igea interactive games & entertainment association

EMERGING ISSUES AND SOLUTIONS

for the Classification of Computer Games in Australia

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IGEA (Interactive Games & Entertainment Association) is an independent industry association representing the business and public policy interests of Australian and New Zealand companies in the computer and video game industry. Its members publish, market, develop and/or distribute interactive games, entertainment content and related hardware.

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EXECUTIVE SUMMARY

Ninety three percent (93%) of Australian households currently have at least one device being used for playing video games[1], with many of these houses (87%) having three or more game playing devices.[2] Computer games are being played on more platforms and devices than ever before, with game experiences often converging across multiple types of devices and being enjoyed by multiple generations of Australians, often simultaneously. Game consoles continue to be the dominant type of game device and this trend is expected to continue with the next generation of game consoles releasing at the end of 2013.

The Internet has changed how consumers acquire computer games and game content. While boxed products remain the primary distribution method for AAA games, other distribution methods are quickly gaining momentum. Digital distribution models (for game consoles and smart phones), subscription models, episodic games, free-to-play and in-game purchases are several examples of the new distribution models that have emerged and that are expected to dominate the gaming landscape.

With the average age of the Australian gamer being 32 and 47% of Australian gamers being female,[3] the games industry is constantly being driven to develop new technologies and experiences to support a broadening demographic. The most popular titles still rely on the traditional game controller or keyboard and mouse, however motion sensing technologies, augmented reality, virtual reality, multi-screens, cross-device and online multiplayer are quickly gaining popularity.

The current classification scheme is primarily based on the recommendations that were made by the Australian Law Reform Commission (ALRC) more than 20 years ago[4] when games were only sold in boxes and commercial digital distribution was not envisaged. In fact, the ALRC's 1991 recommendations even predated the commercial use of CD's. It is not surprising therefore that the application of the National Classification Scheme on digitally distributed games has caused a wealth of issues for the interactive entertainment industry, including:

1. **Complexity of the National Classification Scheme** - With Commonwealth, state and territory legislation and numerous legislative instruments, the National Classification Scheme is overly complex. Considering Australia represents 2% of the global market, such complexity is particularly problematic for global digital game distributors.

2. **Inflexibility of the National Classification Scheme** - Any change to the National Classification Scheme requires the unanimous agreement from the Commonwealth, state and territory ministers. This co-operative model seriously challenges the National

1 The terms 'video games', 'games', 'interactive games', 'interactive entertainment' and 'computer games' are all references to 'computer games' as that term is defined in the Classification (Publications, Films and Computer Games) Act 1995 (Cth).

2 Brand J.E., Lorentz P, Mathew T, (2013) Digital Australia '14, Sydney: Interactive Games & Entertainment Association.

3 Ibid.

4 Australian Law Reform Commission, Censorship Procedure, ALRC Report 55 (1991)

Classification Scheme's ability to adapt in a timely manner to meet the needs of the public and industry. There have been several examples of the scheme's failure to adapt in the past, including the passing of the Classification (Publications, Films And Computer Games) Amendment (Terrorist Material) Bill 2007 (Cth), the introduction of the R18+ classification for computer games and even delayed reform to the scheme following the 2012 recommendations from the ALRC.

3. **Inability to manage the high frequency and volume of digitally distributed games** - While the Classification Board has classified an average of approximately 755 games per year, there were more than 40,000 games released for the iPhone or iPad in 2012 and thousands more on other digital platforms such as Android and Steam. The current scheme is simply unable to keep up with the high frequency and volume of digitally distributed games.

4. **Uncertainty in the National Classification Scheme's application for digitally distributed games** - With the broad ranging scope of state and territory enforcement laws, conflict with the Broadcasting Services Act 2002 (Cth) and the commercial availability of thousands of unclassified digitally distributed games, there is a growing level of uncertainty about the National Classification Scheme's application to digitally distributed games. This uncertainty is particularly problematic for Australian businesses that are within the enforcement reach of the scheme.

5. **Difficulties of applying the National Classification Scheme with game modifications** - Modifications for computer games are now being digitally distributed using micro-transaction models. The vast majority of such modifications are unlikely to change the classification of the original game and, due to the volume and frequency of such modifications, it is unrealistic and impractical to expect such modifications to be separately classified by the Classification Board.

6. **Uncertainties with the National Classification Scheme's application for companion applications** - As game experiences are now extending across multiple devices, Australia's classification system must appropriately address games that consist of separate programs that are sold separately for a range of different devices.

7. **Failure of the National Classification Scheme's application to episodic games** – Similar to television shows, computer games are now being released as episodes of a larger series or season, with each episode being sold for a fraction of the price of a full game. The National Classification Scheme would require each of these episodes to be classified separately, a requirement that has prevented the commercial feasibility of releasing such episodic games in Australia.

An initial selection of reforms were announced in March 2013 pursuant to the ALRC's recommendations in 2012[5]. Several of these announced reforms are particularly relevant to the interactive entertainment industry, including the

5 Jason Clare, 5 April 2013, Reform to the National Classification System, Media Release

reforms concerning computer game modifications and automated classification decision-making systems. The following points need to be considered to ensure that the benefits anticipated by the ALRC are actually realised in these announced reforms:

1. Modifications

The reforms should ensure that the full range of computer game modifications anticipated by the ALRC do not require separate classification, including the following:

- *game updates or patches that fix game bugs;*
- *character skins or costumes that change the way game characters look;*
- *character packs that introduce new characters to the game;*
- *game items, including new objects, tools, weapons and vehicles;*
- *map packs that introduce new environments for users to explore;*
- *mission packs that introduce new storylines and challenges; and*
- *episodic content or sub-sequels that take place in the original game's world,*

provided always that the modification would not change the classification of the original game and that such content can not be played on its own without the original game.

2. Automated classification decision-making system

Classification should be based on content and not platforms. In a converged environment it is important that any reforms are platform neutral and do not unfairly advantage or disadvantage certain platforms or businesses. As computer games are now able to be played across multiple types of devices and platforms, such as smart phone games being playable on televisions and console games being playable on smart phones, it would be impossible for this reform to operate effectively for one type of platform. It is critical that the use of automated classification decision-making systems is not limited to mobile and online games only.

Whilst these individual reforms are welcomed, they do not address the wider issues facing the Australian public or the interactive entertainment industry nor do they reflect the full intention of the ALRC who recommend an end to patchwork fixes and the wholesale change to the classification scheme in Australia. Consequently, the interactive entertainment industry recommends the following to address the many issues that continue to be caused by the National Classification Scheme:

- *the recommendations, as a whole, in the ALRC review must be seriously considered;*
- *the National Classification Scheme be replaced with a co-regulatory industry-led scheme that is overseen by a Commonwealth regulator;*
- *authorised industry assessors and classification decision-making instruments be allowed to classify all computer games; and*
- *the Classification Board be made responsible for auditing and monitoring industry assessor and decision-making instrument decisions and where necessary review decisions brought to the Classification Board's attention by the government regulator or the public.*

1. INTRODUCTION

The aim of this paper is to provide Commonwealth, state and territory government representatives and the public with a comprehensive understanding of how the National Classification Scheme (the Scheme) is currently impacting the interactive entertainment industry in Australia. As expected in an industry that is constantly innovating, there have been a number of significant changes since the Australian Law Reform Commission's (ALRC) most recent review of the Scheme was completed in 2012 (ALRC Review). As the ALRC recommendations and consequential reform to the Scheme is due to be considered, it is important to acknowledge and understand the new developments that are occurring in the interactive entertainment industry and how any reform to the Scheme may impact such developments.

This paper will address the following:

- *The current gaming environment – an exploration of the many platforms and devices that are used for playing computer games.*
- *How games are currently being acquired – identification of the various ways that Australian consumers are purchasing or acquiring computer games and other game content.*
- *How games are being played – an overview of how Australians are enjoying computer games, including through the use of new technologies.*
- *Emerging issues – a comprehensive analysis of the interactive entertainment industry's difficulties with the Scheme.*
- *ALRC Review – a summary of the key recommendations from the ALRC Review that are relevant to the interactive entertainment industry.*
- *Upcoming reforms – the interactive entertainment industry's consideration of the proposed reforms concerning modifications and automated classification decision-making systems.*
- *Recommendations – an outline of how Australia's new classification scheme should address the issues raised throughout this paper.*

2. THE CURRENT GAMING ENVIRONMENT

2.1. Devices and Platforms

Consumers are engaging with computer games on an ever-increasing variety of devices and platforms. The following table sets out a non-exhaustive list of the various categories of computer game devices and platforms along with relevant examples.

CATEGORY	*EXAMPLES*
Personal computers	Windows based computers and Apple's OSX computers
Portable computers	Laptops, netbooks
Game consoles	Sony PlayStation 3 & 4, Microsoft Xbox 360 & Xbox One, Nintendo Wii & Nintendo Wii U
Handheld game devices	Sony PlayStation Vita, Nintendo 3DS & 2DS
Smart phones	iPhone, Windows Phone, Android phones
Tablets	iPad and iPad Mini, Samsung tablets, Microsoft Surface
Smart TVs and set top boxes	Samsung and LG smart TVs, Foxtel set top boxes

93% of Australian households have a device for playing games

2.2. Game Consoles

The major game consoles currently available for sale in Australia include Sony PlayStation 3, Microsoft Xbox 360, Nintendo Wii and the Nintendo Wii U. 93% of Australian households have a device for playing games, with 63% of these households having one or more game consoles[1].

Games for the currently available game consoles are delivered on both physical media (including DVD or Blu-Ray discs) or by digital download over the Internet. Microsoft and Sony's new generation of home entertainment consoles, Microsoft's Xbox One and Sony's PlayStation 4, were released in Australia throughout November 2013. Both of these consoles will be capable of playing games delivered both digitally and on physical media.

All of the currently available game consoles have parental controls and provide accessible instructions on the operation of such parental controls. 53% of Australian parents are familiar or very familiar with parental controls[2], an amount that is likely to increase as gamers become parents and parental controls become more sophisticated and accessible.

1 Brand J.E., Lorentz P, Mathew T, (2013) Digital Australia 2014, Sydney: Interactive Games & Entertainment Association

2 Ibid.

There have been several new entrants to the game console market, which include game consoles that have been crowd funded on fundraising websites such as Kickstarter. For example, the Ouya console was successfully crowd funded on Kickstarter with over $8.5 million pledged by over 60,000 people towards the development of this new game console[3]. The Ouya console has now been commercially released and provides a range of new digitally delivered games[4]. The Ouya is one of the many examples of new entrants in the game console market, with new consoles expected to emerge with the growing demand for digitally delivered content.

3. HOW GAMES AND GAME CONTENT IS ACQUIRED

The definition of 'computer game' in the Classification (Publications, Films and Computer Games) Act 1995 (Cth) (the Commonwealth Act) captures a range of interactive games and game content. From a digital iteration of a game as simple as chess, to sophisticated and immersive games that explore personal stories in virtual worlds, the concept of 'computer game' is very broad.

In addition to computer games, the Commonwealth Act also applies to additional game content, including in-game virtual items and expansion packs.

The introduction of new technologies and high Internet speeds has changed the way consumers acquire computer games and game content. The following sections set out how Australians are currently acquiring computer games and game content.

3.1. Boxed Games

The 'boxed games' category refers to games and game content that is delivered on physical media and sold generally in retail stores. Games for PCs, game consoles and handheld devices continue to be sold as boxed games through traditional 'bricks and mortar' distribution methods. These games are being sold by a number of retailers across Australia, including specialist retailers such as EB Games and JB Hi-Fi and mass merchant retailers such as Big W and Target.

In 2012, there were approximately 720 boxed game titles released in Australia.

3. 2. Digital Download

Consumers are now able to access a huge range of games and game content over the Internet. All game platforms, including PCs, game consoles, handheld devices and smart phones allow users to purchase, download, install and play games and game content. A growing category of platforms, including smart phones, tablets, smart TVs and even newer laptops do not have hardware components such as CD or DVD drives and are therefore unable to read, install and process computer games on physical media and can only receive and play digitally distributed computer games.

3 http://www.kickstarter.com/projects/ouya/ouya-a-new-kind-of-video-game-console?ref=live

4 http://www.ouya.tv

Digital downloads are being sold by a growing range of digital retailers. While new digital storefronts are continuously emerging, the most popular digital game retailers include Apple's App Store, Google's Google Play, Electronic Arts' Origin, Ubisoft's UPLAY, Valve's Steam, Microsoft's Xbox Marketplace, Nintendo's eShop and Sony's PlayStation Network.

The number of digitally exclusive games would exceed 60,000 per year

While digitally distributed computer games may include the downloadable versions of games that are released as boxed games, there is an exponentially growing range of games that are exclusively digitally distributed.

The amount of digital releases is difficult to measure, though it is conceivable that the number of digitally exclusive games would exceed 60,000 per year.

3. 3. Point Of Sale Digital Downloads

Digital downloads can also be purchased at 'bricks and mortar' retailers through the use of activation cards. For example, retailers may display a range of cards, similar to iTunes gift cards, which contain activation codes that can be redeemed online to enable the user to download and play a particular game. These cards, also referred to as 'point of sale activation cards' or 'POSA' cards, are commonly used for exclusively digitally delivered titles that would benefit from a physical retailer presence. POSA cards are also an innovative way to ensure Australian retailers continue to benefit from the growing trend towards digital distribution.

While the sale of physical media in Australian retailers is likely to continue throughout the next generation of games consoles, the use of POSA cards will no doubt also increase with the rising consumer demand for digitally delivered games.

3. 4. Subscription

Subscription is not necessarily a new approach for the games industry, however high speed Internet and digital distribution has allowed more subscription models to develop. The traditional subscription model for games would involve the user paying a periodic fee to access a certain game. For example, users currently pay approximately US$15 per month (or US$78 per year) for gameplay time for the massive multiplayer online game World of Warcaft.

New subscription models have also emerged, with some providing consumers with a regular selection of games for a periodic subscription fee. For example, the PlayStation Plus subscription costs $9.95 per month (or $69.95 per year) and provides subscribers with a number of benefits including discounted and free digitally downloadable PlayStation 3 games.

Subscription models see games moving from a consumer/commodity item to being the delivery of a service, similar to subscription television.

3. 5. Episodic Games

The low cost of digital distribution has paved the way for the development of episodic gameplay. Rather than selling one game for $100, an episodic game could be distributed in five separate parts worth $20 each. Episodic games provide a number of advantages for businesses and consumers, including:

- *allowing games to be released earlier, with the initial episodes being released while the remaining episodes are still in development;*

- *decreasing the entry cost for consumers, allowing them to initially spend less on a game to determine whether they want to spend more for subsequent episodes; and*

- *increasing the publicity period for games businesses, with semi-regular releases prolonging the marketing opportunities for game developers and publishers.*

The most recent successful example of an episodic game is Telltale Games' critically acclaimed title The Walking Dead. This game was split into five separate episodes that were released over a period of approximately eight months. The game was subsequently released as a boxed game containing all the episodes from the collection.

3. 6. Free-to-play, Freemium and In Game Purchases

'Free-to-play' or 'freemium' games are prime examples of the new and innovative business models that have been developed in the mobile game market. These games are provided to the consumer for free, with the developer or publisher's revenue derived from alternative sources such as in-game advertising or in-app purchases. Free-to-play and freemium models are now being used in a variety of devices and platforms, including for smart phone, console and computer games.

In-game purchases (also referred to as in-app purchases) are used for both free and paid games. For example, a customer may download a game for free or for a nominal price and then through subsequent in-game purchases they can unlock further levels or features of the game. Popular free-to-play or freemium games include Candy Crush Saga, Words with friends, Draw Something and Australian developed Real Racing 3.

Several key benefits have emerged through the use of free-to-play and freemium games, including:

- *consumers are able to enjoy games for free or by spending amounts relative to their own financial circumstances and interest in a particular game;*

- *users, or potential users, are now able to effectively 'sample' a game with little or no financial risk to determine whether they would like to spend any money on the game;*

- *developers are able to continually enhance games after their initial launch by building and delivering more game content through in-game purchases;*

- *developers are able to serve a broader market of users, from those users that would prefer not to spend any amount on games and are happy with a basic game experience, to those users that want an in-depth game experience and are willing to pay for it; and*

- *free-to-play and freemium games have also been used to prevent or reduce copyright infringement. As these games are initially provided for free or at a low cost the appeal of downloading such games from unauthorised sources is reduced.*

4. HOW GAMES ARE PLAYED

4.1. Traditional Gaming

Consumers are still enjoying their video games in the traditional way, with a game controller or keyboard and mouse used to navigate and control the game experience, generally on a television screen or panel. Some of the most popular titles, including FIFA 14, Gran Turismo 6 and the Sims 3 all involve the use of a keyboard, mouse or game controller.

4. 2. Motion Sensing

With the introduction of motion sensing technology, including with the Nintendo Wii, PlayStation Move and Xbox Kinect, gamers are now able to use their bodies and gestures to interact with games. A number of game genres have emerged or re-emerged with the use of motion sensing technology, including sports, dancing, racing, singing and exercise games.

4. 3. Multi-Screen Gaming

Games are now being enjoyed on more than one screen. The Nintendo Wii U's controller acts as a second screen to the television, providing an alternative perspective to gameplay. Tablet computers are also being used as a second screen in a number of games, for example in racing games where the tablet computer is used to display a racing map.

4. 4. Cross-Device Play

While computer games are often developed for a number of different devices, consumers are now able to extend their game experience across multiple devices. For example, the popular Candy Crush Saga app can be played on computers, smart phones or tablets with a user's progress on one device shared across the user's other devices. Cross-device games also allow a consumer to play and interact with other consumers that are playing the same game on a different type of device.

4. 5. Companion Applications

The consumer interaction with a computer game is no longer limited to one device alone, with many games now releasing 'companion apps' to be used in connection with the main game on separate devices. For example, while a user can enjoy a game on a game console in their living room, they can also continue their game experience through a separate smart phone or tablet application while commuting to work. The use of companion applications is expected to increase following the release of the next generation of game consoles. Ubisoft Entertainment's highly anticipated release Tom Clancy's: The Division for Xbox One and PlayStation 4 features a sophisticated companion application that allows tablet users to interact with game console players in real-time by allowing them to control a drone that oversees the console player's game and provide support[1].

1 The companion application experience is described in the following videos: http://www.youtube.com/watch?v=rcNB1_bGG5w and http://www.youtube.com/watch?v=dWpAeQm5hrY

4. 6. Online Multiplayer

Online multiplayer games enable users from around the world to play together or against each other over the Internet. Online multiplayer games can be as simple as Scrabble or Chess, where children are playing with their grandparents on their smart phones or tablets, to war simulation games like Call of Duty or Battlefield, where users work with teammates that are scattered across the globe to achieve a common objective. Playing online games is common practice in Australia, with more than 73% of Australian gamers now playing games online[2]. Online multiplayer games usually contain gameplay and communication features that enhance the users' experience, including customisable avatars and game items, text chat, audio chat and friends lists. It is common for online multiplayer games to contain mechanisms for users to report any negative online behaviour of other users.

4. 7. Augmented Reality

Game devices are often connected to video cameras that can be used for augmented reality games. These games will generally use a video camera to record the user's surroundings for display on the user's television or smart phone screen and then will superimpose virtual objects and characters on the displayed image for the user to interact with. For example, the popular PlayStation 3 title 'EyePet' allows users to interact with virtual pets that appear to be running around the user's living room. Augmented reality games are popular with smart phones as these devices usually come equipped with high-resolution video cameras.

4. 8. Virtual Reality

The concept of virtual reality games has existed for some time now, however recent technological developments have allowed this concept to step beyond science fiction and into reality. Most recently, a virtual reality headset called the 'Oculus Rift' has been successfully crowd funded and a development version of the headset has already been released for game developers. The Oculus Rift features head and motion tracking, allowing the user to simply move their head to look around the virtual environment that is being displayed through the headset. Games for the Oculus Rift are currently being developed, including a rollercoaster game that puts the user in the seat of a high speed, gravity-defying roller coaster and a game that allows the user to explore the detailed environment of a mansion in Tuscany. As technology improves, more virtual reality games and hardware are being developed and the cost of such products is expected to be well within reach of the mainstream games market.

2 Brand J.E., Lorentz P, Mathew T, (2013) Digital Australia 2014, Sydney: Interactive Games & Entertainment Association

5. EMERGING ISSUES

The current Scheme is based on recommendations that were made by the ALRC more than 20 years ago when digital distribution was not envisaged as a commercial method of selling computer games. This was the era of cartridge based console games and computer games were supplied on floppy disks and the 'new' 3.5" disk.

The application of an analogue devised scheme in a digital environment has caused a number of significant issues that undermine the intention and purpose of the Scheme while at the same time placing a substantial burden on local industry. While the problems with the Scheme have been thoroughly examined in the ALRC's most recent review, these issues will become increasingly more troublesome unless there are substantial and immediate reforms to Australia's classification laws.

The following issues continue to challenge the computer games industry and market:

- *Complexity of the Scheme;*
- *Inflexibility of the Scheme;*
- *Inability to manage the high frequency and volume of digitally distributed games;*
- *Uncertainty in the Scheme's application for digitally distributed games;*
- *Difficulties of applying the Scheme with game modifications;*
- *Uncertainties with the Scheme's application for companion applications; and*
- *Failure of the Scheme's application to episodic games.*

5.1. Complexity of the National Classification Scheme

The Scheme is a co-operative scheme between Commonwealth, state and territory governments for the classification of films, publications and computer games as set out by the Intergovernmental Agreement on Censorship made between the Commonwealth, states and territories dated 28 November 1995.

The relevant classification legislation is as follows:

JURISDICTION	*LEGISLATION*
Commonwealth	Classification (Publications, Films and Computer Games) Act 1995 (Cth)
Australian Capital Territory	Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (ACT)
New South Wales	Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)
Victoria	Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)
Queensland	Classification of Computer Games and Images Act 1995 (QLD)
South Australia	Classification of Films Act 1991 (SA)
Western Australia	Classification of Publications Act 1991 (WA)
Tasmania	Classification (Publications, Films and Computer Games) Act 1995 (TAS)
Northern Territory	Classification (Publications, Films and Computer Games) Enforcement Act 1996 (NT)

The Commonwealth Act is supplemented by a number of determinations, regulations and legislative instruments relevant to computer games, including:

- *The National Classification Code;*
- *Classification guidelines for Computer Games;*
- *Classification (Markings for Films and Computer Games) Determination 2007;*
- *Classification (Advertising of Unclassified Films and Computer Games) Determination 2009; and*
- *Classification (Markings for Certified Exempt Films and Computer Games) Determination 2007.*

The Commonwealth Act sets out the classification, re-classification and classification review process for computer games, the establishment of the Classification Board and the Classification Review Board. The complimentary state and territory legislation sets out the classification, display and advertising requirements for computer games, including penalties for failing to satisfy such requirements.

Since there are separate enforcement laws for each state and territory, with several differences between how each law handles the sale, demonstration, display and advertisement of computer games, prudent game distributors would need to be aware of the intricacies of each set of state and territory enforcement laws. While this has not had a material impact on local distributors of boxed products, the complexity of the law is a challenge for local and overseas distributors that are distributing digital games around the world over the Internet.

Since Australia represents merely 2% of the global games market, global game distributors of digitally delivered games have responded to Australia's complex Scheme in a number of different ways that undermine the purpose of the Scheme, including by: ignoring Australia's classification requirements; creating their own classification markings and systems; or withholding product from the Australian market. Clearly, none of these outcomes are serving Australian consumers well or delivering the inherent intent or purpose of the Scheme.

5.2. Inflexibility of the National Classification Scheme

High Internet speeds and a demanding tech-savvy market have caused significant change in the computer game industry. Accordingly, it is critical that Australia's laws only interfere where necessary and do not restrict technological and economic developments to the detriment of Australian consumers and businesses, nor create an uneven playing field where extra-territorial businesses are at an advantage compared to local Australian businesses.

Since the Scheme is a co-operative scheme between Commonwealth, state and territory governments, any change to the scheme ultimately requires unanimous agreement between relevant Commonwealth, state and territory ministers. History has proven that this approach prevents the Scheme from being flexible enough to adapt and change to meet the demands of the Australian public and businesses in a timely manner, let alone the speed at which technology is changing and disrupting all facets of society and business. The three key examples that demonstrate the Scheme's failure to adapt include:

1. *The Classification (Publications, Films And Computer Games) Amendment (Terrorist Material) Bill 2007 (Cth) – While there was considerable political debate on the matter addressed in this Bill, the proposed reform failed to be negotiated between state and territory Ministers and the Commonwealth Act was unilaterally amended. This issue was ultimately addressed more than 2 years after the issue first emerged.*

2. *The introduction of an R18+ classification for computer games – Notwithstanding the widespread public support for the introduction of an R18+ classification for computer games, the issue was only addressed recently after more than 10 years of negotiation. Even with the support of the Commonwealth, states and territories, the introduction of relevant reforms in each state and territory was staggered and in one instance R18+ games were legal in all states and territories except Queensland causing a number of complications for consumers and businesses, particularly those businesses distributing from Queensland.*

3. *The ALRC's most recent review on the National Classification Scheme – After a long period of industry requests for reform to the Scheme, in March 2011 Attorney-General Robert McClelland referred the Scheme to the ALRC for review. The Final Report for the ALRC's review was tabled in Parliament on 1 March 2012 and the Australian Government's first response to the ALRC's report was on 5 April 2013 when the then Minister for Justice Jason Clare announced an initial group of reforms pursuant to the ALRC's recommendations[1]. These reforms are yet to be introduced for debate. The issues raised in the ALRC Review existed long before the ALRC's inquiry and, notwithstanding the acknowledged need for reform, the Scheme continues unchanged.*

While amendments to the Scheme should be carefully considered, the structure of the Scheme does not promote flexibility and it is not able to address emerging issues in a timely manner. IGEA's Digital Australia 2014 report outlines a number of concerns that are shared by Australian parents that stand outside the matters addressed in the Scheme, including privacy, security, credit card fraud, geo-tagging and bullying/harassment. Industry classification bodies around the world, including the Entertainment Software Ratings Board (ESRB) and Pan European Game Information (PEGI) are continuously reviewing these emerging issues and have already introduced new mechanisms to address some of these concerns. Australia needs reform to ensure Australia's classification laws and regulations are adequately flexible to address such emerging issues in a timely manner.

5.3. The High Frequency and Volume of Digitally Distributed Games

The popularity and success of independently developed computer games continues to grow with the global increase in Internet connectivity and speeds. While digital distribution has provided Australian game developers with direct and low cost access to a global market, the global market also has direct access to Australian consumers. Consequently, there are now more computer games being released in Australia than ever before and the current process for classifying computer games under the Scheme is failing to adapt.

More than 40,000 games were released in Apple's App Store in 2012

1 Jason Clare, 5 April 2013, Reform to the National Classification System, Media Release

Section 17 of the Commonwealth Act sets out the requirements for applications for the classification of computer games. Section 17(1) requires applications to be:

- *in writing, in an approved form, signed on behalf of the applicant;*
- *be accompanied by a copy of the computer game;*
- *be accompanied by the prescribed fee;*
- *be accompanied by a document setting out the title, production year, publisher name, country of origin and description of game play; and*
- *be accompanied by a recording of any contentious material or particulars on how any contentious materials can be accessed.*

Applicants may use the authorised assessor scheme to recommend a classification to the Classification Board if the likely classification of the computer game is G, PG or M.

Section 19(2) of the Commonwealth Act states that the Classification Board may require the applicant to demonstrate the computer game.

The prescribed fees are as follows:

- *$1,210 for a standard computer game classification;*
- *$890 if the application is accompanied by a recording depicting standard gameplay and of any contentious material;*
- *$430 for an application that has been made with a recommendation to the Board by an authorised assessor; or*
- *$2,460 for an application that will require demonstration of the computer game before the Classification Board.*

Recently, a local Australian developer made the comparison between having games classified in Australia compared to other territories. He rightly pointed out:

"We can sell a game in the Americas (with a population of about 1 billion) for no ratings fees, in Europe (with a population of over 700 million) for 500 Euros per platform and in Australia (23 million) for AUS$430 and considering that only 2% of our revenue comes from Australian sales you can see how ridiculous this is."[2]

The Classification Board has classified an average of 755 computer games per year since its inception in 1996. By way of comparison, in 2012 more than 40,000 games were released in Apple's App Store, up from over 30,000 in 2011. There are approximately 150,000 games currently available on Apple's App Store and 395,000 games currently available on the Google Play Store – the majority of which are being made available to Australian consumers. This amount can be added to the thousands of games that have been released on other digital distribution platforms such as PlayStation Network, Xbox Live, Nintendo eShop, EA's Origin and Valve's Steam.

The new generation of home entertainment consoles, including the PlayStation 4, Xbox One and the Wii U have promoted a renewed focus on independent game development. Game developers from around the world, including in Australia, will soon be able to develop, self-publish and digitally distribute their games on popular home entertainment consoles with very little barriers to entry.

2 Bruce Thompson, Business & Marketing Director, Nnoo at http://www.vooks.net/automated-classification-for-games-in-australia-coube-be-the-eshops-best-friend/

The volume and frequency of computer games released in Australia will grow exponentially and is outside the realistic regulatory scope of the current Scheme.

5.4. Uncertainty for Digitally Delivered Computer Games

There are ongoing uncertainties in the Scheme's application on digitally delivered computer games. Such uncertainty has been caused by a number of factors, including the complexity of the Scheme (addressed above); the unintentionally overreaching enforcement provisions of the state and territory enforcement laws; and the inconsistent approach to online content between the Scheme and the Broadcasting Services Act 1992 (Cth).

The Scheme prohibits Australian school students from being able to develop and share their computer games with friends and family.

All state and territory classification enforcement laws contain a prohibition against the sale or demonstration of unclassified computer games. For example, s27 of the Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW) states that a person must not sell or publicly demonstrate an unclassified computer game and the breach of this section attracts a maximum penalty of 20 penalty units for an individual, or 50 penalty units for a corporation, if the computer game is subsequently classified MA15+ or R18+.

The definitions of 'sell' or 'sale' in state and territory enforcement laws are broad. For example, the definition of 'sell' in the Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic) is as follows:

"sell means sell or exchange or let on hire, and includes offer or display for sale or exchange or hire, agree to sell, exchange or hire and cause or permit to be sold or exchanged or hired, whether by retail or wholesale"

Queensland's Classification of Computer Games and Images Act 1995 also prohibits a person from selling, or attempted sell, unclassified computer games[3]. The definition of 'sell' in the Queensland legislation is as follows:

"sell, for a computer game, means—

(a) sell, whether by wholesale or retail; or

(b) display for sale; or

(c) let on hire; or

(d) exchange; or

(e) distribute; or

(f) offer or agree to do an act mentioned in paragraphs (a) to (e); or

(g) invite to treat or expose for an act mentioned in paragraphs (a) to (e); or

(h) cause or permit to be done an act mentioned in paragraphs (a) to (g)."

Similar to other state and territory enforcement laws, the definition of 'sell' in the Queensland legislation is very broad.

The broad nature of the definition of 'sell' in state and territory classification enforcement laws could potentially include the online sale and download of computer games in digital formats in each state and territory.

3 See section 19 of the Classification of Computer Games and Images Act 1995 (QLD)

The 'classify before sale or demonstration approach' set out in state and territory enforcement laws is in conflict with the approach for online content services set out in Schedule 7 of the Broadcasting Services Act 1992 (Cth) (BSA). Schedule 7 of the BSA does not require online content, which potentially includes computer games delivered over the Internet, to be classified by the Classification Board before it is made available for download. Rather, the BSA requires content that is, or is likely to be, MA15+ or R18+ to be subject to a restricted access system and provides the Australian Communications and Media Authority with the power to issue take-down notices for instances of non-compliance.

While there are difficulties in designing and implementing an effective restricted access system, the overall approach in Schedule 7 of the BSA strikes the appropriate balance between protecting children from harmful material and ensuring Australians have access to content. Uncertainty will continue to exist while there is conflict between the regulation of online content standards in state, territory and Commonwealth legislation.

The uncertainty clouding the Scheme has serious consequences for the Australian industry and the public, including:

- ***Mixed messages for classification information*** – Online computer game retailers have started to establish their own classification systems, often resulting in the same computer game being classified separately by different retailers. For example, first person zombie shooter DEAD TRIGGER is available on a number of platforms and storefronts, including Apple's App Store, the Appstore for Amazon's Kindle and Google Play for Android. While DEAD TRIGGER is classified '17+' on Apple's App Store, it is labeled 'Mature' on the Appstore for Amazon and 'High Maturity' on Google Play. This decentralised approach requires users, including parents, to leave behind the familiarity and trust of the Australian classification markings and struggle with a variety of new classification systems, labels and types of consumer advice.

- ***Some games, including Australian developed games, are being withheld from the Australian market*** - While some businesses continue to sell unclassified games over the Internet, other businesses simply are not willing to run the risk of potential non-compliance with Australia's classification laws. As a result, many digital exclusive titles are not being released in Australia. Between PlayStation 3 and Vita's online stores, there are at least 63 games that have not been released in Australia due to classification requirements. Xbox Live's Indi Channel, comprised of almost 3,000 independently developed games, is not available in Australia due to the prohibitive cost of compliance with Australia's classification laws.

It is unfortunate that the Scheme prohibits Australian school students from being able to develop and share their computer games with friends and family through XBOX Live's Indi Channel.

Unfortunately, even though a decision may be made to inhibit the 'official' sale of these products in Australia, the nature of the Internet and the demand of consumers who have access to this content through other avenues in the digital environment means that the product may end up back in Australia, unclassified still and revenues being collected offshore. This fails to serve the consumer, local industry and the intent of the Scheme.

- ***The risks and costs to the local interactive entertainment industry*** - Australian game developers and distributors have been placed in a difficult position - should they wear the cost and friction of compliance, withhold product or completely ignore Australia's classification scheme? This decision is made against the understanding that those same costs and friction points are not applied to their offshore competitors.

  The massive scale of digitally delivered content, the relatively high cost of classification and Australia's small percentage of the global market makes this position even more difficult. Compared to offshore distribution businesses, Australian businesses are particularly disadvantaged as they are more likely to be within the jurisdictional scope of enforcement.

5.5. Game Modifications

Digital delivery has allowed computer games to continuously evolve through the use of digital game updates, patches and additional content. Consequently, business models have adapted to take advantage of digital distribution by continuously developing and selling modifications through micro transactions.

There are several types of game modifications, including:

- *Game updates or patches that fix game bugs;*
- *Character skins or costumes that change the way game characters look;*
- *Character packs that introduce new characters to the game;*
- *Game items, including new objects, tools, weapons and vehicles;*
- *Map packs that introduce new environments for users to explore;*
- *Mission packs that introduce new storylines and challenges; and*
- *Episodic content or sub-sequels that take place in the original game's world.*

The following quote is from the lead architect of PlayStation 4, Mark Cerny, who makes reference to modifications while predicting how game experiences will change in the next generation of games:

"I think another thing we are going to see is living worlds. When we were touring with the developers a lot of them had the same vision for the future - that because there is a hard drive in PlayStation 4 they will be able to update the game daily, weekly [or] monthly which means every time you go back to play it there will be something new to experience: new missions, new places to explore and the like."[4]

Section 21(1) of the Commonwealth Act states, if a classified computer game is modified, it becomes unclassified when the modification is made. There are no definitions in the Commonwealth Act for 'modification' and there is no level or degree of modification necessary to trigger section 21(1) of the Commonwealth Act.

4 http://www.youtube.com/watch?v=HsbivGaJbNQ

Accordingly, any modification of a computer game, including a simple modification that does not significantly change the user's experience of the computer game, could potentially cause a computer game to become unclassified and in breach of the various state and territory enforcement laws. Consequently, game publishers would potentially need to classify every modification and every combination of modification. This becomes particularly problematic as minor modifications are frequently sold (and in some cases done automatically and seamlessly in the background) for free or for nominal amounts over an extended period of time.

5.6 Companion Applications

As set out above, 'companion applications' for smart phones and tablets are often used in connection with a main game being played on a separate device. The Scheme provides a number of challenges to the emergence of companion applications, including:

- *When considering the definition of computer games in the Commonwealth Act, should companion applications be considered to form part of the original game?*
- *Should companion applications be classified separately or should they automatically inherit the classification of the original game?*
- *Is it appropriate for a companion application to have a classification that is lower than the original game's classification?*

As companion applications have only recently been introduced to the market, the above issues are yet to be comprehensively explored. It would be important to consider this type of content in any reforms of the Scheme.

5.7 Episodic Games

As previously explained, episodic games involve computer games being sold in smaller separate instalments over a period of time. The Commonwealth Act would require each instalment to be classified separately, therefore multiplying the classification costs for episodic games. Such games have been withheld from Australian storefronts and subsequently classified and sold as collections once all episodes have been developed and released. This prevents Australian consumers from accessing such content within the same period as overseas markets – a situation that leads to a number of undesirable consequences such as the distribution of unclassified versions of such games through unauthorised distribution channels.

It is important that any reforms to the Scheme provide for such episodic games and remove the requirement to classify such content multiple times.

6. AUSTRALIAN LAW REFORM COMMISSION: CLASSIFICATION INQUIRY

In March 2012 the ALRC tabled its Final Report for its inquiry into the Scheme. Following this extensive review, the ALRC recommended the development of a new scheme for classifying content. Some of the key features of the ALRC's recommended new scheme include:

- *Platform-neutral regulation with one set of laws establishing obligations to classify or restrict access to content across media platforms.*
- *Co-regulation and industry classification, with more industry classification of content and industry development of classification codes, but subject to regulatory oversight.*
- *An Australian Government scheme that replaces the current cooperative scheme with enforcement under the Commonwealth law.*
- *A single regulator with primary responsibility for regulating the new scheme.*
- *Authorisation of classification decision-making instruments, such as online questionnaires.*

Subject to a few exceptions (primarily concerning the requirement for the Classification Board to classify computer games likely to be classified MA15+ or above) the interactive entertainment industry generally supports the recommendations made by the ALRC.

7. UPCOMING REFORMS TO CLASSIFICATION LAWS

On 5 April 2013 the then Minister for Justice, Jason Clare, announced an intention to introduce an initial stage of reforms to implement seven of the ALRC's recommendations[1]. These reforms included:

- *broadening the type of content that is exempt from the scheme and reducing the red tape associated with running festivals;*
- *enabling the use of automated classification decision-making systems, starting with a pilot for mobile and online computer games;*
- *including classification marking requirements in the Commonwealth Act and revamp existing statutory instruments so they are clearer and simpler;*
- *changing the rules so that 2D and 3D versions of films or computer games no longer need to be classified twice;*
- *changing the rules to allow minor modifications to be made to computer games without further classification;*
- *introducing a program of research to examine current classification categories, symbols and community standards in relation to media content; and*
- *giving explicit power to Commonwealth officials so that they can notify law enforcement authorities of content that is potentially Refused Classification prior to classification by the Classification Board.*

Of these, the reforms concerning computer game modifications and the use of automated classification decision-making systems are most relevant to the interactive entertainment industry.

7.1. Modifications

As outlined above, the Scheme has interfered with the development and sale of computer game modifications, particularly those that are sold online using micro-transactions. The ALRC recognised these issues and recommended several reforms. The ALRC's view on how computer game modifications should be addressed is set out in the following extracts from the ALRC's Final Report [emphasis added]:

"8.28 - The ALRC considers that the new Act should provide that classified content only becomes unclassified if it is modified in such a way that the modified content is likely to have a different classification from the original content. Neither the Act nor industry codes need to prescribe specific types of modifications that would, or would not, change the classification of content. Whether something has been modified should depend on the content itself, not on the type of modification.

8.29 - However, only minor changes should be considered 'modifications'. 'Modify' means to 'make partial or minor changes to; alter without radical transformation'. As discussed later in this chapter, adding extra content will often not be a 'partial or minor' change."

1 Jason Clare, 5 April 2013, Reform to the National Classification System, Media Release

8.52 - In Chapter 6, the ALRC suggests that only computer games that are 'works', that is, games that are 'produced for playing as a discrete entity', should be required to be classified. **'Mods' and expansion packs will rarely be produced for playing as a discrete entity, and therefore would not meet the definition of content that must be classified. If they are sold separately, therefore, they should not need to be marked and classified. In the ALRC's view, this is an appropriate and effective means of dealing with the volume of separate 'mods' and expansion packs that can be released, many made and produced by users rather than the original developers.**"

Ultimately, the ALRC did not expect minor modifications, mods and expansion packs to be subject to separate classification. Accordingly, any reform on this issue that is designed pursuant to the ALRC's recommendations should address the range of modifications contemplated by the ALRC, including:

- *game updates or patches that fix game bugs;*
- *character skins or costumes that change the way game characters look;*
- *character packs that introduce new characters to the game;*
- *game items, including new objects, tools, weapons and vehicles;*
- *map Packs that introduce new environments for users to explore;*
- *mission packs that introduce new storylines and challenges; and*
- *episodic content or sub-sequels that take place in the original game's world.*

provided always that such content is unlikely to change the classification of the original game and that the modification can not be played on its own without the original game (or 'as a discrete entity').

7.2. Automated Classification Decision Making Systems

The global interactive entertainment industry has been engaged in extensive discussions over the last three years on the development of an international automated approach to classifying digitally distributed computer games, including games on game consoles, personal computers, handheld devices and smart phones. This international approach is now known as the International Age Rating Coalition (IARC). The ALRC considered the use of an automated decision-making instrument/system such as IARC in its inquiry and ultimately recommended allowing the use of such an instrument provided that it has been properly authorised.

Classification should be focused upon content rather than platform or means of delivery

While the interactive entertainment industry is supportive of a pilot program for such automated classification decision-making systems, in an increasingly converged environment it would be incredibly difficult to limit the pilot program's application to mobile and computer games only. As computer games are no longer limited to one type of platform, with mobile games now being played on televisions and console games being playable on mobile phones, such a limitation will inevitably undermine the performance of the pilot program.

One of the key guiding principles of the ALRC's review was that "Classification should be focused upon content rather than platform or means of delivery." Consistent with this guiding principle, the interactive entertainment industry strongly suggests that the pilot program for automated classification decision-making systems be made available to digitally distributed content generally and not limited to particular platforms or businesses.

8. RECOMMENDATIONS

The Scheme is in desperate need of substantial reform to ensure that it is able to achieve its full objectives in a digital and converging environment. The ALRC Review found that there are complicated and often conflicting matters that must be considered in the design of a new classification scheme. The interactive entertainment industry largely supports the recommendations made in the ALRC Review. Essentially, the interactive entertainment industry recommends that:

- *the recommendations in the ALRC review be seriously considered;*
- *the current Scheme be replaced with a co-regulatory industry-led scheme that is overseen by a Commonwealth regulator;*
- *authorised industry assessors and classification decision-making instruments be used to classify all computer games; and*
- *the Classification Board audit and monitor industry assessor and decision-making instrument decisions and where necessary review decisions brought to the Classification Board's attention by the government regulator or the public.*

8.1. ALRC Recommendations

The ALRC Review proposes significant changes to the Scheme and acknowledges that the Scheme cannot be repaired through minor amendments. The ALRC Review explored serious questions about what content should be classified and proposed a solution that aims to address the many shortfalls of the current Scheme.

The ALRC's recommendations in their entirety need to be seriously considered. With the ALRC Review being tabled in March 2012, and the industry issues addressed in the ALRC Review quickly escalating, it is critical that further delay is avoided and that the full extent of the ALRC's recommendations are properly considered.

8.2. A Co-Regulatory Scheme

In other major territories around the world, including North America and Europe, industry alone classifies and rates computer game content. While Australia's local industry would welcome the opportunity to be solely responsible for classifying content, it is understandable that this proposal is unlikely in the current regulatory environment. The interactive entertainment industry is therefore recommending the implementation of a co-regulatory scheme for classifying computer games in Australia.

In a co-regulatory scheme, industry would work with a single government regulator, likely a Commonwealth regulator, to develop and authorise industry codes and guidelines for the classification, display, marking and advertisement of computer games. Such a co-regulatory scheme would offer sufficient flexibility for industry while providing the enforcement backing of a government regulator.

8.3. Industry Assessors and Classification Decision Making Instruments

Authorised industry assessors and classification decision-making instruments should be allowed to classify computer games. The ALRC Review recommended that the Classification Board be responsible for classifying MA15+ and R18+ computer games however this approach will confront the same problems that have been identified by the current Scheme, with the Classification Board unable to handle the sheer volume and frequency of computer games classified MA15+ or R18+ and the costs of such classification being prohibitive for global digitally distributed games.

The interactive entertainment industry has been trusted to classify computer games in major territories around the world with little-to-no regulatory intervention. In Australia, authorised assessors are used to recommend classifications to the Classification Board for G, PG and M computer games. The new classification scheme should allow industry representatives that have been properly trained and authorised by a government regulator to classify the full range of computer games. Similarly, with the high volume and frequency of digitally delivered games being released globally, a regulator should be able to authorise the use of an automated classification decision-making system to classify the full range of computer games.

8.4 Classification Board

In a co-regulatory scheme, the Classification Board would play an important role of ensuring that classifications are being properly applied. This would involve continuous auditing of industry decisions and reviewing disputed classification decisions that are reported by the government regulator or the public that are unable to be resolved by industry. This approach will prevent any bottlenecks in the classification process while ensuring that industry remains accountable. This approach would also remove any perceived notion about the conflict between the industry's commercial interests and social responsibility.

9. CONCLUSION

The interactive entertainment industry and market in Australia has experienced significant change, primarily in how consumers are able to play and acquire game content over the Internet. With the thousands of unclassified games being made available and the extensive delays in how the Scheme adapts to emerging issues and technologies, it is clear that the Scheme is in desperate need of reform. The recommendations from the ALRC Review, and the recommendations set out in this paper, must be considered and the reform process should commence without further delay.

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