed.

The Board has repeatedly noticed that the Netflix tool, as used in Australia, does not classify nudity in accordance with Australian standards because it is treating a male without a shirt on as constituting nudity at a PG level. The Board does not treat a topless male as constituting nudity. This has resulted in misclassification of nudity by the Netflix tool. Accordingly, it is clear that the lack of definition of ‘nudity’ in the current Film Guidelines is resulting in Netflix re-defining the concept of



nudity when classifying for the Australian market. The only existing definition of 'nudity' sits in the Publications Guidelines and therefore, the Board is of the opinion that this needs to be incorporated in any future Guidelines: *"Nudity can consist of frontal or rear below waist visuals, full frontal or full rear visuals for both sexes, or breast nudity for females. The amount of detail is determined not only by the content of the nudity shown, but by other factors including closeness and size of visuals, realism, and clarity."*

## **Recommendations**

- 2.18 That any future Guidelines for content include the definition of 'nudity' in the List of Terms that is currently contained within the Publications Guidelines.
- 2.19 That the proposed future single set of statutory Guidelines (Recommendation 1.1) provide descriptions of allowable content for the element of 'nudity' for each classification category, eliminating existing variations between media types.

## OTHER COMMENTS

**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 Board fully supports the principles contained in clause 1 of the Code with a minor updating of expression. As discussed in response to Question 1 (Issue C), the term ‘minor’ should be deleted and replaced with ‘children and young people’.

There are three matters the Board raises in response to the current Guidelines and discusses below:

- A. Consideration of the impact of interactivity.
- B. Recognition of the importance of providing consistent and effective consumer advice across classification processes (digital tools and classifiers).
- C. The need to address the length of time classification decisions remain valid.

### Issue A: Consideration of the impact of interactivity

#### Current Challenges

From a practical, day-to-day working point of view, the Board is concerned about the inconsistent treatment of the concept of ‘interactivity’ between the current Film and Games Guidelines and the restrictions imposed around it.

In the Film Guidelines, the one paragraph relating to interactivity sits under the sub-heading of “*Assessing impact*”, whereas in the Games Guidelines, the six paragraphs relating to interactivity are a separate concept with their own heading of “*Interactivity and computer games*”, rather than forming part of assessing impact. In both Guidelines, interactivity is an inclusive definition: “*use of incentive and rewards, technical features and competitive intensity*”. The Board recognises a more practical definition of interactivity, including in-game inducements, incentives and rewards, and understands that it may and equally may not, increase the impact of any of the classifiable elements. The Board considers ‘incentives’ or ‘rewards’ to include, but not be limited to: the awarding of additional points; achievement unlocks; new skills or increases in attributes such as strength; making tasks easier to accomplish; accumulating rare forms of game equipment; plot animations and pictures as rewards following an event/action.

The Board is concerned that the concept of interactivity is seen as a stand-alone concept when classifying computer games but is viewed as part of assessing impact when classifying a film. The Board does not support the continuation of this distinction.

It is imperative in this age of media convergence where what is a film and what is a computer game is fluid (this has already been addressed in regards to the example, *Black Mirror: Bandersnatch*) that concepts such as interactivity have the same weight and understanding irrespective of the media type being classified. New and future media, including virtual and augmented reality theatres and devices, will incorporate interactivity in various forms. Unified guidelines should therefore be flexible enough to cover media of all types.

## Options

The Board's preferred approach is to take interactivity into account for each classifiable element, and not to treat it as a separate concept. Assessing interactivity is part of assessing impact in relation to the six classifiable elements. This then allows interactivity to be considered and assessed as part of context and accords with the approach taken to frequency, treatment, tone, the use of special visual effects, musical scores, sound effects and other impact accentuation techniques that are used across films and games.

## Recommendation

- 3.1 That any future Guidelines for content position interactivity as part of the essential principles which include considering context and assessing impact in relation to the six classifiable elements, rather than interactivity being treated as a separate consideration.

## Issue B: Consistency of consumer advice

### Current challenges

The Board is concerned about consistency in the provision of consumer advice across classification methods. The Board considers the formulation and application of appropriate consumer advice for films and computer games to be of central importance to the classification process. Without this advice, consumers are only given "half the story". To an extent, the application of consumer advice lacks consistency across the film and game industries.

With the advent of industry assessor schemes under the Classification Act as well as the introduction of digital classification tools, there is now a plethora of variations in the creation of consumer advice for films and games.

Under Section 20 of the Classification Act, consumer advice must be determined by the Board giving information about the content of a film or game which is classified G, PG, M, MA 15+, R 18+ or X 18+. The Board has a discretion to determine consumer advice for a publication.

Industry assessors make recommendations to the Board for classification and consumer advice about additional content being attached to previously classified films being released through home entertainment (eg. Blu-ray), the classification of television film series and certain computer games. As these are recommendations only, the Board has the opportunity to review the suggested consumer advice and to ensure its consistency with Board practice and standard.

However, this opportunity to review and vary consumer advice is not available with the digital classification tools. In the case of IARC, there is a prescribed limited number of possible consumer advices and these do not necessarily address all types of content as broadly as the Board is able to do. There are a number of issues regarding consumer advice generated by the Netflix tool and these are discussed below.

Similar provisions to Section 20 of the Classification Act are provided in the various television classification guidelines. For example, clause 2.5.1 of the *Commercial Television Industry Code of Practice* requires that "prominent and legible Consumer Advice must be given at the start of:

- a) a Film classified PG or above;

- b) all Programs classified M which commence between 7.30 pm and 8.30 pm;
- c) one-off Programs and very short series classified M;
- d) any Program classified MA 15+; and
- e) any other Program which contains material of a strength or intensity which the Licensee reasonably believes viewers may not expect.”

The content of this consumer advice is left up to the discretion of the commercial television classifiers and therefore lacks consistency.

While the current Board standard is to provide consumer advice using a modifier from the impact level of the classification category (for example, at PG, “*mild violence and coarse language*” or at MA 15+ “*strong themes, violence and sexual references*”), other modifiers are routinely used to provide more information to consumers (for example, at PG, “*Predatory animal behaviour*” or at MA 15+, “*strong animated violence*” or at R 18+, “*high impact horror themes and violence*”).

Public and commercial television broadcasters use their own sets of consumer or viewer advice, which are often limited in scope and may not mirror the consumer advice provided by the Board, even when they are using the Board’s classification for a film or series to be broadcast on television. A film the Board has classified PG with consumer advice of *mild fantasy themes, animated violence and coarse language* may be classified PG with consumer advice of *mature themes, stylised violence and infrequent mild coarse language* for a television broadcast. This is not consistent with the Board and may create confusion for consumers.

Clause 2 of the Schedule to the *Classification (Publications, Films and Computer Games) (Netflix Classification Tool) Approval 2016* requires the Netflix Classification to determine consumer advice giving information about the content of each film that it classifies. Section 22CF (1) of the Classification Act states that an approved classification tool decision is taken, for the purposes of this Act, to be a decision of the Board to classify the media item. Therefore, it is not an unreasonable expectation that consumer advice generated by the Netflix tool should be in line with the Board’s standards for classification decisions and consumer advice. The consumer advice generated by the Netflix tool does not conform to Board standards for the following reasons:

- the impact modifier at G, PG, MA 15+ and R 18+ classifications is repeated (eg. *Orange is the New Black - Season 7: Strong Themes Strong Nudity Strong Violence Strong Sexual Violence Strong Coarse Language Strong Drug Use Strong Sex Scenes Strong Crude Humour*);
- it is unpunctuated when it is uploaded to the National Classification Database and is generally, but not always, displayed by Netflix in an unpunctuated state on a viewing platform;
- for the first several years of the Tool’s operation, the consumer advice included multiple advisories for individual elements instead of selecting the single most impactful advisory for the element (eg. *Mummy, I’m a Zombie: Mild Supernatural Themes Mild Animated Violence Mild Themes Some scenes may scare very young children Predatory Animal Behavior [sic] Mild Violence Mild Threat Mild Fantasy Violence Mild Fantasy Themes Mild Horror Themes*). While Netflix Australia has previously advised that it is of the opinion that this is offering the most information and is most helpful to its viewers, the Board does not support this view as it is of the opinion that the information provided is overwhelming and often confusing. The

sheer volume of words is off-putting. Further, it is displayed fleetingly when at the beginning of the film on Netflix and is unlikely to be read in its entirety; and

- the order of the advisory does not appear to be in accordance with the most impactful material (eg. *I Lost My Body*: Coarse Language Mature Themes Crude Humour Violence Nudity Sex Scenes. Coarse language is not the most impactful element in this film).

Further, the Board has experienced a lack of consistency in the display of consumer advice for the same film across different Netflix delivery platforms (mobile phone vs tablet vs television). This inconsistency results in a failure to adequately inform and protect consumers.

The negative impacts of unwieldy consumer advice include the following:

- when Australian distributors are publishing Netflix classified films for home entertainment (Blu-Ray/DVD) they are required to insert the total consumer advice, into the limited size classification marking box. The reality is that the repetition of the modifier and the repetition of multiple advisories for single elements (eg. Mild themes, mild supernatural themes, some scenes may scare young children, predatory animal behaviour) result in the consumer advice not fitting within the marking box. This causes immediate problems for Australian distributors who then need to seek a mechanism by which to have the unwieldy Netflix tool consumer advice modified to reflect Board standards and Australian community expectations.
- three forms of consumer advice now exist in the Australian market – the format used by the Board (one mention of the impact modifier at the start of the advice); the format used by Free To Air TV (which may or may not include the use of a modifier); and then the format used by the Netflix tool (which repeats the modifier before each advisory element).
- a classification decision is made in perpetuity, therefore there are now many Netflix tool decisions included in the National Classification Database with consumer advice in a format that does not conform to that of decisions made by the Board.

The Board has been advised by Netflix Australia that they have no intention of modifying the current format of their consumer advice for Australian audiences.

Having regard to the foregoing, if there is a move towards a greater use of digital classification tools, then in order to achieve harmony in classification processes there must also be consistency and simplicity in the wording of consumer advice.

## Options

The formulation of consumer advice needs to be consistent and simplified in order to minimise consumer confusion. This would be at the cost of removing the flexibility of the current system where, for example, the Board is free to use a unique formulation of consumer advice that is specific to a particular film or game, and would require Netflix to remove its repeated modifier and select only the most relevant consumer advice for a particular classifiable element (for example, it could no longer say *Mild Supernatural Themes*, *Mild Themes*, *Some scenes may scare very young children*, *Predatory Animal Behavior* [sic], *Mild Threat*, *Mild Fantasy Themes* and *Mild Horror Themes* for the one film).

With the further digitisation of classification it may be an inevitable development that the range of available consumer advices has to be limited and stipulated.

## Recommendation

- 3.2 That consumer advice be standardised for all media types and be used by all classification processes (digital tools and industry classifiers).

## Issue C: How long should classification decisions remain valid?

### Current challenges

Once a media item is classified, its classification category and consumer advice are valid indefinitely, unless subsequently re-classified. This classification and consumer advice (or lack thereof) bind all subsequent publishers<sup>14</sup> of the media. There are currently significant limitations around the re-classification of media in Australia and the Board supports a review of these restrictions.

Re-classification of media is provided for in sections 37 – 41 of the Classification Act. Pursuant to section 39, it is only the Minister responsible for the administration of the Act who may request the Board to re-classify a publication, film or game (and only after a period of two years has elapsed since classification). If the Board is requested to re-classify a media item, the Director of the Board must invite submissions and the Board must consider any submissions that have been made.

Unless the provisions in section 37 – 41 are activated, classification decisions do not expire. This means that a film that was classified G or R 18+ in the year 2000 retains that classification in 2020 despite the passage of time bringing changes to classification categories, the Guidelines and – more importantly – community standards and expectations.

For example, correspondence was recently received by the Board enquiring about the current classification of the film, *The Road to El Dorado* which is **G** (General) with no consumer advice as was the practice for G classified films in 2000.

The film was classified on 30 March 2000 (twenty years ago). The enquiry came from a mother of young children who had started to view this film via a streaming service in Australia. She was concerned about the impact of thematic content and frequency of sexual innuendo in this animated children’s film and believed that the film warranted a higher classification. She queried whether or not the streaming service was correctly displaying a G classification.

Despite the Board having no capacity in 2020 to re-classify the film in accordance with today’s Guidelines and community standards, it did, however, view the film and subject it to a classification-like process so that it could respond to the enquiry. The Board determined that if the film were classified today, it would receive a classification of PG with consumer advice of mild themes, animated violence, sexual innuendo and coarse language. This is significantly different from the G classification (no consumer advice) it currently holds and is indicative of a shift in the cultural mores in Australian society over the past 20 years. It clearly demonstrates a need for a flexible and rational approach to reviewing archaic classifications and consumer advice for previously classified media.

While the Board empathised with the mother’s concerns about the film’s current classification and lack of consumer advice, which the Board found to be substantiated, there was no mechanism by

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<sup>14</sup> Section 5 of the Classification Act defines **publish** as “includes sell, offer for sale, let on hire, exhibit, display, distribute and demonstrate”

which the Board was able to re-classify the film. This meant that parents could not be more fully informed, nor children protected from content to which their parents did not wish to expose them.

A significant proportion of correspondence to the Board in recent years has related to classification decisions for media that pre-dates the last review for Film and Games Guidelines in 2012 and Publications in 2005.

### **Options**

If classification is to be undertaken to give effect to community standards of morality, decency and propriety (as is required under the Act and Code), there needs to be a legislative acknowledgment that those standards will inevitably change over time and therefore, provision must be made for a simple mechanism to allow for the re-classification of content.

While classifications should not 'expire' per se, there should be legislative acknowledgement that a classification may be 'reviewed' by way of re-classification after effluxion of a specified period of time. The Board would suggest this time period be 10 or 15 years. It is understood that some European jurisdictions already adopt this approach and others are considering it.

Such re-classifications could be initiated either by the Board on its own motion, or by responding to another party's application, request or enquiry. There would of course need to be restrictions placed around the re-classification process so as to avoid frivolous or vexatious requests.

### **Recommendation**

- 3.3 Amend sections 37-41 of the Classification Act to allow for the re-classification of content by the Board, either upon the Board's own motion, or upon application, or implied request (arising, for example out of an enquiry or a complaint).

## PART 2: MODERNISING CLASSIFICATION LEGISLATION

### CONTENT TO BE CLASSIFIED

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

The Board supports the classification of as much media content as is possible. However, different levels and approaches to classification should be adopted depending upon whether the media has been professionally produced for entertainment purposes, or is user-generated content uploaded to a streaming service.

The Board identifies the following issues and discusses below:

- A. Exempt material.
- B. User-generated content.
- C. Publications.
- D. Current gaps in the classification of content.

#### Issue A: Exempt material

##### Current Challenges

The Board is of the opinion that the scope of ‘entertainment’ content needs to be better defined than it currently is in Item 4 of the Review of Australian classification regulation discussion paper (pages 13-14). The Board notes that a significant quantity of material broadcast on television and some streaming services falls in the entertainment categories of News, Current Affairs and Sports. Owing to the nature of this material, it is not of the kind that is classified by the Board, but does form a significant part of the media entertainment platform of television.

Accordingly, in any harmonised classification environment, consideration must be given to whether or not this material should be exempt from classification across all platforms, as it is for broadcast television. The use of guidelines relating to material which may cause distress in News and Current Affairs programs, such as those found in clause 3.2 of the *Commercial Television Industry Code of Practice*, should also be taken into account. The exemption from classification of sports would not extend to include comedy or light entertainment/variety programs with a sports theme or association (eg. World Wrestling Entertainment (WWE)).

##### Recommendation

- 4.1 That the exemption from classification for News, Current Affairs and Sports Programs be retained and made consistent across all delivery platforms.



## Issue B: User-generated content

### Current Challenges

The Board believes that recent developments in the easy classification of user-generated content ([You Rate It](#)) by the Netherlands Institute for the Classification of Audio-visual Media (NICAM) and the British Board of Film Classification (BBFC) demonstrate the capacity to simply and quickly classify non-professional, user-generated content and thereby afford protection to children, young people and adults from material that is likely to harm or disturb them. You Rate It is a simple tool that is used by uploaders of user-generated video to rate their own content by answering six questions about the content of their video on: behaviour; drugs; horror/ fear; [coarse] language; sex; and violence. It also includes a facility for viewers to report content which might be illegal. You Rate It makes all ratings freely available.

The You Rate It website, which is jointly managed by NICAM and the BBFC, invites other interested organisations and rating bodies to join them in this project. The Board supports Australia's participation.

In relation to professionally produced media, the Board supports a form of classification that is more extensive than the You Rate It approach, which is specifically designed only for user-generated content, as it lacks the depth and complexity that is needed to classify professionally-produced content.

### Recommendation

4.2 User-generated content should be informally classified, for example, by the You Rate It tool (or similar).

## Issue C: Publications

Any definition of classifiable content needs to include content that is currently classified under the Publications Guidelines. In relation to hard-copy publications, any future Guidelines would need to contain provisions relating to the display and wrapping of restricted publications.

The definition of a publication under section 5 of the Classification Act is broad: *“any written or pictorial matter”* (but does not include a film, a computer game or an advertisement for a publication, film or computer game). A *“submittable publication”* is an unclassified publication that contains *“depictions or descriptions that are likely to cause the publications to be classified RC; or are likely to cause offence to a reasonable adult to the extent that the publication should not be sold or displayed as an unrestricted publication; or are unsuitable for a minor to see or read.”*

The definition of a *“submittable publication”* should be amended and replaced with the following:

Any written or pictorial matter, the content of which:

- should not be sold or displayed as an unrestricted publication (as it unsuitable for a minor to see or read), or
- should be legally restricted to adults, or
- should be Refused Classification.

In relation to publications, the Board believes that the current guidelines and classification categories are unnecessarily convoluted and inappropriate to the digital world. The Board proposes the adoption of the current equivalent Film and Games classifications of M, R 18+ and X 18+ for publications:

Current Publications Classification	Proposed Equivalent Classification
Unrestricted Publication classification	M
Category 1 – Restricted Publication classification	R 18+
Category 2 – Restricted Publication classification	X 18+

## Recommendations

4.3 That the current definition of “*submittable publication*” in the Classification Act be deleted and replaced with:

*Any written or pictorial matter, the content of which:*

- *should not be sold or displayed as an unrestricted publication (as it unsuitable for a minor to see or read); or*
- *should be legally restricted to adults; or*
- *should be Refused Classification.*

4.4 That the current publication classification categories of Unrestricted, Category 1 – Restricted and Category 2 – Restricted be abolished and be replaced respectively with the M, R 18+ and X 18+ equivalent classification categories.

4.5 That any future Guidelines for content include provisions relating to the display and wrapping of restricted publications.

## Issue D: Current gaps in the classification of content

### Current Challenge

For various reasons, not all providers of classifiable content are currently submitting it for classification, resulting in unclassified material being available to consumers. Some of this material may warrant Refused Classification.

The definition of ‘film’ in section 5 of the Classification Act is broad and includes theatrical release films, home entertainment on hard media (eg. Blu-ray), as well as film content downloaded or streamed to customers via the internet. Any unclassified content needs to be classified in accordance with the provisions currently contained in the Classification Act. This means that the *Classification (Publications, Films and Computer Games) (Markings and Consumer Advice) Determination 2014* (the 2014 Determination), also applies to classified and unclassified content.

In 2000, the then-Minister for Communications, issued a declaration specifically excluding online video content and internet streaming services from the definition of ‘broadcasting services’

contained in the *Broadcasting Services Act 1992* (BSA), the effect of which was that the regulation of content within these services moved from the BSA to the Classification Act.

However, not all services are using the current classification processes established under the Classification Act. It has been of particular concern to the Board that when Amazon Prime commenced streaming in Australia, it utilised the Australian classification markings including the CTC (Check the Classification) marking. This projected a false expectation upon Australian consumers that Amazon Prime would be undertaking an Australian classification process, when it did not and continues not to do so. The objective of the 2014 Determination is to *“ensure that consumers have ready access to clear classification information to inform their choices about publications, films and computer games.”* The complementary laws of the States and Territories contain provisions dealing with the consequences of not displaying markings and consumer advice in accordance with section 8 of the Classification Act and the 2014 Determination.

The Board also notes that between 2015 and 2020, Stan Entertainment Pty Ltd submitted only 11 film titles to the Board for classification purposes. These 11 titles are not indicative of the total number of unclassified films that have been available for streaming on Stan, which also utilises the Australian classification markings.

Following Australian legal proceedings that concluded in 2014, the primary applicant for pornographic films (which would warrant an X 18+ or Refused Classification) has declined to submit content for classification.

This highlights the current lack of compliance with classification laws.

## **Recommendation**

- 4.6 That all classifiable content is classified in accordance with Australian classification laws and standards.

## APPLYING THE SAME CLASSIFICATION STANDARDS ACROSS DELIVERY FORMATS

### 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)?

Yes.

As discussed in answer to Question 1 (Issue A), the existing Publications, Film and Games Guidelines need to be repealed and replaced with a single set of statutory guidelines for the classification of media content. It is important that, irrespective of the media type, that there is a single set of classification categories for all media. Refer to **Recommendation 1.1**.

For example, currently, classification decisions for films may be made using a variety of guidelines, including the Board's Film Guidelines, guidelines set out under the Commercial Television Industry Code of Practice, guidelines set out under the Australian Subscription Television and Radio Association (ASTRA) Codes of Practice, guidelines set out under the ABC Code of Practice or guidelines set out under the SBS Codes of Practice.

Australian consumers expect content to be classified at the same level regardless of the delivery format of that material. One way to promote classification consistency and harmony is to ensure that all segments of industry are operating under a uniform set of guidelines for the classification of content. This would formalise existing practice as well as promote consumer confidence in classification processes and decisions, independent of the delivery platform.

## CLASSIFICATION PROCESSES

### 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?

The Board recognises the need for further industry self-classification and is broadly supportive of a move towards establishing a multi-faceted classification process. This would require appropriate safeguards and for the system to operate under a single set of classification guidelines for all media types. Oversight by a single Government regulator is preferred, with the Board's future role forming part of this entity.

The Board raises the following matters in response and discusses below:

- A. Oversight by a single Government regulator and the future role of the Board.
- B. Maintaining consistency of standards and outcomes under a system that uses multiple classifiers and multiple classification tools.
- C. Expanding the National Classification Database.
- D. The weaknesses and limitations of classification tools.
- E. The need for industry options.
- F. The Board's current role as a decision-making body in setting benchmarks for industry assessors and classifiers to follow.
- G. Industry classifiers cannot prohibit their own content by classifying it Refused Classification.
- H. Conditional Cultural Exemptions.

### Issue A: Oversight by a single government regulator and the future role of the Board

#### Current Challenges

The Board supports the creation of a single regulator which is a government agency, and does not support the regulator being an industry-operated body, to oversee issues related to the classification of content. The Board's future roles and functions would form part of this entity.

There are certain concerns that arise out of the creation of a single government regulator whose responsibilities extend to a vast array of issues, functions, powers and objectives which reach across divergent content/media entertainment; for example, films that are streamed, need a streaming service and need to be classified. The streaming service needs infrastructure to enable the delivery of that entertainment. The Board is concerned that if there is a single government regulator *and it is a convergent regulator*, that it is not overwhelmed by infrastructure, service delivery issues, and questions about media content and classification. These concerns were addressed in paragraph 14.45 of the ALRC's Final Report<sup>15</sup>:

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<sup>15</sup> ALRC, Final Report, Op cit, p. 330.

*One challenge for convergent regulators is to avoid prioritising infrastructure and service delivery issues over questions of media content. Otherwise, ‘issues of culture would come secondary to arguments on efficient market mechanisms and competition’. The question of how to balance content questions and cultural regulation with carriage functions and economic regulation is a complex issue of regulatory design, and there are important lessons to be learnt from how other convergent media regulators have approached such issues.*

The Board supports the conclusion of the ALRC Report, which was that any new convergent regulator, “give equal weight to the social and cultural dimensions of media regulation, including classification regulation, as to economic and technical regulation.”<sup>16</sup>

Ongoing or new fundamental roles for the Board would include:

- setting the standards of Australian classification and driving consistency in decision-making by industry and digital tools, thereby maintaining public confidence across a harmonised classification system;
- undertaking auditing and benchmarking of classification decisions made by industry classifiers and digital tools, and varying and revoking these classification decisions and classifying this content;
- directing the refinement of digital tools in order to generate classification decisions that are applicable and consistent with Australian classification standards;
- participating in the development and testing of algorithms in the creation of any new digital tool and its ongoing testing and future refinements;
- informing the Minister regarding the exercise of section 22CA of the Classification Act;
- providing training and accreditation of industry classifiers and assessors and monitoring their performance and directing remedial action;
- undertaking the classification of content at first instance, for commercial and law enforcement applicants; and
- undertaking the current role and functions of the Classification Review Board (discussed below in response to Question 7), as well as operating as the review body for all other decisions made under any new scheme.

It is essential for the integrity of any new scheme that a truly independent decision-maker is kept in place, to ensure the application of Australian community standards. The Board’s skills, experience with all forms of media and industry standing mean that it is ideally placed to retain that role.

The Board notes that in the current classification landscape there are multiple agencies responsible for dealing with complaints from members of the public about classification decisions. This is discussed below in response to Questions 7 and 9. The Board proposes that the new government regulator should assimilate these disparate complaints avenues.

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<sup>16</sup> Id.

## Options

In order to be able to determine classification benchmarks and correlate these with evolving community standards, the Board must have material that it classifies which ranges across genres and impact levels and media types. This is discussed in Question 6 (Issue F).

When making a classification decision, the Board generates a report that details its reasons for reaching both the classification and the consumer advice for specific content. Currently, despite the Board being supportive of its Decision Reports for commercial applications (not law enforcement) being published on the classification website, the Classification Branch has not enabled this to happen. In part, the position of the Branch has been that industry ‘does not want spoilers out there’. The Board does not support the Classification Branch’s position as in the opinion of the Board, it is not convinced that it is conducive to transparency in decision-making and informing the Australian public of the Board’s interpretation of community standards. Further, it does not allow industry to easily check benchmarking standards.

## Recommendations

- 6.1 That there should be a single government regulator whose responsibilities cover the classification processes of all media types (films for theatrical release and home entertainment, streaming services, free to air television, user-generated video content, computer games, and publications) for all applicants (commercial and law enforcement).
- 6.2 This regulator should assimilate the functions relating to classification processes and complaints handling currently carried out by the Classification Board, Free TV, ASTRA, ACMA and the Office of the eSafety Commissioner.
- 6.3 That the Board forms part of the new regulator and:
  - 6.3.1 sets the standards of Australian classification;
  - 6.3.2 undertakes auditing and benchmarking of classification decisions made by industry classifiers and digital tools, and can vary or revoke these classification decisions and can classify this content;
  - 6.3.3 undertakes auditing and benchmarking of digital tools, and can direct the refinement of the tools in order to generate classification decisions that are applicable and consistent with Australian classification standards;
  - 6.3.4 participates in the development and testing of algorithms in the creation of any new digital tool and its ongoing testing and future refinements;
  - 6.3.5 is responsible for the functions under section 22CA of the Classification Act recommending or otherwise to the Minister a proposed classification tool;
  - 6.3.6 provides the training and accreditation of industry classifiers and assessors and monitors their performance and directs remedial action;
  - 6.3.7 undertakes classification of content at first instance, upon receipt of a valid application, for both commercial and law enforcement applicants;

- 6.3.8 undertakes the review of classification decisions currently performed by the Classification Review Board, as well as operating as the review body for all other decisions made under any new scheme; and
- 6.3.9 that the Board's new functions and roles are enshrined in the legislative instruments establishing the new government regulator.

## **Issue B: Maintaining consistency of standards and outcomes**

### **Current Challenges**

The Board acknowledges that classification processes are currently fragmented across content platforms. Television content is self-classified by broadcasters, online-only computer games are classified using the approved IARC tool, and Netflix content is classified using the approved Netflix tool.

Outside of these processes, the Board, in its role as a standard-setting decision-maker, classifies content from a variety of sources, including submittable publications, all applications for public exhibition films, episodic television film series released on physical media or a video on demand service, and computer games released on physical media.

In addition to acting as a decision-making body, the Board currently receives and processes applications made under several authorised assessor schemes. The Board conducts targeted and random audits of:

- Computer games applications submitted by authorised assessors under section 17(3) of the Classification Act, which allows for an applicant who is of the opinion that a game would be classified G, PG or M to supply a recommendation of the classification and consumer advice for the game;
- Additional content applications submitted by authorised assessors under section 14(5) of the Classification Act, which allows for the recommendation of the classification and consumer advice of additional film content by an applicant who is of the opinion that it would be classified R 18+ or lower; and
- Television series film applications submitted by authorised assessors under section 14B(1) of the Classification Act, which allows for the recommendation of the classification and consumer advice for a television series by an applicant who is of the opinion that it would be classified R 18+ or lower.

The Board may also, of its own initiative, audit decisions made by the Netflix or IARC digital classification tools, but current financial expectations by the Department are that the Board will undertake only limited assessments owing to the Board currently being funded on a cost-recovery model.

The Board also routinely provides classifications and evidentiary certificates for enforcement bodies, including investigations into criminal and terrorist activities, under section 87 of the Classification Act. However, there is no fee imposed to cover the Board's costs.

Some of this content, such as content submitted by enforcement bodies or content that it likely to be Refused Classification, is simply not suitable for industry self-assessment.



The majority of classifiable content, however, is *potentially* suitable for classification by industry tools or assessors, *providing that* they are governed by clearly defined guidelines and procedures, *including* procedures for audit and review. Therefore, the Board proposes that the auditing of classification decisions would apply across media types, genres and classification categories, *prior to* industry-generated decisions being uploaded to the National Classification Database. This is analogous to the current authorised assessor industry schemes which make recommendations to the Board, which are either accepted, rejected or varied.

Future workflow models involving greater industry self-classification cannot come at the expense of consumer protection. This means that if industry is to self-classify public exhibition (theatrical release) films, *for example*, then industry must undertake this process with sufficient lead time to allow for the Board to audit and amend the classification and/or consumer advice if necessary, prior to the film's being released. If sufficient lead time is not factored into the process, then the film will be shown to the public before its classification is reviewed and this would significantly reduce the current level of consumer protection and lead to confusion if a classification review process is triggered after release.

## Options

If the proposed classification system expands to include multiple inputs from multiple classification tools as well as other classification assessments, maintaining the consistency of standards and outcomes across that system will become exponentially more important. The need for oversight and auditing processes becomes paramount.

Under the existing authorised assessor schemes (except for advertising), the assessor *makes a recommendation* to the Board for the unclassified media's classification. The Board either accepts, varies or rejects that recommendation. Assessors are trained by the Board<sup>17</sup> and authorised by the Director under the Classification Act. This has helped the Board to maintain a high level of consistency with respect to both classifications and consumer advice for content. In contrast, decisions made by classification tools are taken to be decisions of the Board. Once a classification has been made by an authorised tool, it has the force of law.

It is also important to note that the current four assessor schemes (known as ATSA, ACA, ACGA and AAA<sup>18</sup>), contain varying sanctions if the Director of the Board reasonably thinks that an authorised assessor has made an assessment that does not reasonably apply the Act, the Code and the classification guidelines. The sanctions may include the imposition of additional training or barring notices issued to the authorised assessor and/or distributor depending upon the scheme. If issues are unresolvable, then the authorisation for the assessor may be revoked by the Director of the Board.

In order to maintain a robust classification system with decisions that reflect current *Australian* classification standards, it is imperative that all users of classification tools undertake training, approved by the Director of the Board (as is currently the requirement for industry assessors under the Classification Act). In this regard, the Classification Branch has been working with the Director of

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<sup>17</sup> Prior to late 2019, the Department had been undertaking the role of training both Board Members and Authorised Assessors, however, with the demise of the role of Staff Assessor in the Department's FTE count, the Classification Branch no longer has staff experienced in day-to-day classification decision making or in training in classification. Hence, the training of industry and Board Members has reverted to the Classification Board as was the case prior to the Department taking over the role.

<sup>18</sup> Authorised Television Series Assessor (ATSA), Additional Content Assessor (ACA), Authorised Computer Games Assessor (ACGA) and Authorised Advertising Assessor (AAA).

the Board in the development of online training programs for films and games classification. This training will go live in 2020 and will provide both initial and refresher training for industry assessors and Board members.

In the opinion of the Board, this training regime of initial and ongoing refresher training must be applied to Netflix staff who are tagging and creating classifications for content available in Australia. To date, there has only been one-off initial training for Netflix staff prior to the pilot of the tool commencing (2016). It is inequitable to require Australian industry assessors to undertake ongoing training and not to have the same requirement imposed upon Netflix, particularly noting that in the year ending 30 June 2019, the Netflix tool made 1,923 decisions.

It appears that within the existing legislation, there are no sanctions for the misuse of authorised classification tools. The Board supports the current sanctions contained within the authorised assessor schemes as they provide impetus for the assessors to perform with a level of accountability. It is therefore imperative that authorised classification tools include a range of sanctions for misuse be they deliberate or accidental.

## **Recommendations**

- 6.4 That the Board, as part of the Government regulator, undertakes thorough and regular processes of audit and review of classification decisions in order to ensure consistency of standards and outcomes.
- 6.5 That future workflow processes involving greater industry self-classification must provide sufficient lead time to allow for the Board to audit and amend the classification and/or consumer advice, as necessary, prior to the public being exposed to content that has been incorrectly classified.
- 6.6 That the Board, as part of the Government regulator, be responsible for the ongoing training and authorisation of industry classifiers and assessors.
- 6.7 That all users of digital classification tools undertake initial and structured refresher training in the classification of media in Australia, prior to using digital classification tools.

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## Issue C: Expanding the National Classification Database

### Current challenges

When films are modified for broadcasting on television or streaming services, the modifications are generally made so that the film can be screened at a lower classification level within a specified time zone. Currently, these classifications are not recorded on the National Classification Database (NCD). In the event that there is greater harmonisation of classification processes, all classification decisions need to be recorded and available to be inspected by members of the public.

### Options

This would necessitate an expansion of the role of the NCD. For example, if the film, *Maleficent*, (classified M) was to be edited so as to enable broadcasting in a PG time-slot on free-to-air television, then the television station modifying the film and the classification should be required to record their decision in the NCD.

### Recommendation

6.8 That the National Classification Database becomes the repository of all classification decisions.

## Issue D: The weaknesses and limitations of classification tools

### Current challenges

Australia is currently utilising two digital classification tools: IARC for computer games and Netflix for films. IARC is comprised of *“representatives from numerous ratings authorities around the world, each of which plays a role in developing the questionnaire and programming the logic in the rating tool that developers complete when obtaining a rating. That logic is based on the distinct content standards used by each rating authority, and the system generates a unique rating for each territory based on those localized standards.”*<sup>19</sup> The Board believes that it is the construction of the IARC tool (ie. logic based upon distinct content standards for each individual authority) which gives it its strength and leads to the generation of classification decisions that are appropriate for Australia (and the other participating authorities). This is in contrast with the Netflix classification tool, which is not based upon a series of questions but consists in the adaptation of existing tagging (for recommending content to subscribers) in order to generate a classification category and consumer advice for Australia.

The Board’s experience in testing and auditing classifications and consumer advice made by the Netflix tool since its trial operation began in 2016 has had its challenges. Despite the tool’s approval and the contention that it generates decisions that are *“broadly consistent with Australian community standards and decisions of the Classification Board”*, the Board is of the opinion that, given the number of decisions already generated, the use of the tool has irrevocably shifted the Australian classification standard away from Australian cultural mores, to those operative in North America, which is reflective of those undertaking the Netflix meta-tagging and the values of the US-based Netflix corporation. This is particularly evident in relation to the classifiable elements of

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<sup>19</sup> <https://www.globalratings.com/for-developers.aspx>

language, sex and nudity, where the American tolerance is less than the allowance made by Australian consumers.

‘Broadly consistent’ is, in the Board’s opinion, an insufficient standard. It requires generation of a classification that is one classification higher, or one classification lower, or equal to the classification that would be reached by the Board had it classified the material.

The Board is aware of the BBFC being one year into a pilot with Netflix of the UK Netflix algorithm. During phase one of this pilot, both the BBFC and Netflix classified films simultaneously and the results were compared. From phase two onwards, Netflix will classify content for the UK and the BBFC will audit Netflix’s work by checking a cross-section of titles, including by genre and category. The goal is for Netflix and the BBFC to move to a permanent arrangement under which 100% of content on Netflix’s UK platform will carry a BBFC rating, generated in-house by Netflix.

Significantly, the BBFC and Netflix do not use a standard of ‘broadly consistent’. The joint goal of both parties is to achieve (i) a self-generated age rating that is consistent with the BBFC’s Guidelines and policies and (ii) ‘ratings info’ (the equivalent of Australia’s consumer advice) that successfully captures those key elements about which UK families need to be advised.

In the Board’s opinion, the Netflix tool as used in Australia, does not classify in accordance with Australian standards because it either classifies the content at a different classification level (generally higher) than the Board would, or misclassifies individual elements, resulting in consumer advice that fails to provide adequate information to consumers.

This results in a shift of classification standards overall. An example of this issue is the film *Dave Chappelle: Sticks and Stones*, which was classified R 18+ for language by the Netflix tool. Upon review, the Board classified the film at MA 15+. It was not only language that the Board discovered had been misclassified, but also several other elements:

Classifiable Element	Netflix	Board
Themes	MA 15+	MA 15+
Violence	None	M
Sex	PG	MA 15+
Language	R 18+	MA 15+
Drug use	M	M
Nudity	None	None

The elements of violence and sex had been misclassified by two classification levels or more; language was misclassified by one level and therefore, as it was the sole element determining the film’s classification, this decision satisfies the Classification Branch (not Board) standard of ‘broadly consistent’. In the Board’s opinion, this is not an adequate standard for the Netflix tool as it fails to provide appropriate information for consumers about other content in the film. In contrast, the Board’s classification decision was MA 15+ with consumer advice of strong themes, crude humour, sexual references and coarse language. This is not an isolated example and the tool continues to experience these misclassifications.

The Board is also concerned at what it perceives to be the artificially low number of complaints received to date about decisions made by the digital classification tools (ie. Netflix and IARC). The Board is equally concerned that the classification website does not adequately advise Australian consumers that they should be lodging their queries or complaints about decisions made by classification tools with the Board.

The Board has previously discussed the weaknesses and limitations in consumer advice generated by the Netflix classification tool in response to Question 3 (Issue B).

Another issue that the Board is acutely aware of is the purported re-classification of films by the Netflix tool when the film has already been classified by the Board. This is despite re-classification being prohibited by condition 5(a) of the *Classification (Publications, Films and Computer Games) (Netflix Classification Tool) Approval 2016* (the Netflix tool instrument). This resulted in the children's film *Turbo*, which was classified G by the Board, appearing with a classification of PG on Netflix with consumer advice of Mild Crude Humour Mild Themes Mild Violence Scary Scenes. Some other examples include: *The 15:17 to Paris*, which the Board classified M (with consumer advice of Violence), appearing on Netflix with a classification of MA 15+ with consumer advice of Strong Blood and Gore Strong Violence Strong Themes; and the film, *Drunk Parents*, which the Board classified M with consumer advice of Crude sexual humour and coarse language, appearing on Netflix with an MA 15+ classification and consumer advice of Strong crude humour.

No sanctions are levelled against Netflix, so there is no impetus for Netflix to address these recurring issues.

The introduction and use of digital classification tools has, in the Board's experience, served to highlight the need for structured (not ad hoc), ongoing auditing of decisions.

Another concern with the use of digital classification tools is the (potential) ability of the user to manipulate inputs in order to achieve the output (ie: classification and consumer advice) that is desired. This highlights the need for consistent, regular and thorough auditing of tool decisions and monitoring of the performance of users.

## Options

Given the potential for error and deviations from Australian community standards, robust auditing practices will be required to ensure consistency with Australian classification standards and public confidence under any future classification regime. A complaints-based system of review available to applicants and consumers should also be considered in addition to these processes.

The Board acknowledges that self-classification by industry through digital classification tools may be achievable, but maintains that any new tools should be subject to greater sustained scrutiny than that which is currently in place for the IARC and Netflix tool models. Even if the current system were to remain in place, the Netflix and IARC tools require further improvement and ongoing scrutiny by dedicated resources.

Further, as the Board has previously noted in its Annual Reports and referred to above, the distribution of films and games is an international activity and is part of the globalisation of media content, and it has therefore lent its support to the ongoing use of the IARC tool for the classification of games and the development of a SIMO (single input, multiple output) tool to classify films. The Board notes that it (and the Classification Branch) have been involved in ongoing discussions with some other Western ratings authorities about the development of a film SIMO tool and that there are several options currently under development.

## **Recommendations**

- 6.9 That the Board undertakes auditing and benchmarking of digital tools, and can direct the refinement of the tools in order to generate classification decisions that are applicable and consistent with Australian classification standards.
- 6.10 That the Australian Government dedicate resources to developing an international SIMO tool for the digital classification of content.

## **Issue E: The need for industry options**

### **Current challenges**

The Board currently deals with a variety of applicants, including large international corporations, smaller local distributors and, in some cases, individual content creators. Some of these applicants will have the means to fund their own systems for self-classification, either by employing trained content classifiers or developing approved tools of their own, but many will not. Some will simply prefer to have their content classified, as is currently the case, by the Board.

There may also be cases in which a distributor, cognisant of the limitations of classification tools and considering the nature of their content, seeks the imprimatur of an independent body. The Board is best placed to continue this function under any proposed regime. The Board does not support an environment where publishers of content are only able to use a tool in order to classify.

### **Recommendation**

- 6.11 That the Board undertakes classification at first instance, upon receipt of a valid application, for both commercial and law enforcement applicants.

## **Issue F: Setting benchmarks**

### **Current challenges**

One of the strengths of the Board and its current position in the Australian classification landscape is that its decisions serve as benchmarks for industry, in particular, authorised industry content assessors and television assessors, who are required to use Board classifications for the classification of films which are broadcast on television. Assessors cannot make classifications in a vacuum, and Board decisions – which continually evolve to reflect shifts in community standards – provide context for the classifications and consumer advice.

If the Board's role is changed so that its primary function becomes an auditing one, it is more important than ever that the Board's auditing decisions are communicated to industry in a timely fashion, so that the benefit of benchmarking is amplified across industry; in other words, the results of benchmarking cannot be limited to merely the applicant or assessor whose content decision has been reviewed by the Board. It is important that industry receives timely notification of misapplied classifications and the reasons for these being overturned by the Board. This is consistent with intentions expressed by the ALRC.

Further, if the government elects to focus on the use of tools to classify, then there must be permanent, dedicated resources for re-calibrating and re-programing these tools to reflect shifts in community standards and expectations around classification categories and consumer advice.

If there is to be a single Government regulator, it is imperative that the Board forms part of this regulator and that its functions are not limited to merely auditing of material, but extend to being the source of authority for Australian classification standards. It is equally important that the Board is the sole trainer of classifiers across industries. In order to be the source of authority on standards, the regulator must be undertaking classification of product across a range of classification categories and media types.

This accords with a number of key recommendations of the ALRC review (Recommendations 7-1, 7-2 and 7-3)<sup>20</sup>: namely, that the Classification Board be retained as an independent classification decision-maker with an essential role in setting benchmarks.

### Options

One of the strengths of the Board is that its members are intended to be broadly representative of the Australian community and its decisions are therefore objective and free of industry self-interest as the Board operates in the public interest. The Board also operates independently of any government. This is especially important to ensure transparency and to avoid any bias attached to a classification decision. The Board is not removed from approaches by government Ministers advancing arguments on public policy platforms that certain content, for example, a film, be Refused Classification because the ‘message’ in the film is currently at odds with some government policy. As the Board is an independent statutory authority, it is not beholden to Ministerial direction. It is imperative that any future iteration of the Board is not subject to political interference or dictation in the classification of media, and continues to be founded on principles of transparency and consistency with legislated principles and guidelines.

The foregoing highlights the need for the membership of any future iteration of the Board to be constructed carefully. The Board reflects and sets community standards in classification. It needs to be independent and its members broadly representative of the Australian community in order for it to undertake a benchmarking role.

The Board supports Recommendation 7-1 of the ALRC review, namely that a legislative instrument should set out the content that must be classified, and the content that must be classified by the Board. The Board further supports the ALRC’s recommendation that the Board should have the power to classify any media content that is submitted for classification, on receipt of a valid application, irrespective of the existence of any digital classification tool or authorised assessor scheme. The Board should also continue to be responsible for content that is submitted for classification for the purpose of enforcing classification laws, including those concerning prohibited content (Refused Classification).

It is noted that, in part, Recommendation 7-3 of the ALRC review recommended that the new national classification scheme identified content that must be classified by the Board, including feature films for Australian cinema release. The basis for this recommendation was that cinema release films “*provide a practical way to capture a finite, readily identifiable subset of content that has wide appeal, represents many entertainment genres and will likely have a significant reach*

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<sup>20</sup> ALRC, Final Report, Op cit. p. 153-159.



*across the wider Australia population, taking into account total distribution/views of these films additional to their cinema screenings.”<sup>21</sup>*

The Board notes that the other part of Recommendation 7-3 was that the Board must classify “computer games that are likely to be MA 15+ or higher”<sup>22</sup> (which is consistent with the current authorised assessor scheme for computer games).

While the Board supports the principle of establishing benchmarks for classification of content, it does not support implementing Recommendation 7-3 as this will not be achieved by singling out two content types only. The Board is of the opinion that it will be able to set benchmarks and address community concerns around the impact levels of material by undertaking random and targeted audits of classified content and classifying at first instance any material submitted, across a range of content types, genres and classification categories.

## **Recommendations**

6.12 That in a new classification regime, the Board continues to be the setter of benchmarks and standards for Australian classification.

6.13 That the Board, as the setter of benchmarks and standards, should continue to be involved in classification at first instance across different content types, genres and range of classification categories, in addition to auditing and review.

## **Issue G: Industry classifiers cannot prohibit their own content by classifying it Refused Classification**

### **Current challenges**

A robust classification system must be able to not only differentiate between impact levels of classifiable elements, but also recognise content that is so abhorrent that it should be Refused Classification, as it offends against the standards of morality, decency and propriety generally accepted by the adults in the community the classification system is serving.

There are also other provisions in the Code that provide grounds for refusing classification for certain content, namely:

- that which describes or depicts in a way which is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 years of age (whether the person is engaged in sexual activity or not); and
- that which promotes, incites, or instructs in matters of crime or violence.

Section 9A of the Classification Act contains specific provisions for refusing classification for content that “*advocates the doing of a terrorist act*”.

While the ALRC<sup>23</sup> commented in its report on reforming the Refused Classification category, including proposing that it be re-named “*Prohibited Content*”, it nonetheless recognised the

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<sup>21</sup> Ibid. p. 157.

<sup>22</sup> Ibid. p. 159.

<sup>23</sup> ALRC, Final Report, Op cit, Chapter 11.



importance of certain content not being able to be published in Australia. The Board supports this position. In terms of proposals to address greater harmonisation of classification and an increasing reliance on industry to self-classify, it must be recognised that self-classification does not lend itself to content being Refused Classification.

One of the Board's most important statutory functions is determining when content exceeds what is allowed under classification legislation and guidelines for both commercial and law enforcement applicants. This includes content that deals with matters including crime or violence, sex, drug use and terrorist activity that is deemed to "*offend against the standards of morality, decency and propriety generally accepted by reasonable adults*", and is consistent with the general principles underlying the Code that "*minors should be protected from material likely to harm or disturb them*" and that everyone should be protected from exposure to unsolicited material that they find offensive.

In order to not offend and to protect people, it is important that content is Refused Classification at first instance, rather than on review. Ensuring that material which is potentially offensive to the community, or in breach of the law, is submitted to the Board in the first instance for classification, is one way to minimise the potential exposure and harm that a system of self-classification poses. This would require industry classifiers to make an assessment that the content warranted classification by the Board and that they should not proceed to classify it in the first instance.

## Recommendations

6.14 That the onus be on industry classifiers to identify content that warrants classification by the Board in the first instance, because it may be Refused Classification.

6.15 That the Board be the only authority that may determine a 'Refused Classification' classification decision.

## Issue H: Conditional Cultural Exemptions

Following on from legislative amendments made to the Classification Act in September 2014 relating to conditional cultural exemptions (including film festivals and games' expos), the routine role of the Director of the Board in reviewing festival applicants' unclassified films or games for publication, has been removed. The onus has shifted to the applicant to conduct a reasonable assessment of the likely classification of unclassified content and to impose age restrictions upon attendance.

These amendments have created an untenable situation whereby a *person* who works (paid or voluntary) for, represents, or otherwise is associated with, an organisation that is registering an event (for a film festival or a games' expo) does not require any training in classification, yet is making assessments about the likely classification of unclassified media. Conversely, if a *cultural institution* such as an art gallery or museum wants to have the status of being an 'Approved Cultural Institution' (ACI) it must have been formed wholly or mainly for the purposes of carrying on activities of an educational, cultural or artistic nature *and* must have a person who has satisfied training requirements in relation to classification, in order to publish unclassified content.

These anomalies between an untrained individual wishing to register an event compared with an ACI, who must have a trained person, have created inconsistencies in the safeguards around the publishing of unclassified content. While this particular question posed by the review is asking

whether all *classifiable* content could be classified by a single process, the Board is concerned that these egregious amendments need to be reviewed and rectified so as to restore harmony to the regulatory framework around the publishing of unclassified content which is intended for public entertainment.

### **Recommendation**

6.16 The existing conditional cultural exemption provisions in the Classification Act be reviewed and rectified, so that there is consistency in the training of people seeking to register an event in order to restore harmony to the regulatory framework around the publishing of unclassified content.

## REVIEWS OF CLASSIFICATION DECISIONS

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

The Board is concerned about the phrasing of this question. To maintain standards and public confidence, classification decisions must always be subject to an audit process and be open to a review process at the request of applicants or the Minister. The Board raises the following matter in response and discusses below:

- A. Should the Classification Review Board be retained to undertake reviews in a new regulatory framework?

#### Issue A: Classification Review

##### Current challenges

Under the current scheme, Classification Board decisions can be reviewed by the Classification Review Board, an independent statutory body. The Review Board exists separately to the Classification Board and convenes only when needed. Only certain people (typically the applicant, but also the Minister or a “person aggrieved”) can make an application for review, and the cost of a review – currently \$10,000 – is prohibitively expensive.

While the applicant makes a detailed submission to the Review Board, any documentation relating to the Classification Board’s original decision, including the report and other notes and materials recorded by the individual members of the original Classification Board panel, is not considered. The review process is then essentially a new classification made by the members of the Review Board, who typically have limited classification experience as they are not full-time classifiers and are called upon rarely (there were only four reviews undertaken for the year ending 30 June 2019 and to date there have been no reviews in this financial year).

This leads to the Review Board creating classification decisions that are not necessarily consistent with either the statutory Guidelines or Board precedent (which goes to both guiding and responding to community expectations). For example, the film, *Rocketman* (2019), a dramatic bio-pic about Elton John, was originally classified on 5 April 2019 as MA 15+, Strong coarse language. As submitted, this film appeared to be missing end credits and a few sequences appeared to be ungraded.

A **modified** version of the film was classified on 16 May 2019, also as MA 15+, Strong coarse language. Having regard to the Film Guidelines, Board standards and precedent, and community standards, the impact of particular language in these films was ‘very strong’ and therefore, the films warranted a legally restricted classification of MA 15+. The Board noted that the films contained other coarse language that could be accommodated in a lower (M) classification level.

On 21 May 2019, upon application, the Classification Review Board, **reviewed** the **modified** version of the film and notwithstanding the use of very strong coarse language, classified the film M, Mature themes, drug use, sex scene and frequent coarse language. This decision is at odds with classification decision making by the Board for two reasons:

- very strong coarse language in accordance with the Film Guidelines and Board precedent requires an MA 15+ classification.
- ‘frequent’ as a modifier for coarse language is not possible at an M classification given that the film guidelines require that “*aggressive or strong coarse language should be infrequent*”; further the film contained not only strong coarse language but very strong coarse language.

## Options

In the Board’s opinion, the current review process of Board decisions is both prohibitively expensive and liable to produce inconsistent decisions. As recommended by the ALRC review<sup>24</sup> (Recommendation 7-9), the Board believes it is best placed to review its own decisions, either by convening a wider panel or a full panel of Board members, or by designating reviews of decisions to a specific sub-committee of the Board. The Board also believes that the cost structure of reviews should be significantly reduced. Moving the functions of the Review Board into the Board would be the easiest way to achieve this, and would result in decisions that accord with the Guidelines.

The Board notes that it is not a censorship board, and does not give advice to applicants about content that may be altered or excised in order to achieve a targeted classification. Applicants may ask for a copy of the Board’s Decision Report in order to attempt to inform themselves as to the nature of the content that has resulted in the classification and consumer advice.

## Recommendation

- 7.1 Under a unified classification system, the Board undertakes all reviews of classification decisions, including its own.

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<sup>24</sup> [https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_118\\_for\\_web.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_118_for_web.pdf)

## CLASSIFICATION GOVERNANCE

### 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?

No.

The Board is of the opinion that the current co-operative scheme is convoluted and not fit for purpose in a modern content environment.

The Board remains supportive of the ALRC review recommendations, specifically Recommendations 15-1 and 15-2, that a new Classification of Content Act be enacted pursuant to the legislative powers of the Parliament of Australia, and that the Classification Act should express an intention that it cover the field, so that any state legislation operating in the same field ceases to operate, pursuant to s109 of the Constitution.

The Board raises the following matters in response and discusses below:

- A. The ability to update legislation and guidelines where required.
- B. Enforcement and compliance.
- C. Best Interest Duty.

### Issue A: Updating legislation and guidelines where required

#### Current challenges

The Classification laws of Australia need to be updated in order to ensure consistent classification of content, decision-making and enforcement. The concerns of previous generations on the mode of delivery of content are now redundant owing to the instantaneous nature of digital media. The same classification rules need to apply to the classification of all classifiable content whether it is online or offline. The *Agreement Between the Commonwealth of Australia, the States and Territories Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia (1995)* is the foundation for the current co-operative classification scheme in Australia, its establishment and ongoing maintenance. The existing *Classification Act* provides that the Commonwealth, state and territory ministers responsible for classification must agree unanimously to any amendment of the Code, and classification guidelines.

Classification of content needs to achieve a clear public service which is set out in clause 1 of the Code. The several regimes that currently exist for the classification of content by the Board and the regulation of television and online content provided by mobile carriers contained in the *Broadcasting Services Act*, needs to be simplified and homogenised.

Given that the Australian Government is responsible for regulating online content, it is, in the Board's opinion, best placed to take on the full legislative and enforcement responsibility for the classification and regulation of content in Australia.

Therefore, the current national co-operative scheme should be replaced by a centralised Commonwealth scheme with classification laws that can respond effectively to media convergence. While any gaps in Commonwealth legislative powers may not be significant and could potentially be

covered by a referral of state powers to the Commonwealth under section 51 (xxxvii) of the *Australian Constitution*, the Board leaves consideration of these matters to constitutional lawyers to resolve. What is important is that the outcome does not leave the new classification scheme vulnerable to constitutional challenge.

### **Recommendation**

- 8.1 That new classification laws should be enacted pursuant to the legislative powers of the Parliament of Australia, and that all state and territory legislation pertaining to classification should cease to operate.

## **Issue B: Enforcement and compliance**

### **Current challenges**

This is a broader issue and the current co-operative scheme has resulted in different standards of enforcement and compliance across the states and territories. Without the will to enforce classification regulations and to ensure that all classifiable content of all media types is submitted for classification, the rules will continue to be applied in a piecemeal fashion, if at all.

It is still an expectation of Australian consumers that there will be restrictions on the publishing of certain media and that the access to some media should be restricted by age. The Board supports the retention and enforcement of action for offences in relation to selling, screening, distributing or advertising certain categories of material whether classified or unclassified.

The Board supports inclusion in the new classification laws of provisions for their enforcement under Commonwealth law. Any new Act of Parliament should require media content providers to have certain content classified and to provide offences and penalties for failure to do so. The new Act should also provide for restrictions on access to content and on the sale, screening, provision online or other distribution of content. The Board notes that the ALRC has already addressed matters relating to proposed offences and penalties.<sup>25</sup>

### **Recommendation**

- 8.2 That any new classification laws should require media content providers to have certain content classified and to provide offences and penalties for failure to do so. These powers should vest in the new single government regulator of classification.

## **Issue C: Best Interest Duty**

### **Current challenges**

In order for a harmonised classification system to operate effectively when it consists overwhelmingly of industry assessors and classifiers, and people using digital tools, there must be greater emphasis placed on governance and risk mitigation issues, as well as cultural attitudes by organisations employing or otherwise engaging authorised content assessors or classifiers.

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<sup>25</sup> ALRC Final Report, *Op cit.*, paras 16.50-16.81, p. 363-369.

Industry self-classification inevitably runs the risk of bringing classifiers of content into conflict with their employers or those who have otherwise engaged their services to classify. For example, it has long been understood that there is a connection between a classification category and likely revenues to be derived upon publication of content. It is highly likely that an intended family film or game will not be as well received by parents or guardians if it has an M classification rather than a PG classification. It also should be acknowledged that a distributor's expectations (and marketing and revenue projections) are based upon an expected and desired classification and/or consumer advice.

## Options

If industry is to take on a greater role in classifying content then there must be safeguards in place, *at the outset of this shift in classification processes*, that address, upfront, such potential conflicts between a classifier discharging their responsibilities in accordance with classification law, and a distributor's expectations of content receiving a specific and desired classification and/or consumer advice.

To address such potential conflicts of interest, it is suggested that industry be required to adopt and implement '**Best Interest Duty**'. This would mean that content assessors or classifiers *and* their employers/retainers would need to act in the best interests of the Australian public and if this was breached, they could face a civil penalty or other sanction. While the Board and other government employees are already bound by a Code of Conduct, it is intended that all people and agencies involved in the classification of content would adopt and implement 'Best Interest Duty'.

The 'Best Interest Duty' is intended to improve compliance with classification laws, codes and standards, and to deter misconduct and ensure that grave misconduct meets with proportionate consequences. The following norms of conduct should make up the duty:

- obey the classification laws, codes and standards;
- act fairly and do not mislead or deceive;
- undertake classification of content with reasonable care and skill;
- ensure that classification decisions are fit for purpose; and
- act in the best interests of the Australian public.

## Recommendation

8.3 That any future harmonisation of classification require the adoption and implementation of 'Best Interest Duty' made up of the following norms of conduct:

- obey the classification laws, codes and standards;
- act fairly and do not mislead or deceive;
- undertake classification of content with reasonable care and skill;
- ensure that classification decisions are fit for purpose; and
- act in the best interests of the Australian public.

## OTHER

### 9) Are there other issues that a new classification regulatory framework needs to take into account?

The Board has identified the following matters in response and discusses below:

- A. The need for consumer education.
- B. The need for ongoing research related to classification matters.
- C. Trailers and the commensurate audience rule.
- D. Future accommodation for the Board and the new regulator.

#### Issue A: The need for consumer education

##### Current Challenges

The Board notes the lack of education campaigns in recent years to inform the Australian public about the differences between the classification categories, and the advent of digital classification tools and the appropriateness of consumers lodging complaints with the Board about decisions made by the tools.

It is important that consumers are able to inform themselves of the impact level of the six classifiable elements in each classification category and the type of material that may be accommodated therein. It is the impact of the classifiable elements which is determinative of the classification of content.

Over at least the past seven years, there has not been an active education program about classification-related matters for members of the Australian public.

There is limited information available for *consumers* on the Australian Classification website about the classification levels and the classifiable elements from a practical perspective. A recent website development has seen the inclusion of 'More information about the content of this film' for theatrically released films. The purpose of this is to provide consumers with a very limited précis of the content in the film relating to the six classifiable elements, at any classification level, regardless of the film's classification; for example, a film may be classified MA 15+ for themes, violence and sex, but may include information about M-level drug use and nudity. The 'More information' section is limited to only films being classified by the Board, in the first instance for theatrical release. It does not extend to films being classified in the first instance either for streaming services to deliver, or for home entertainment (DVD / Blu-ray), or to computer games. It is unclear who will complete this information on the National Classification Database if industry is responsible for classifying theatrical release films.

The Board is further concerned that in the newly-designed classification website the path for lodging a complaint about any matter is not easy to navigate. There is no instruction provided to consumers that they should be lodging complaints about decisions made by the IARC and Netflix classification tools with the Board (given that tool decisions are deemed to be decisions of the Board pursuant to legislative provisions contained in the Classification Act).



## Options






An education campaign should be developed and implemented nationally, to provide easily digested and pertinent information about the classification categories and their impact levels and suitability for viewing by different groups of people. This is a responsibility of government.

Notwithstanding the recent rollout of a visually updated classification website, the Board is of the opinion that greater dissemination of information, particularly targeted at consumers, is required about the six classifiable elements and the classification categories, as well as information about different kinds of consumer advice. This would give greater credence to the classification website's being regarded as the primary source of truth about classification decisions, as well as providing the means for consumers to more fully inform themselves.

With a progressive move towards industry self-regulation of classification of content, it is imperative that there is a library of robust and contemporary information available to consumers about classification content that can be anticipated at each level (as well as readily and easily accessible complaint mechanisms about classification decisions). For example, the following kind of tabulated information should, in the Board's opinion, be provided on the Classification website so that consumers can readily inform themselves as to the type of content that *may* be classified and visually depicted or verbally referenced within each classification category, for each classifiable element. A sample for the classifiable element of nudity is in Table 8.

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**Table 8: Sample Consumer Information for the classifiable element of Nudity**

 <p><b>Very mild</b></p>	<p><b>Depictions of nudity may include:</b></p> <ul style="list-style-type: none"> <li>• Infrequent occurrences</li> <li>• Often partially obscured</li> <li>• Very brief scenes</li> <li>• Stylised representations include paintings, murals, statues</li> <li>• Brief full frontal nudity in documentary/archival contexts (colour or black and white footage and still photographs)</li> <li>• Naked animated characters, where the animation is basic and simple (eg: <i>The Simpsons</i>)</li> </ul> <p><b>Verbal references to nudity</b> are exceptionally rare as nudity is predominantly a <i>visual</i> classifiable element.</p>
 <p><b>Mild</b></p>	<p><b>May include:</b></p> <ul style="list-style-type: none"> <li>• Infrequent occurrences</li> <li>• Brief visuals of breasts and buttocks which are not the focus of the scene</li> <li>• Full length nudity shot from behind or side view, to obscure genital detail</li> <li>• Full frontal nudity, with genitals, in a documentary context or archival footage – may include singing, dancing, jumping around</li> </ul>
 <p><b>Moderate</b></p>	<p><b>May include:</b></p> <ul style="list-style-type: none"> <li>• Infrequent occurrences</li> <li>• Brief glimpses of genitalia – but no close-ups</li> <li>• Full-length nudity may be shown – may be shadowed or a distance-shot</li> <li>• Breast nudity with nipples and areolae (male nipples are <i>not</i> nudity)</li> </ul>
 <p><b>Strong</b></p>	<p><b>May include:</b></p> <ul style="list-style-type: none"> <li>• Full-length frontal, including genitalia</li> <li>• Genitalia may be in close-up (no sexual arousal)</li> </ul>
 <p><b>High</b></p>	<p><b>May include:</b></p> <ul style="list-style-type: none"> <li>• Frequent occurrences</li> <li>• Prolonged and detailed depictions</li> <li>• Sexualised depictions, that is, sex and nudity are linked (eg: sex scene in which the element of nudity is depicted and impact is heightened by the element of sex)</li> <li>• Genital focus</li> <li>• Sexual arousal</li> </ul>

While the Board supports the overdue education of the Australian public about the *current* impact levels of the classifiable elements for the existing classification categories, the need for this becomes more critical if there are any changes made to any aspect of classification of content in Australia.

Online and social media campaigns, as well as the ongoing expansion of the Classification website, with the aim of making it a truly valuable consumer resource, may be a cost-effective means of achieving this.

## Recommendations

- 9.1 That an education campaign be developed by the Board in consultation with the new government regulator about the classification categories and the impact of the classifiable elements in each category, and certain common consumer advices.
- 9.2 That the Classification website be enhanced to include information in relation to the type of material that may be visually depicted or verbally referenced within each classification category for each of the classifiable elements.
- 9.3 That the Classification website be enhanced to provide additional information in relation to the lodging of complaints or enquiries by consumers about classification decisions for the various media types, including decisions made by digital classification tools (IARC and Netflix to date).

## Issue B: The need for ongoing research for classification-related matters

It is as important that the Board and the new regulator have access to rigorous, evidence-based research into the attitudes and expectations of Australian consumers regarding classification-related matters, and that this research is not undertaken predominantly in metropolitan cities on the Eastern seaboard of Australia. Sample sizes must be statistically significant: the confidence interval and the confidence level must withstand scrutiny. Most researchers use the 95% confidence level and the Board supports this as a minimum. The Board needs to participate in the development of research briefs, setting out the objectives, the target audience and the deliverables, in order to ensure the research captures the pertinent information sought.

Research may be achieved not only by formal and structured research programs, but by utilising other approaches to gain insights, for example, the New Zealand Office of Film and Literature Classification (the **OFLC**) has a school education program called “Censor for a Day”, where students watch one of several available films which have all recently been classified. In the year ending 30 June 2018, the program was delivered in 7 locations and presented to approximately 800 students and 56 teachers from 37 schools. The program is not only about teaching young people about the classification system, it allows the OFLC to hear their views about classification-related matters.

It is important that in the new classification landscape that consideration is given to how media and entertainment companies may influence classification processes and expectations, and how this may impact Australian society. Future research should not resile from tackling issues such as gleaning perceptions about whether or not the classification decisions of a tool, for example, have shifted tolerances for the inclusion of certain depictions and references to classifiable elements at particular classification levels.

## Recommendation

9.4 That relationships be established between the Board, the new regulator and academic institutions for the conduct of research into classification-related matters and issues.

## Issue C: Trailers and the commensurate audience rule

### Current challenges

The current co-operative classification scheme provides for restrictions on the advertising of films, games and publications. For example, if a film that is intended for theatrical release is yet to be classified, but a distributor wants to advertise it as a forthcoming release, screening the trailer before another feature film that has been classified, then the trailer for the unclassified film can only be shown to ‘commensurate audiences’ (that is, for example, if the trailer is for a *film that is likely to be classified* MA 15+, then the trailer cannot be shown before a feature film that is classified G, PG or M).

There have been previous representations by some sections of the entertainment industry that there should be a shift away from considering the *likely classification of the unclassified film* to classifying the contents of the actual trailer. Film trailers are conceits used to set up the basic premise of the film and do not disclose critical plot points. *If* the trailer was classified, it is highly likely that it would obtain a *lower* classification in many circumstances than the *likely classification* of the unclassified feature film. This would then enable the trailer to be screened potentially to a wider audience, as the commensurate audience rule would no longer limit the screening of the trailer to the intended audience of the film’s likely classification.

The self-interest of industry cannot outweigh the protection of the public. If the commensurate audience rule was amended to permit the rating of the film trailer itself, thereby allowing the trailer to be screened before feature films that are at a lower classification than the feature film is likely to be classified at, this would create an anomalous situation in the classification of media, as it would invite people who are legally restricted from viewing certain content, or for whom certain content is not recommended, to consider accessing that content.

Therefore, the Board does not support any change to the commensurate audience rule for the screening of trailers in cinemas.

## Issue D: Future accommodation for the Board and the new regulator

In order to maintain consistency of standards and outcomes under a system that uses multiple classifiers and multiple classification tools, it is crucial that the Board, as part of the Government regulator, undertakes thorough and regular processes of audit and review of classification decisions. The Board will also undertake classification at first instance, upon receipt of a valid application, as well as conduct reviews.

As identified earlier in this submission, future workflow processes involving greater industry self-classification of theatrical release films must provide sufficient lead time to allow the Board to audit and amend the classification and/or consumer advice, as necessary, prior to the public’s being exposed to content that has been incorrectly classified. In order to do this the Board must be

adequately resourced with appropriate infrastructure for the screening of cinematic release films and the playing of pre-release games.

Security concerns that operate within the film industry need to be understood; that is, major distributors of cinema release films will not provide access to these for classification purposes unless they are issued as a Digital Cinema Package (DCP) with a locked Key Delivery Message (KDM). This material can only be played on Digital Cinema Initiative (DCI) compliant hardware (a specialised projector and server). The Board would also require a silver screen capable of displaying 3D projection.

The Board must be able to assess the impact of a public exhibition film in its intended viewing environment (a theatre) so as to correctly assess the impact of individual scenes as well as cumulative effect of both scenes and classifiable elements.

### **Recommendation**

9.5 That future accommodation provided for the Board enables the viewing for classification and auditing purposes of all media types.