

EXPLANATORY STATEMENT

Select Legislative Instrument 2007 No. 180

Issued by the Authority of the Attorney-General

Classification (Publications, Films, and Computer Games) Amendment Regulations 2007 (No. 1)

The *Classification (Publications, Films and Computer Games) Act 1995* (the Act) facilitates the operation of the national classification scheme, a cooperative arrangement between the Commonwealth, States and Territories. Among other things, the Act also establishes the Classification Board and Classification Review Board. Under the national classification scheme the Boards classify films (including videos and DVDs), computer games and certain publications.

Section 93 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Classification (Publications, Films and Computer Games) Regulations 2005* (the Principal Regulations) essentially provide for fees and fee related matters. The Regulations were overhauled in 2005 following a review of the classification fees and charges in line with the Australian Government's cost recovery principles.

The purpose of the *Classification (Publications, Films, and Computer Games) Amendment Regulations 2007* is to amend the Principal Regulations to:

- provide that the Convenor of the Classification Review Board rather than the Director of the Classification Board makes decisions regarding the partial refund of fees for the application for review;
- prescribe the way in which the period within which the Classification Board must make its decision is worked out; and
- prescribe 'such other period' within which the Classification Review Board must make a review decision and the way in which the period within which the Classification Review Board must make its decision is worked out.

The Regulations commenced on 1 July 2007 to coincide with the commencement of related amendments to the Act made by the *Classification (Publications, Films and Computer Games) Amendment Act 2007* (the Amendment Act). The Amendment Act received Royal Assent on 15 March 2007.

All but one of the amendments to the Regulations arises from changes made by the Amendment Act to reinforce the independence of the Classification Board and Classification Review Board and provide the Convenor with separate statutory powers to manage the administrative functions of the Classification Review Board independently of the Board.

The Classification Amendment Regulations 2007 is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Subregulations 16(2) to (5) - Partial refund

Previously under regulation 16, an applicant for the review of a classification decision was required to apply to the Director for a partial refund of the application fee if they withdrew their review application before the Classification Review Board had made a decision.

Regulation 16 has been amended so that review applicants must apply to the Convenor rather than the Director for a partial refund. This amendment removes the anomalous situation whereby the Director of the Classification Board has been responsible for exercising powers relating to the operation of the Classification Review Board.

Regulation 20 – Calculation of period within which Board is to make decision (Act s 87A)

Regulation 20 arises from section 87A of the Act, which was inserted by the *Classification (Publications, Films and Computer Games) Amendment Act 2000*.

Section 87A provides that the Classification Board must make a decision on (a) an application for the classification of a publication (s13), film (s14) or computer game (s17) (other than an enforcement application) or (b) an application for approval of an advertisement (s 29) within 20 days or such shorter period as is prescribed by the regulations. It also provides that the time from which the period (ie 20 days) runs is to be worked out in the way prescribed by the regulations. However, this has only been prescribed for applications for which a priority processing fee is paid, which must be dealt with in 5 days (Regulation 9).

Under subregulation 20(1) the time period of 20 days for the purposes of section 87A(1) commences on the first full business day following the day on which the staff assisting the Classification Board recommend to the Classification Board that the application satisfies the requirements of section 13, 14, 17 or 29 of the Act.

Although the requirements for an application under each section vary, generally speaking each section requires that an application is:

- (a) in writing and in the approved form;
- (b) signed by or on behalf of the applicant;
- (c) accompanied by the prescribed fee or the fee has been waived under section 91 of the Act; and
- (d) accompanied by a copy of the relevant material.

Examples of requirements unique to specific provisions include a written synopsis of a film in English (subparagraph 14(1)(d)(ii)) and a description of game play for computer games (subparagraph 17(1)(e)(v)).

Subregulation 20(2) and 20(3) – Suspension of time period

Subregulations 20(2) and 2(3) provide a ‘stop-the-clock’ mechanism for the time period under section 87A.

Under subregulation 20(2) the period does not include any period commencing on the day when the Classification Board requests expert, technical or other advice or information (20(2)(a)(iii)) or the rectification of a copy of a publication, film, computer game or advertisement (20(2)(a)(iv)) and ending at the start of the business day after the Classification Board receives a complete response to the request.

Subsection 87A(2) of the Act provides that if the Classification Board does not make a decision within the time period the Director must explain why in its annual report to the Minister. The mechanism under subregulation 20(2) is therefore intended to deal with circumstances which are likely to prevent the Classification Board from making a decision within the 20 day time period but should not result in a reportable breach of the time period.

Firstly, the Classification Board may need to obtain expert, technical or other advice or information, to ensure it understands the material before it and properly discharge its statutory duties.

Secondly, the ability to seek rectification is intended to deal with situations such as where the applicants have provided the Classification Board with an advance copy of a film which is watermarked to prevent piracy. The Classification Board is required under the guidelines to assess the impact of a film in making a classification decision however the impact of the film may be lessened by the distraction of the watermark. The regulation enables the Classification Board to request the applicant remove the watermark to ensure the impact of the film can be properly assessed without the applicant or the Classification Board being constrained by the statutory time frame.

Subregulation 20(3) would also exclude from the time period any period starting from when the Classification Board finds that the application does not meet the requirements as recommended by staff and ending when the Classification Board determines the application does meet the requirements of sections 13, 14, 17 or 29.

This proposed subregulation is intended to deal with situations where at face value an application appears to meet the requirements of the relevant provisions and, on that basis, staff had recommended the application is complete. However, it is subsequently found by the Classification Board that the application was incomplete or incorrect in some way. Suspending the time period under these circumstances is intended to prevent applicants from having to make a fresh application and pay another application fee whilst ensuring the Classification Board has the same amount of time within which to make its decision had the application not been found to be incomplete.

For example, upon viewing the film the Board finds that the applicant has underestimated the running time of the film and has paid a lower fee than is prescribed for a film of that running time. As a result the form is incorrect (as it includes the wrong running time), the correct fee has not been paid and the

application does not meet the requirements of the relevant provision. Under subregulation 20(3) the time period would be suspended while the applicant pays the additional amount and ensures their application is complete.

Regulation 21 – Period within which the Classification Review Board is to make a decision

Section 87B, inserted by the Amendment Act, provides that the Classification Review Board must make a decision on an application for review of a decision within 20 business days or such other period as is prescribed by the regulations. Section 87B is, for the most part, intended to mirror section 87A. It commenced on 1 July 2007.

Subregulations 21(1), 21(2) and 21(3)

Subregulation 21(1) provides that an application for review must be decided within 20 working days unless the Convenor is satisfied that the application is sufficiently complex that it is unlikely to be completed within 20 days in which case a review must be decided within 40 days.

Subregulation 21(2) provides a non-exhaustive list of circumstances in which the Convenor may be satisfied that an application is sufficiently complex that it is not likely to be completed within 20 days including applications dealing with a computer game, material which has the potential to promote, incite or instruct in a matter of crime or violence and enforcement applications. The circumstances set out in subregulation 21(2) were identified, following consultation with the Classification Review Board, as almost invariably taking more than 20 days due to the complexity or volume of work required of the Review Board.

In addition under subregulation 21(3) the Classification Review Board can extend the time period up to 40 days on written application by the applicant for review and the original applicant. This mechanism allows the parties and the Classification Review Board to agree to a longer time period where it is mutually convenient and will not cause prejudice to the parties.

The Explanatory Memorandum to the Amendment Act explains that the ability to prescribe a longer period in the regulations was considered necessary because merits review often involves extra work over and above the Board's classification process. Additionally, the Classification Review Board is a part-time body. Imposing a 20 day time period on the Classification Review Board in all situations is unrealistic and unduly burdensome.

Subregulation 21(4) – when the period commences

Section 87B also provides that the time from which the period – whether 20 days or another time period prescribed in the regulations – begins to run is to be worked out in the way prescribed by the regulations. Under subregulation 21(2) the 20 day or 40 day period starts to run on the first business day following the day when the Classification Review Board:

(a) decides that an application for review satisfies requirements of Part 5 of

the Act: and

(b) receives a copy of the relevant material for the purpose of review.

The Classification Review Board must determine the validity of an application for review. Whether an application is valid depends on whether it satisfies a number of elements (which can be established with varying degrees of difficulty and timeliness) contained in Part 5 of the Act. These are:

(a) the applicant has standing under section 42 of the Act;

(b) the application is made within 30 days after the applicant received notice of the original decision (ss43(3)(a)) or within such longer period as the Review Board allows (ss43(3)(b)); and

(c) the prescribed fee, if required, is paid or a fee waiver is granted.

Where the applicant for review is the Minister pursuant to paragraph 42(1)(a), the application must only be in writing, in the approved form and signed by or on behalf of the Minister. The Minister is not required to pay the prescribed fee and can make an application for review at any time.

The subregulation ensures that time will not start to run until the Classification Review Board has received a copy of the relevant material. Part 5 of the Act does not require that an application be accompanied by a copy of the material. Obtaining a copy of material can often be difficult for the Classification Review Board particularly in cases where the applicant for review is not the original applicant. Therefore the paragraph specifies that time for decision making will not start to run until the Classification Review Board has suitable access to the material at issue.

Subregulation 21(5) – suspension of time period

Subregulation 21(5) provides a ‘stop-the-clock’ mechanism for applications to the Classification Review Board similar to that for the Classification Board under subregulation 20(2) but applies to when the Classification Review Board requests expert, technical or other advice or information or the Board is requested to extend the time period under proposed subregulation 21(3).

Under subparagraphs 21(5)(a)(i) and 21(5)(b)(i) the time period (whether 20 or 40 days) stops running from the date of the written request for the relevant advice or information was made and recommence on the first business day after the day on which the requested advice or information is received by the Review Board. The re-commencement of the clock is subject to the Classification Review Board being satisfied that the advice or information received was adequate for the purpose requested.

Under subparagraphs 21(5)(a)(ii) and 21(5)(b)(ii) the time period (whether 20 or 40 days) stops running from the date a request for an extension of time is made to the Classification Review Board by the applicants for review and the original applications under subregulation 21(3) and recommences on the first business day after the day on the Classification Review Board decides whether or not to extend the period.

Subsection 87B(2) of the Act provides that if the Classification Review Board does not a decision within the time period the Convenor must explain why in its annual

report to the Minister. The mechanism under subregulation 21(5) enables the Classification Review Board to deal with unforeseen issues without breaching statutory time-frames.

The Classification Board and the Classification Review Board were consulted on the proposed amendments to the Principal Regulations and on the draft Instrument. The former Office of Film and Literature Classification was also consulted. Further consultation is unnecessary for this legislative instrument as this instrument is of a machinery nature only.