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Please find attached the submission of researchers from the Digital Media Research Centre at the Queensland University of Technology to the Review of Australian Classification Regulation.

The principal contact for this submission is:

Professor Terry Flew
Digital Media Research Centre
Queensland University of Technology
Musk Avenue, Kelvin Grove QLD 4059

[REDACTED]

We welcome this submission being made publicly available.

Review of Australian classification regulation

**Submission by Digital Media Research Centre, Queensland University of
Technology, Brisbane, Australia.**

Prepared by:

Professor Terry Flew

Distinguished Professor Stuart Cunningham

Dr. Rosalie Gillett

Dr. Brendan Keogh

Professor Amanda Lotz

Dr. Kylie Pappalardo

Professor Nicolas Suzor.

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About the Digital Media Research Centre

The Queensland University of Technology Digital Media Research Centre (QUT DMRC) conducts world-leading research for a creative, inclusive and fair digital media environment. It is one of Australia's leading organisations for media and communication research, areas in which QUT has achieved the highest possible rankings in Excellence in Research for Australia, the national research quality assessment exercise, in every evaluation since 2010.

The DMRC's research programs address the challenges of creativity and innovation, inclusion and diversity, and trust and fairness in the constantly changing digital media landscape. The DMRC has access to cutting-edge research infrastructure and capabilities in computational methods for the study of communication and society, and is actively engaged with industry and academic partners in Australia, Europe, Asia, the US, and South America.

The DMRC is also a member of the global Network of Centers – a group of academic institutions with a focus on interdisciplinary research on the development, social impact, policy implications, and legal issues concerning the Internet.

The DMRC Director is Professor Jean Burgess.

Introduction

The Digital Media Research Centre (DMRC) welcomes the commitment on the part of the Australian Federal Government, and the Council of Attorneys-General, to undertake a Review of Australian Classification Legislation. As noted in the Departmental Consultation paper, the Australian media market has changed substantially since a National Classification Scheme was enacted in 1995. In particular:

The current system was not designed to manage media convergence or the large volumes of content now available via streaming services, online game storefronts and other professionally produced content platforms (Australian Government 2020, p. 5).

A major review of the National Classification Scheme was undertaken through the Australian Law Reform Commission (ALRC), and its *Classification: Content Regulation and Convergent Media – Final Report* was submitted to the Government in 2012 (Australian Law Reform Commission 2012). One of the authors of this submission, Professor Terry Flew, was the Chair of that Review.

The ALRC Review identified the need for a harmonised regulatory framework, grounded in principles-based regulation broadly reflective of community standards, while also being responsive to technological change and adaptive to new technologies, platforms and services, with classification regulation kept to the minimum needed to achieve clear public purposes.

To that end, the ALRC recommended platform-neutral regulation, with ‘one legislative regime establishing obligations to classify or restrict access to content across media platforms’ (Australian Law Reform Commission 2012, p.24). The ALRC also recommended a shift in focus towards the promotion of cyber-safety, greater application of co-regulation and industry classification of media content, a shift in enforcement powers towards the Commonwealth, and a single regulator with primary responsibility for regulating the new scheme (Australian Law Reform Commission 2012, p.25).

The major guiding principle of the ALRC's recommendations was that 'classification regulation should be focused upon content rather than platform or means of delivery' (Australian Law Reform Commission 2012, p. 24). Its recommendations were in line with those of the Convergence Review, also undertaken in 2012, which undertook a review of Australia's media and communications policy framework, in order to achieve greater regulatory harmonisation, eliminate redundant laws, and be more adaptive to technological change (Convergence Review 2012).

The Changing Context of Media Classification

In the period since the ALRC's Review of the National Classification Scheme in 2012 and the current review, there have been major changes in the ways in which media content is produced, distributed and consumed in Australia. The guiding principles of media classification retain broad community support, and classification 'helps Australian consumers make informed decisions about content and helps parents and carers protect their children from inappropriate content' (Australian Government 2020, p. 4).

There are four developments in particular which the Government needs to consider carefully in revising classification legislation to be more responsive and adaptive to the changing media and technological environment:

- 1) ***The growing power of digital platforms.*** At the time of the ALRC review in the early 2010s, companies such as Google, Apple and Facebook were certainly significant in the changing media classification landscape but were not seen as being at the centre of it. For the most part, these platform-based businesses were seen as technology companies rather than as media companies: Apple's role in the music industry, and Apple and Google's role in apps-based games were two exceptions).

In the early 2020s, this situation is very different. Companies such as Google, Apple, Microsoft, Facebook, Amazon and Netflix dominate the global business landscape, as measured by share market value and the value of these global brands (Interbrand 2019). Most of these companies have business models that insert them in multiple industries (Google, Apple, Microsoft, Facebook, Amazon), and although perceived as part of a common 'tech' or

‘digital’ sector, engage in a variety of practices of greater and lesser concern to issues of competition, classification, and public shocks. For instance, Apple, Amazon and Microsoft are far less advertiser-supported platforms than Google and Facebook, and Netflix is a subscription-based video-on-demand service.

The Australian Competition and Consumer Commission’s *Digital Platforms Inquiry*, which focused upon the role played by Google and Facebook in news media and advertising markets, captured the extent of market dominance that can be exercised by digital platforms operating in multi-sided markets, and the potential for unequal bargaining relations to exist between firms involved in the production of media content and digital platforms that dominate distribution through search and social media (Australian Competition & Consumer Commission 2019).

While the ACCC’s focus was upon news and information media, and classification legislation primarily impacts upon entertainment media, the overall power of digital platforms in media markets provides a key contextual element in any revisions to current laws and policies.

- 2) ***The Platformised Internet.*** An important element of the power of digital platforms is that they are now increasingly the sites through which all Internet content is accessed. The ACCC observed that Google accounts for 95% of all online search activity undertaken by Australian Internet users, while Facebook and Instagram account for about 85% of time spent by Australian on social media platforms. Between them, Google and Facebook products and services are estimated to account for almost 40% of time spent by Australians on the Internet (Australian Competition & Consumer Commission 2019, p. 65, 77, 269).

As a result, we are increasingly talking about a *platformised Internet* where ‘we can see the critical role played by successful digital platforms in curating the open web, and enabling participation and engagement at scale among ever growing sections of the global population’ (Flew, 2019, p.4).

The rise of the platformised Internet is often discussed in terms of market dominance, and there are moves internationally to address the market power of digital platforms through anti-trust and other strategies to enable greater competition in the digital economy (Khan 2018; Stigler Center for the Study of the Economy and the State 2019; Wu 2018). But there are growing

concerns about the extent to which public debate is increasingly managed through the digital platforms themselves, through algorithmic processes that are not transparent and open to public scrutiny. This has led legal theorists such as Kyle Langvardt and communications scholars such as Philip Napoli to argue that corporate threats to the free circulation of speech and ideas are becoming greater than those presented by government restrictions (Langvardt 2019; Napoli 2019).

- 3) **Public shocks.** Events such as the livestreaming of the Nakhon Ratchasima mass shooting in Thailand and the Christchurch mosque atrocities in New Zealand raise extensive public concerns about the power of digital platforms. Mike Ananny and Tarleton Gillespie have termed these *public shocks*, which draw attention not only to the importance of digital platforms, but the extent to which they now constitute the public infrastructure of communication (Ananny & Gillespie 2017).

At such moments, legitimate public concerns are raised about the social obligations and responsibility of digital platforms and the companies that own and operate them. Historically, the response has been to say that the platforms are not publishers, but rather simply the means of carriage for content that is distributed among the platform's users. In other words, they are not media companies, subject to traditional laws and expectations surrounding media policy and regulation. But this is increasingly contested. As the communications policy analysts Victor Pickard and Robert Picard have observed:

Our contemporary digital environment, which includes Internet and related activities, raises the question of what, exactly, is a media company. This question has direct implications for assumptions about the social responsibilities of powerful platforms such as Google and Facebook [...] we acknowledge that platform responsibilities might differ from those of traditional publishers, yet they nonetheless may be implicated in the increasing concerns about so-called fake news and other social problems. It should be noted that these firms are increasingly monitoring, regulating and deleting content, and restricting and blocking some users, functions that are very akin to editorial choices (Picard & Pickard 2017, p. 6).

- 4) *A new regulatory activism.* It has been the case for many years that governments have been reluctant to extend powers related to media and communications to the Internet environment. The combination of ‘safe harbour’ provisions, that provided legal indemnity for digital platforms for content hosted on their sites, and the capacity of platform companies to curate and moderate content on their platforms without losing ‘safe harbour’ provisions and being deemed to be publishers or media companies, provided considerable legal protection to digital platforms in the face of calls to extend classification rules and other content obligations to their sites (Flew et al. 2019).

This situation is now changing throughout the world, as part of what *The Economist* has referred to as the global ‘techlash’ (Economist 2017; Flew 2018). There are over 50 inquiries now taking place into the power of digital platforms, and significant legislative changes are being enacted in many countries, including Germany, the United Kingdom, Canada and New Zealand. Internationally, the European Commission has taken a more activist role towards the regulation of digital platforms (Keen 2018, Ch. 6).

In Australia, the Minister for Communication, Cyber-Safety and the Arts, Paul Fletcher MP, has observed:

It is essential that social media companies are transparent with users and governments around the world about the processes that take place on their platforms ... If there is a need for further regulatory action so that community expectations about online safety are met, our government stands ready to take it (Fletcher 2020).

Digital platform companies are themselves increasingly recognising the winds of change that exist. Facebook CEO Mark Zuckerberg has commented on several occasions that external oversight of content obligations for companies such as his own are warranted, and Facebook responded to the ACCC Final Report by observing that ‘the internet is entering a new phase ... [and] the era of "trust us" is over’ (Clegg 2019).

We note that the Review of Australian Classification Legislation is taking place alongside a consultation on the proposed new Online Safety Act. There are also important developments internationally, including the Online Harms White Paper recently released in the United

Kingdom. This submission does not comment directly upon the Online Safety Act, except to note that the enactment of new classification legislation will clearly take place in parallel with this Act, and both will inform one another. We are aware of other submissions relating to the Online Safety Act, including one being prepared by Nicolas Suzor and Lizzie O’Shea for Digital Rights Watch, and a submission being prepared by the Centre for Media Transition at the University of Technology, Sydney.

Response to Consultation Paper – Specific Questions

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

The classification categories for films and computer games are for the most part satisfactory. Two issues are worth noting.

One is a lack of clarity in the relationship between the PG, M and MA classifications. The PG classification runs the risk of being too broad, and incorporates content which may not be for all ages, but is clearly suitable for children above the age of 8-10. At the same time, it currently includes content that is not suitable for children under the age of 13. If an additional category was introduced for content that was not suitable for those under 12-13, then the ‘M’ category would become redundant. The more informative ‘MA15+’ category should be changed from ‘Mature Accompanied’ to ‘Mature Audience’, as the concept of ‘accompaniment’ only makes sense in the context of films exhibited in cinemas.

The current Refused Classification (RC) content standard conflates two quite distinct forms of content: that which depicts activities that are clearly illegal and are prohibited under criminal laws, and that content which is deemed to be ‘offensive’ against ‘community standards’ or ‘public decency’. The latter is very much a subjective category, that can warrant restrictive access, but not necessarily outright banning, particularly if consumed in private or semi-private settings. The term ‘Refused Classification’ is also misleading, as such content has clearly been classified, and often reclassified, in the context of the RC classification being considered. This anomaly is most apparent when RC decisions are appealed with the Classification Review Board.

Changing the RC category to ‘Prohibited’, and narrowing its scope to content that is in breach of criminal laws, as distinct from that which may be deemed offensive against community standards, which are clearly more subjective in their nature, would provide a clearer indication as to the legal standing of the content in question.

2) Do the provisions in the Code, the Films Guidelines or the Computer Games Guidelines relating to [‘themes’ (2a), ‘violence’ (2b), ‘sex’ (2c), ‘language’ (2d), ‘drug use’ (2e), and ‘nudity’ (2f)] reflect community standards and concerns? Do they need to change in any particular classification category or overall?

In considering these categories, we note that classification guidelines evolve over time, but that they do so slowly. Concern about depictions of gambling have become more important over the course of the 2010s, whereas attitudes to language have arguably become more relaxed over the same period. Insofar as the concern is less about the depictions of these elements *per se*, but rather about their potential to impact upon behaviour, this is an area where the relative flexibility of the Online Safety Act may provide better scope to respond to current community concerns than the more broad-brush nature of classification guidelines.¹

An issue that does need addressing is the differential treatment of computer games as compared to other media arising from association of the content with any of the categories. While many important advances have been made in games classification since the 2012 ALRC Report, it remains the case that the perceived interactivity of computer games leads to stronger action being taken on the basis of depictions being identified than for other media.

The identification of drug use in a game is more likely to lead to its access being restricted than a film. In August 2019, the multiplayer PC game *DayZ* was refused classification for the inclusion of marijuana joints, despite already having been available for purchase on digital platforms for quite some time. Also in August 2019, the independent title *We Happy Few* was refused classification for due to its depiction of a fictional hallucinogenic drug called Joy. The

¹ An interesting recent case is the awarding of an ‘R’ classification to the 2019 film *Joker*. It could be argued that, in a strictly quantitative sense, *Joker* is less violent than many recent feature films released for a mass audience. The distinction seems to be that the depictions of violence in *Joker*, and the contextual factors that are seen to drive violent behaviour on the part of the main protagonist, may be seen to be more likely than other films to incite violent behaviour on the part of its viewers.

representations of drugs in these games are hardly realistic or extreme, and the same intensity of representation in a film would receive a much less harsh response. We would argue that a harmonised regulatory framework should address the anomalous treatment of computer games as compared to other media.

- 3) 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?**

As noted in response to Question 1, it would be timely to replace the category of ‘Refused Classification’ with ‘Prohibited’, and to narrow the scope of the latter to reduce elements of subjectivity in its application. As the Online Safety Act is likely to provide regulators with a greater degree of flexibility in responding to problematic online content, the RC category is increasingly associated with a fast-declining segment of the overall media market.

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

Harmonisation of current codes and classifications is welcomed. Age recommendations used on sites such as Apple’s App Store and Google Store, as well as the Netflix classification tool, can and should be aligned to Australian classification codes and guidelines to the greatest degree possible. Standardisation of classification guidelines would also eliminate redundant “double handling” of the same content across different platforms.

There should also be harmonisation of guidelines that apply to content broadcast on TV and the rules governing other media platforms, particularly in light of media convergence.

- 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?**

Moves towards a more co-regulatory framework across media industry sectors are welcomed, particularly as convergence and digitisation increase the amount of media content and the jurisdictional issues surrounding whether emergent fields sit within the scope of Commonwealth regulation. At the same time, there is a need for robust enforcement provisions by designated Commonwealth regulators in line with best practice application of co-regulatory or ‘soft law’ principles.²

The classification framework should be overseen by a single regulator, and enforcement of classification laws should be a responsibility of the Commonwealth government, as recommended in the ALRC Review. As recommended in the 2017 Review of the ACMA by the Department of Communication and the Arts, responsibility for media classification should become the exclusive responsibility of the ACMA over time, as all media content increasingly takes a primarily digital form.

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

We view avenues for review of classification decisions as essential to fairness and due process, and that this needs to be undertaken by an entity that is independent of the agency making the initial decision. This is particularly important in instances where classification decisions lead to the restriction of access to, or the banning of, content.

The Discussion Paper notes the relatively high administrative costs of maintaining the Classification Review Board, and that the number of appeals it receives have been declining significantly in recent years. At the same time, its adjudications have the virtue of reference to the National Classification Code, and it is less clear that this would exist for an alternative administrative entity.

² The concept of ‘soft law’ refers to the use of quasi-legal processes, typically applied at an industry level, to enforce appropriate corporate behaviour, including rules, norms, guidelines, codes of practice, recommendations and codes of conduct (Freiberg, 2010; van der Sluijs, 2013).

We note that these issues are discussed in more depth in submissions to the Online Safety Legislative Reform by Digital Rights Watch and the UTS Centre for Media Transition, and refer the reader to these submissions.

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

The current co-operative scheme between the Commonwealth and the states is unnecessarily complex from the point of view of media content producers, distributors and consumers, and should become the sole responsibility of the Commonwealth government. The Commonwealth has sufficient powers under Section 51 of the Constitution, and state legislation operating in the same field should cease to operate as pursuant under Section 109 of the Constitution. This could be advanced within the framework of the Broadcasting Services Act 1992, or under new legislation, as envisaged in the 2012 ALRC Review.

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

There are clearly many issues that could be considered further in the development of a new classification regulatory framework. One is to be aware of what comparable legislators are doing in other jurisdictions. For instance, there is a history of a ‘watershed’ in broadcast television that exists across multiple countries, typically around content with violent or sexually explicit content. As the viewing of screen content is less and less tied to the ‘tyranny of scheduling’ (i.e. all content is available at all times, and across multiple devices), is a content grounded in the shared experience of linear, limited-channel television still relevant?

As the Review of Classification Regulation is taking place in conjunction with a consultation about a proposed new Online Safety Act, an issue of regulatory responsibility can potentially arise between the Australian Communications and Media Authority and the Office of the eSafety Commissioner. It is the view of this submission that the ACMA should have primary regulatory authority for classification regulation and enforcement in Australia, and that the Office of the eSafety Commissioner should operate within the offices of the ACMA.

We note that much of the discussion of content classification focused upon the power of governments. Less talked about is the power of corporations who, in the pursuit of platform governance, can undermine the opportunities for content creators through decisions to block or de-monetise their content that content producers often have little awareness of, and virtually no capacity to appeal. The 2017 “Adpocalypse” on YouTube, where advertiser pressures on Google to make the site more family-friendly led to the blocking of a large number of channels with significant user bases, is an often-cited case in point. While the power of government with regards to such decisions is unclear, it is important to note that concerns about content classification, or even outright censorship, exist towards commercial content distributors, and not just government agencies.

Finally, the last decade has seen a number of innovations and changes into the monetisation strategies of videogame products. Most notably, many games have shifted away from a traditional one-off payment towards free access to the game content with the occasional incentive to pay a "micro-transaction" for extra content. The 2018 Senate Inquiry into "Gaming micro-transactions for chance-based items" (Commonwealth of Australia 2018) outlines a number of complications in terms of classification and regulation arising with these new business models that deeply fuse payment transactions with content. While the question as to whether or not payment models such as microtransactions and chance-based 'loot boxes' count as gambling remains unresolved, this fusing of payment with content delivery renders micro-transactions a significant area requiring clear classification that can help guide consumers—particularly parents—to consider the appropriateness of different computer game products.

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