

Australian Visual Software Distributors Association
Classification of Films for the Home Entertainment Market
ISSUES PAPER

Purpose

The purpose of this Issues Paper is to:

- Summarise the legal and practical elements of the **National Classification Scheme** as it relates to the classification of films intended for the home entertainment market;
- Clarify the principal **Issues Facing AVSDA's Members** within this scheme;
- Identify **Related Issues** faced by the Office of Film & Literature Classification and others that should be considered; and from these,
- Identify, on a preliminary basis, **Themes For Reforming the National Classification Scheme** to address AVSDA's members' issues. These are set out in the AVSDA Reform Themes Paper.

The Issues Paper and the AVSDA Reform Themes Paper can then form be basis for a meeting between AVSDA and the Office of Film & Literature Classification to progress reform of the National Classification Scheme.

An Executive Summary now follows.

Executive Summary

There are two key issues facing AVSDA members:

- The time and expense of resubmitting modified classified films to the Office;
- The exclusion of AVSDA members from the advertising certificate of exemption scheme.

Turning to each of these in brief:

Resubmitting Modified Films

With some limited exceptions, all films sold or exhibited in Australia must be classified by the Office of Film & Literature Classification.

AVSDA members must ensure that all the films they distribute and sell are classified in accordance with the Commonwealth Act. While the theatrical distributors classify the majority of films prior to theatrical release, AVSDA members are responsible for ensuring the films they intend to distribute are:

- (a) submitted for classification if the film has not yet been classified (some films skip theatrical release and proceed directly to home distribution); or
- (b) re-submitted for classification if there have been any “modifications” to an already classified film (when a film is modified it becomes unclassified).

Given the common practice of adding features to DVD releases of previously classified films, such as subtitles, extra scenes and interviews, AVSDA members submit the majority of their films to the Office on the grounds of such films having been modified. Given the accumulative costs and delays in submitting films for classification, this is of considerable commercial importance for AVSDA’s members.

Advertising Exemptions

An advertisement for an unclassified film must not be published unless the film is the subject of a “certificate of exemption”.

Certificates are only available for “eligible films” being ones that are intended for “public exhibition”. This excludes films distributed by AVSDA members. In any event, the allocation of certificates is restricted to 100 and 79 of these are designated go to 5 of the theatrical distributors.

AVSDA members are currently not able to advertise yet to be classified films – this includes most DVDs.

Possible Reforms

Any proposal for reform must have the support of the Office.

In brief, possible themes for reform include:

- for the modification issue:
 - only requiring modified films to be resubmitted to the Office if the modifications are of a type likely to affect the existing classification; or
 - defining “modification” so that it excludes particular modifications (such as the addition of verbatim subtitles or interactive menus;
- for the advertising exemption issue:
 - amending the definition of “eligible films” so that home entertainment distributors may apply to the Board for certificates of exemptions in relation to advertising; and
 - allocating at least half of the nominated recipients of certificates to home entertainment distributors; and
 - increasing the number of certificates that may be issued or dispensing with such a restriction.

THE NATIONAL CLASSIFICATION SCHEME

A National System - Co-operation between States, Territories and the Commonwealth

The Australian Visual Software Distributors Association (“**AVSDA**”) represents the interests of owners of copyright in, and distributors of, videos, Digital Versatile Discs (DVDs) and potentially other formats to the Australian home entertainment market.

The classification and sale of such material is governed by the **National Classification Scheme** (the “**Scheme**”). The Scheme embodies both State and Commonwealth legislation and Commonwealth regulations and classification guidelines. Together this framework regulates the classification of publications, films and computer games and the enforcement of those classifications. The framework is held together by agreement between the States, Territories and the Commonwealth¹.

The Office of Film & Literature Classification (the “**Office**”) is the Federal Government agency responsible for providing administrative support for the Classification Board. Such support includes developing classification policies, processing classification applications and providing services to industry clients and the community. The Office is established and governed by the *Classification (Publications, Films and Computer Games) Act 1995* (the “**Commonwealth Act**”).

The penalties for selling or publicly exhibiting an unclassified film are covered by State and Territory legislation such as the New South Wales *Classification (Publications, Films and Computer Games) Enforcement Act 1995*.

The Commonwealth Act – The Classification Procedure and Requirement

The Commonwealth Act:

- (a) sets out the procedure and costs for classifying a film;
- (b) establishes the Classification Board² (the “**Board**”) whose primary role is the classification of publications, films and computer games; and
- (c) establishes the Classification Review Board³ (the “**Review Board**”) whose role is to review the classification decisions made by the Board (if required).

In performing the roles outlined above, the Board and the Review Board follow the principles set out in the:

- (a) Commonwealth Act;
- (b) National Classification Code (the “**Code**”) that forms part of the Commonwealth Act. The Code names and describes the classification categories used by the Board; and
- (c) Classification Guidelines (the “**Guidelines**”) that describe the different classification categories and detail the limits of material suitable for each category.

The *Classification (Publications, Films and Computer Games) Regulations* set out the fees for classifying publications, films and computer games (the “**Regulations**”).

¹ Agreement dated 28 November 1995 after the Australian Law Reform Commission's Report on Censorship Procedure.

² Section 45 of the Commonwealth Act

³ Section 72 of the Commonwealth Act

State and Territory Legislation - Enforcing the Commonwealth Act

The penalties for selling or publicly exhibiting an unclassified film are covered by State and Territory legislation. The New South Wales legislation operating within the Scheme is the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (the “NSW Act”).

The NSW Act is largely concerned with the enforcement of classification decisions made under the Commonwealth Act and sets out the circumstances in which a publication, film and computer game can be sold, distributed and exhibited in public in New South Wales.

For the purposes of this Issues Paper the legislation in other states and territories essentially mirrors that in New South Wales⁴.

Modifications

The basic principle is that an *unclassified* ‘film’⁵ cannot be sold or exhibited⁶. ‘Unclassified’ is not defined in either the Commonwealth Act or the NSW Act. ‘Unclassified’ would therefore be accorded its ordinary meaning, being a film that has not been classified.

Unless a film is exempt⁷, the Commonwealth Act provides that films are to be classified in accordance with the Code and the Guidelines⁸.

If a Film is Modified It Must be Reclassified

Subject to the exceptions set out below, if a classified film is **modified**, it is deemed to be *unclassified* under the Commonwealth Act⁹. If a film is unclassified then, if it is to be sold or exhibited, it must be resubmitted to the Office for classification.

⁴ Tasmania: *Classification (Publications, Films and Computer Games) Enforcement Act*, Queensland: *Classification of Films Act 1991*, Victoria: *Classification Publications, Films and Computer Games)(Enforcement) Act 1995*, South Australia: *Classification (Publications Films and Computer Games) Act 1995*, Northern Territory: *Classification of Publications, Films and Computer Games Act* and Australian Capital Territory: *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995*.

⁵ ‘Film’ is defined in the Commonwealth Act to include a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer generated image, can be produced (together with its sound track), but does not include: (a) a computer game; or (b) an advertisement for a publication, a film or a computer game. The definition is not limited to “moving pictures”.

⁶ For example see Section 6(a) and (b) of the NSW Act (see also corresponding provisions for other states and territories)

⁷ Section 5B of the Commonwealth Act provides a list of types films that are exempt from being classified. The list includes scientific, educational and “musical presentations” and there are limitations, for example, the content cannot be likely to be M+ or higher. A list of exempt films is provided at the end of this paper.

⁸ Section 9 of the Commonwealth Act

⁹ Section 21(1) of the Commonwealth Act

What Constitutes Modification?

What constitutes modification is not clear.

The word “modified” or “modification” is not expressly defined in the Commonwealth Act nor has it been the subject of judicial interpretation in this context. Broadly speaking, one applies the natural and ordinary meaning of “modification”. The Compact Oxford Dictionary describes a modification as the “action of modifying” and “modifying” as to “make partial changes to”. Synonyms include alteration, adaptation, change, adjustment and conversion.

Bearing in mind the definition of “film” includes not only the film itself (reference is made to a “cinematograph film”) but also to the format of the film (reference is made, for example, to a video disk from which visual images can be produced), it would appear that “modification” could encompass both a change in format (a conversion) as well as a change in substance of a film (changing scenes or adding subtitles for example).

That said, the Office’s website seems to indicate that a change in the format of the film alone does not, in the Office’s view, constitute a modification. The site states: “*Any film which is modified in any way when being transferred to a different format (for example a scene is added or deleted) also needs to be classified separately*”.

The Office has indicated that its current policy in respect of what constitutes a modification is that *any* modification to the content (ie any material on the medium on which the film is incorporated) of the film will constitute a modification, *regardless* of how minor the modification is.

However, we are also instructed, that the Office does not view adding an interactive menu as a modification. This view appears to contradict the Office’s current policy outlined above. This will need to be explored further with the Office.

While the Office appears to be exercising some discretion in how it applies the definition, the word “modification” could be interpreted very broadly to encompass changes in format (theatrical exhibition to DVD) or other modifications that do not change the substance of the film such as verbatim English language sub-titles.

What Does Not Constitute Modification?

The Commonwealth Act sets out two specific circumstances in which a classified film can be modified without the film being deemed to be unclassified.

Firstly, a film is not ‘modified’ by including or removing an advertisement, other than one of the following advertisements:¹⁰

- (a) an advertisement for a film where that film has not been classified¹¹;
- (b) an advertisement for a film that has a higher classification than the film¹² (It is not clear why the removal of an advertisement for a more restricted film would be of concern); or
- (c) an advertisement for a film where that advertisement has been refused approval by the Board¹³.

Secondly, an imported film is not ‘modified’ if the film was originally in a form that could not be modified (but has since been converted into a form that can be modified) and advertising for a film that has not been published in Australia has been removed¹⁴. ‘Imported’ is not defined in the Commonwealth Act. It therefore should be given

¹⁰ Section 21(2)(a) of the Commonwealth Act

¹¹ Section 22(1)(a) of the Commonwealth Act

¹² Section 22(1)(b)(i) of the Commonwealth Act

¹³ Section 22(1)(b)(ii) of the Commonwealth Act

¹⁴ Section 21(2)(b) of the Commonwealth Act

its ordinary meaning, namely, a film that is manufactured outside Australia and imported into Australia. Further clarification of the definition of 'imported' can be explored with the Office.

A Classified Film Cannot Be Sold if Altered or Added To or Bears a New Title

The NSW Act provides that a classified film is not to be sold or exhibited under a different title or if the form of the film has been altered or added to¹⁵. This provision does not precisely mirror the Commonwealth principle of "modification". The Acts in the other states and territories have the same provisions as the NSW Act.

Revocation of classification of films that are found to contain contentious material

The Board must revoke the classification of an interactive film (and any approved advertisement for the film) if the Board¹⁶:

- (a) is of the opinion that the film contains contentious material¹⁷ that was not brought to the Board's attention at the time the application for classification of the film was made; and
 - (b) had been made aware of the material before the classification was made, it would have given the film a different classification.
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¹⁵ Section 7 NSW Act. The Tasmanian legislation states "A person must not exhibit a film in a public place unless the film is (a) classified and (b) is exhibited with the same title; and (c) is exhibited in the form it was classified without alteration or addition – Classification (Publications, Films and Computer Games) Enforcement Act 1995 – s.20

¹⁶ Section 21A of the Commonwealth Act

¹⁷ 'Contentious material' in relation to a film means any material that would be likely to cause the film to be classified M or a higher classification: Section 5 of the Commonwealth Act.

Application Process

An application for the classification of a film must be accompanied by¹⁸:

- (a) a copy of the film;
- (b) the prescribed fee¹⁹ for that category of film; and
- (c) an adequate written synopsis of the film in English that includes a statement or summary of any incidents, or of the plot, depicted or intended to be depicted by the film.

The Board must make a decision on a classification application within 20 business days²⁰. The Board's decision must be notified to the applicant by the Director of the Board as soon as practicable but no later than 30 days after the Board's decision²¹.

Interactive Films

For applications involving films that have a computer generated interactive component (such as most DVDs) the application must also have²²:

- (a) A statement of details of any contentious material (which the Office indicates as being possible M or higher classification);
- (b) The way to access any such contentious material; and
- (c) A complete menu list of all contents, showing the time for each separate element on the disc.

The submission of these additional elements can be time-consuming and thus costly. It is not immediately clear why a DVD should require such elements. It may reflect a concern over "hidden" material that can be "unlocked" such as in some video games. This will need to be explored with the Office.

The Office's preliminary view on the rationale behind requiring these additional elements for interactive films is that the Board must be able to view all the content of the film in order to make an accurate classification of the film.

Advertising approval

As a general rule, advertisements²³ are not required to be approved by the Board.

However, an advertisement *must not* be published if the advertisement:

- (a) is for an unclassified film (other than a film that is the subject of a certificate of exemption under the Commonwealth Act)²⁴;
- (b) has been refused approval by the Board²⁵ (some advertisements may be called in for approval);

¹⁸ Section 14(1)(d) of the Commonwealth Act

¹⁹ The correct classification fees are set out in the Regulations and will depend on the format and the running time of the film.

²⁰ Section 87A(1) of the Commonwealth Act

²¹ Section 26(4) of the Commonwealth Act

²² Section 14(4) of the Commonwealth Act

²³ A definition of "advertisement" appears at the end of this paper.

²⁴ Section 39(1)(b) of the NSW Act

²⁵ Section 39(1)(a) of the NSW Act

- (c) would be refused approval by the Board if submitted for approval under the Commonwealth Act²⁶;
- (d) is for a film classified RC or X²⁷; or
- (e) was approved by the Board and the approval has since been revoked²⁸.

Therefore, in order to publish an advertisement set out in (a) to (e) above;

- (a) approval of the advertisement by the Board must be sought; or
- (b) in the case of an unclassified film, a certificate of exemption must be obtained under the Commonwealth Act.

Advertising Certificate of Exemption

A distributor or exhibitor of an 'eligible film' may apply to the Board for a certificate of exemption in relation to the film for advertising purposes²⁹.

An 'eligible film' must be a film that is intended for public exhibition that is not an "excluded film"³⁰. 'Public exhibition' is not defined in the Commonwealth Act. The NSW Act provides that to 'publicly exhibit' a film (or an advertisement for a film) means to exhibit the film or advertisement in a public place, or so that it can be seen from a public place³¹.

The Office's website appears to indicate that 'public exhibition films' are those films shown at cinemas.

An 'eligible film' must satisfy the following conditions³²:

- (a) it is reasonable to expect that the film will be classified 'G', 'PG', 'M' or 'MA' by the Board (or the Review Board);
- (b) the film must not contain frequent or intense depictions of sex, violence, drug-taking or use of obscene language; and
- (c) the film must deal only in a discreet or subtle manner with elements such as sexual concepts, violence, drugs and assaultive use of coarse language.

In addition, the following material must be submitted to the Board along with an application for an exemption certificate³³:

- (a) a synopsis of the film;
- (b) details of the major cast and credit lists;
- (c) available foreign advertising;
- (d) reviews or media comment (both foreign and Australian); and

²⁶ Section 39(1)(a) of the NSW Act

²⁷ Section 39(1)(a) of the NSW Act

²⁸ Section 38(1)(b) of the NSW Act

²⁹ Section 32(1) of the Commonwealth Act

³⁰ Section 31 of the Commonwealth Act. 'Excluded film' means a film that is exempt from classification, or from enforcement provisions relating to the public exhibition or sale or hire of films under a law of a State or Territory.

³¹ Section 4 of the NSW Act

³² Part 1 Schedule of the Classification (Eligible Films) Determination 2002

³³ Part 1 Schedule of the Classification (Eligible Films) Determination 2002

- (e) details of any foreign classification and markings for the film.

The exemption certificates can only be allocated in the following manner:³⁴

Distribution Group	Number of certificates
Roadshow Film Distributors Pty Ltd	17
United International Pictures Pty Ltd	17
20th Century Fox Film Distributors Pty Ltd	15
Columbia Tri-Star Films Pty Ltd	15
Buena Vista International	15
Independents/Reserve	21

At 30 September in each calendar year, if any certificates are yet to be issued to a particular distribution group then they may be made available to any other group on a first come first served basis.

As films distributed by AVSDA members for home entertainment do not appear to fall within 'films that are intended for public exhibition', AVSDA members cannot currently make an application for a certificate of exemption in relation to advertising. Accordingly, AVSDA members must currently submit all advertisements for unclassified film for classification.

The Office's preliminary view on the rationale behind the current allocation of exemption certificates is that the manner in which exemption certificates are allocated was "historical". It may reflect the times when theatrical distributions were considerably more dominant than home entertainment distributions.

³⁴ Part 1 Schedule of the Classification (Eligible Films) Determination 2002

ISSUES FACING AVSDA'S MEMBERS

This section summarises the classifications issues that confront AVSDA's members.

Requirement to Have Films Reclassified if Modified

The resubmission of previously classified films that have since been "modified" (as defined by the Commonwealth Act) constitutes the vast majority of films submitted by AVSDA members to the Office.

The Commonwealth Act provides no guidance as to what constitutes a "modification". That said, the Office exercises some discretion in how it applies the definition. For example, interactive menus are not currently considered "modifications" whereas the addition of English language sub-titles are.

The word "modification" could be interpreted very broadly to encompass modifications that do not change the substance of the film such as:

- verbatim English language or translated sub-titles;
- Changing a film's format (e.g video to DVD);
- Creating a compilation of previously classified material "box-sets" (e.g the first series of *Friends*);
- adding an interactive menu such as a choice between playing the movie and scene selection;
- colourising black and white films.

Arguably, when considered in light of the purpose of the Commonwealth Act and the Scheme, such modifications should not require reclassification.

AVSDA members would like certainty as to or some control over what is considered a "modification". The State and Territory legislation should mirror definitions of the Commonwealth Act.

AVSDA members would like to avoid resubmitting films where the modification does not change the substance of the film.

Further, AVSDA members must submit entire "exempt" films for classification if non-exempt material is added. For example, Music Performances are exempt from classification (subject to restrictions e.g can't be likely to be M+ or higher content) but if an interview with the performer is added then the whole film must be classified. We are informed this involves submitting lyrics from the performance and that this is practically very difficult.

AVSDA members would like to minimise the need to submit otherwise exempt films for classification.

Advertising Exemption for Unclassified Films

Under the Commonwealth Act, an advertisement for an unclassified film (such as a trailer) cannot be included on, say, a DVD for home release unless the advertisement has been classified. Exemption certificates are only given in relation to certain “eligible” films that are intended for public exhibition.

The Classification Board may only grant a limited number of certificates of exemption each calendar year in relation to eligible films. From 1 January 2003 the maximum number of certificates that may be granted in a calendar year is 100. They are divided according to a pre-determined list set out in the *Classification (Eligible Films) Determination 2002*.

AVSDA members wish to have access to certificates of exemption in relation to advertising unclassified films in at least the same capacity as do theatrical distributors.

Time and Expense of Submitting Films for Classification

Given the large number of films released for the home distribution market, the cumulative costs involved in submitting a film for classification are substantial both in terms of time and money.

Time

The Commonwealth Act provides for a maximum turnaround time for a classification of 50 business days from application. On its website, the Office states that it will turnaround classifications within 20 full business days. Urgent turnarounds are available.

Interactive Films (most DVDs) require the submission of (a) a statement of details of any contentious material, (b) The way to access any such material and (c) a complete menu list of all contents, showing the time for each separate element on the disc. The submission of these additional elements can be time-consuming and thus costly. There may be alternative approaches to deal with the Office’s concerns. This will need to be explored with the Office.

Costs

The standard costs for a classification of a non-interactive film is between \$510 and \$1010 per application. The costs are slightly less if the classification is for a previously classified revised film.

Interactive films that have an element of choice (such as choosing a scene as in most DVDs) are more costly – between \$600 and \$1490.

Urgent turnarounds cost an additional \$490. Due to the increasingly short windows for release, time is commercially critical and urgent applications are common.

Having a classification decision reviewed, such as in the case of one of the *Harry Potter* films, can be expensive (particularly if the DVD has extra content) as the fees are proportional to the total time of all elements of the DVD. It is possible for the cost of classification to reach \$11,110.

The Office has indicated that it is currently reviewing the costs involved in classification applications. It has also indicated that the cost of a classification application is based directly on recovering the costs incurred by the Office. AVSDA members seek to minimise the time and expense of the classification process.

RELATED ISSUES

This section outlines issues external to AVSDA's members that are relevant when considering possible themes for reform.

Issues Facing the Office

- Maintaining the purpose and principles of the Commonwealth Act;
- Abiding by the principles of the Agreement with the States and Territories that underlies the Scheme;
- Attitudes of the States and Territories to any reform;
- Costs associated with any reform in light of limited resources;
- Change may lead to uncertainty or may disadvantage other stakeholders;

These need to be further discussed with the Office.

Other Issues

- Ensuring that the classification procedure does not inhibit benefits to the public, including:
 - the release of suitable films to the public;
 - the availability of English and other language sub-titles for the hearing impaired and non-English speaking members of the public;
- Consideration of the impact of changes to the theatrical distributors including the allocation of exemptions.
- Impact on anti-piracy strategies (such as short windows of release);

WHAT CONSTITUTES AND EXEMPT FILM?

WHAT IS CONSIDERED AN ADVERTISEMENT?

What constitutes an *Exempt Film*?

Unless a film is exempt, the Commonwealth Act provides that films must be classified.

A film specified in this table is an exempt film. Applications for classification of exempt films are not necessary.

<u>Type</u>	<u>Description</u>
Business	A film of a promotional, technical or similar nature for use in the course of a business or trade
Accounting	A film for use in the keeping or verification of accounts
Professional	A film of a promotional, technical or similar nature for use in the course of a profession
Scientific	A film for use pursuant to a branch of knowledge conducted on objective principles involving the systemised observation of, and experiment with, phenomena
Educational	A film whose main purpose is for training, instruction or reference, as a manual, a lesson, an encyclopedia or a guide.
Current affairs	A film wholly comprising news reports or information about, or analysis of, current issues or events of public interest or importance
Hobbyist	A film wholly comprising a documentary record of a hobby or activity
Sporting	A film wholly comprising a documentary record of a sporting event
Family	A film wholly comprising a documentary record of a family event or activity
Live performance	A film wholly comprising a documentary record of a live artistic performance or that is used within such a performance
Musical presentation	A film wholly comprising a musical presentation
Religious	A film wholly comprising a documentary record of a religious event or activity
Community or cultural	A film wholly comprising a documentary record of a community or cultural activity or event

However, a film or computer game is not an exempt film if it contains:

- (a) an advertisement that has been refused approval; or
- (b) an advertisement for an unclassified film or computer game; or
- (c) an advertisement for a film that has been classified M or a higher classification or an advertisement for a computer game that has been classified M (15+) or a higher classification; or
- (d) material that would be likely to cause it to be classified M or a higher classification.

What is considered an Advertisement?

- Advertisements for an unclassified film *must not* be published without a certificate of exemption.
- A certificate can be obtained by distributor or exhibitor of an 'eligible film'. An eligible film must satisfy certain conditions including that it is intended for public exhibition.

All states and territories, except Queensland, take their definition for "advertisement" from the Commonwealth Classification Act. The definition of advertisement while self-referential is intended to cover all forms of advertising as is commonly understood.

The Commonwealth Act provides:

advertisement for a publication, a film or a computer game means any form of advertising for the publication, film or game, and includes:

- (f) advertising, whether visual or audible, whether in the form of written or spoken words or other sounds and whether in a book, paper, magazine, poster, photograph, sketch, program, film or slide or in any other form; and
- (g) advertising on a container or wrapping enclosing the publication, film or game; and
- (h) advertising on an item of clothing advertising the publication, film or game;

but does not include:

- (i) advertising for an exempt film or exempt computer game; or
- (j) advertising, in an imported publication, for a publication, film or computer game that has not been published in Australia; or
- (k) advertising, in an imported film or computer game that is in a form that cannot be modified, for a film or computer game that has not been published in Australia (the **advertised film or game**), whether or not the advertised film or game is later published in Australia.

Queensland has an essentially similar definition in the Classification of Films Act 1991.