

# EXPLANATORY STATEMENT

## ISSUED BY THE MINISTER FOR HOME AFFAIRS

### *CLASSIFICATION (ADVERTISING OF UNCLASSIFIED FILMS AND COMPUTER GAMES SCHEME) DETERMINATION 2009*

The *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) facilitates the operation of the intergovernmental co-operative legislative scheme for censorship in Australia. The Classification Act provides for the classification of films, computer games and some publications.

#### **Authority for making the instrument**

The *Classification (Publications, Films and Computer Games) Amendment (Assessments and Advertising) Act 2008* (the Amendment Act) inserts subsection 31(1) into the Classification Act. The new subsection allows the Minister to determine a scheme for the advertising of unclassified films and unclassified computer games. Subsection 31(6), also inserted by the Amendment Act, limits the determination so that it may not permit the advertisement of a film that would be likely to be classified X 18+ or a film or computer game that would be likely to be classified RC - Refused Classification.

#### **Purpose of the instrument**

The advertising of unclassified products was prohibited under the previous classification arrangements. Limited exemptions were available only for cinema release films.

A new scheme has been introduced by the Amendment Act, complementary amendments to State and Territory classification enforcement legislation and this determination. The new scheme provides a consistent approach to advertising unclassified films and computer games and improves the quality of information provided to consumers. State and Territory legislation will now permit unclassified films and computer games to be advertised in accordance with this determination.

The new scheme does not apply to publications, nor does it permit unclassified films likely to be classified X 18+ or unclassified films or computer games likely to be classified RC to be advertised.

The determination sets out the requirements for display of an advertising message on various forms of advertising for unclassified films and computer games advising consumers to *Check the Classification*. Unlike the message currently displayed on advertising for unclassified cinema release films that have been granted an advertising exemption, this message remains relevant after classification.

The determination also limits advertising that can be placed together with classified films or computer games, such as trailers shown in cinemas or on DVDs. In this case,

advertisements for unclassified material are only allowed where the likely rating of the unclassified material is the same or lower than the classified work. Currently, films likely to be classified PG are allowed to be advertised during exhibition of a G rated film. The new scheme means that consumers will not be exposed to advertisements for higher level material when they have chosen to view or play content classified at a particular level.

For advertising that is to be placed with a classified film or computer game, the new scheme requires that the likely classification of the unclassified product be assessed either by the Classification Board or by an authorised assessor. The Amendment Act provides for applications to the Board for assessments.

For this sort of advertising, the determination sets out a scheme, similar to the existing industry assessor schemes for classification of previously classified films with additional content in Part 2, Division 2A of the Act, and for classification of television series films in the *Classification (Authorised Television Series Assessor Scheme) Determination 2008*. Consistent with the other schemes, the determination allows the Director of the Classification Board to authorise people to be authorised advertising assessors, once they have attended training approved by the Director. It also sets out the requirements for assessments they make. In summary, assessors must assess the likely classification of an unclassified film or computer game by considering the classifiable elements and their impact, and must base these assessments on the best information reasonably available to them and reasonable assumptions, or both.

The determination includes sanctions for abuse of the scheme, including providing the Director with the ability to suspend or revoke an assessor's authorisation to make assessments under the scheme and to bar a distributor from advertising unclassified films or computer games with classified products where the scheme is being abused. These sanctions are drawn from the existing assessor schemes. As with existing assessor schemes, it is anticipated that they would be used rarely, and only in circumstances where the Classification Board has provided assistance to the assessor to improve the quality of their assessments, or discussed concerns with the distributor and the Director considers that this extreme sanction is warranted. The Director would need to comply with procedural fairness requirements.

### **Issues giving rise to the need for the instrument**

The scheme was developed in response to industry's concerns that the advertising framework for unclassified material was cumbersome and outdated. The increasing risk of piracy has led to products being made available for classification very close to their release date. The prohibition on the advertising of unclassified material inhibits the marketing of classifiable products. Advances in technology and changes to the entertainment market mean privileging unclassified cinema release films over other unclassified films and unclassified computer games is no longer appropriate. It is more equitable to apply a consistent set of rules for advertising unclassified films, whether they are released in cinemas or on DVDs, videos or other formats and unclassified computer games, subject to safeguards.

## **Consultation**

On 28 August 2006, the Attorney-General's Department released a discussion paper 'Review of Advertising of Unclassified Material under the National Classification Scheme' for public consultation. The paper looked at ways to update and simplify the requirements for advertising unclassified material. Submissions generally supported the proposal to move to a scheme that does not advantage one distribution method over others. Face-to-face meetings were held with industry representatives and peak bodies to discuss the proposal. In March 2007, State and Territory Censorship Ministers agreed to proposals for the new advertising scheme.

The Classification Board, State and Territory officials and peak industry bodies were consulted on the policy proposal developed following the initial consultations and on the determination during the drafting process. The Minister for Home Affairs has consulted State and Territory Censorship Ministers before making the determination, as required by subsection 31(5) of the Classification Act.

## **Commencement arrangements**

The determination commences on 1 July 2009, which is the day on which the relevant provisions in the Amendment Act commence.

Consequential amendments to the *Classification (Markings for Films and Computer Games) Determination 2007* (the Markings Determination) and the *Classification (Publications, Films and Computer Games) Regulations 2005* also come into effect on 1 July 2009.

Complementary amendments to State and Territory legislation come into effect on 1 July 2009.

The determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA). In accordance with subsections 44(1) and 54(1) of the LIA, it is not subject to disallowance or sunseting because the Classification Act facilitates the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more of the States, and authorises the instrument to be made by the Minister.

The Hon Brendan O'Connor MP  
MINISTER FOR HOME AFFAIRS

## **ATTACHMENT**

### **Details of the *Classification (Advertising Of Unclassified Films and Computer Games Scheme) Determination 2009***

#### **Section 1 - Name of the Determination**

The Determination is called the *Classification (Advertising of Unclassified Films and Computer Games Scheme) Determination 2009* (the Advertising Determination).

#### **Section 2 - Commencement**

The Advertising Determination commences on 1 July 2009 in conjunction with amendments to the Classification Act made by the Amendment Act.

#### **Section 3 – Revocation**

The Advertising Determination revokes the *Classification (Advertising for Unclassified Films) Instrument 2005* (the Unclassified Films Instrument). The Unclassified Films Instrument sets out conditions for advertising and other matters related to the grant of exemptions by the Classification Board which permitted certain cinema release films to be advertised before classification. When the advertising scheme commences, the Unclassified Films Instrument will no longer be needed.

Transitional provisions for unclassified films which currently have an exemption under the Unclassified Films Instrument are outlined in the *Classification (Publications, Films and Computer Games) Amendment Regulations 2009 (No ----)*.

#### **Section 4 – Application of the scheme**

This clause ensures that, consistent with the limitations on the scheme contained in the Amendment Act, ‘submittable publications’ and sexually explicit films are excluded from the scheme. Similarly, films or computer games that are likely to be classified RC will continue to be prohibited from being advertised.

The complementary amendments to State and Territory classification enforcement legislation provide that a person must not publish an advertisement for an unclassified film or unclassified computer game otherwise than in accordance with the scheme established by this determination.

#### **Section 5 - Definition**

The Act as defined in the determination is the *Classification (Publications, Films and Computer Games) Act 1995*. The section also contains notes to point readers to definitions of terms used that are contained in the Act.

## **Section 6 – Conditions for advertising unclassified films and computer games**

Schedule 1 of the instrument sets out the conditions under which an unclassified film or an unclassified computer game may be advertised.

## **Section 7 – Industry self-assessment of likely classification**

Schedule 2 of the instrument sets out the requirements relating to assessment by industry of the likely classification of an unclassified film or unclassified computer game.

## **SCHEDULE 1 – CONDITIONS FOR ADVERTISING UNCLASSIFIED FILMS AND UNCLASSIFIED COMPUTER GAMES**

### **Clause 1.1**

The definitions include the long and short messages to be displayed on advertising. The long message advises consumers to ‘Check the classification’. The short message is ‘CTC’. The focus of these messages is on advising consumers to check the classification before making entertainment choices.

Definitions of ‘unclassified film’ and ‘unclassified computer game’ are included. These complement section 4, and reinforce that only unclassified films likely to be classified R 18+ or lower and unclassified computer games likely to be classified MA 15+ or lower can be advertised.

### **Clause 2.1**

This clause contains the general requirement to display the advertising message in an advertisement for an unclassified film or computer game.

The following display requirements are based on those contained in the repealed Unclassified Films Instrument and the Markings Determination. This means that classification information will continue to be displayed in ways familiar to consumers.

Some advertising, such as standees, display bins, larger printed advertisements and small internet advertising, is not required to display a message. This continues the exceptions to the display requirements contained in the revoked Unclassified Films Instrument.

The exceptions are based on the understanding that these media are not usually relied on by consumers to obtain classification information; so the benefits of imposing marking requirements on these items would be minimal, while imposing significant costs on industry.

### **Clause 2.2**

This clause contains the requirements for display of the short message, and an explanation of that message, in film guides or directories advertising future session times

for unclassified films. The display requirements are those contained in clause 2.12 of the revoked Unclassified Films Instrument.

### **Clause 2.3**

This clause contains the requirements for the display of the message on printed advertisements. A printed advertisement with an area of less than 75 cm<sup>2</sup> must display the short message. A printed advertisement with an area of at least 75 cm<sup>2</sup> but less than 300 cm<sup>2</sup> must display the long message box. Minimum size requirements are set out for each.

The display requirements are those contained in clause 2.13 of the revoked Unclassified Films Instrument.

### **Clause 2.4**

This clause contains requirements for the display of the short or long message box in internet advertisements other than moving image advertisements. The display requirements are those contained in clause 2.14 of the revoked Unclassified Films Instrument.

Internet advertisements that are moving image advertisements are dealt with in clause 2.5.

### **Clause 2.5**

This clause contains requirements for the display of the message for moving image advertisements, such as trailers in cinemas or on DVDs or game discs. The requirements are based on clause 2.15 of the Unclassified Films Instrument. The distinction between 'celluloid' and 'medium other than celluloid' advertisements has been removed, so that industry can choose between displaying the message at the beginning of the advertisement or on a 'ticker' during the advertisement.

The length of time the message must be displayed depends on the length of the advertisement. Instead of requiring the ticker to be displayed for a minimum of 10 seconds, as in the Unclassified Films Instrument, the ticker will need to be displayed for the length of the advertisement where this is less than 10 seconds. The minimum of 10 seconds could, where there is an advertisement for a range of products including an unclassified film or computer game, lead to the ticker advising consumers to 'Check the Classification' while unrelated products such as socks, clothing or garden products are being shown on the screen. This undermines the effectiveness of the message.

The size and placement requirements for the ticker are based on clause 2.7 of the Unclassified Films Instrument.

A note is included to clarify that where the advertisement for an unclassified film or computer game is part of an advertisement including other unrelated material, only the advertisement for the film or computer game is covered by the determination and its

length, not that of the advertising for other material, is the relevant time for the purposes of applying this determination.

### **Clause 2.6**

This clause contains requirements for display of the message in small screen advertisements. A small screen advertisement is a screen with a presentation format of less than 300 pixels in height.

The display requirements are those in clause 2.16 of the Unclassified Films Instrument.

### **Clause 2.7**

This clause contains requirements for ceasing to display the message and updating advertising to reflect the actual classification of the product. It also describes certain kinds of advertising material that do not need to be updated. The requirements are based on clause 2.2 of the Unclassified Films Instrument. An important improvement for consumers is the new requirement that trailers in cinemas must be updated to the actual classification no less than 48 hours before the release of the film for public viewing.

The Advertising Determination requires most advertising, such as internet advertisements, cinema trailers and newspaper and magazine advertisements to be updated to reflect the actual classification of a film or computer game.

As the new message will remain valid after classification, updates will not be required where it is not feasible or it would be unduly onerous to change advertising material after classification. This reduces the regulatory burden on industry, while continuing to point consumers towards information to assist them to make informed entertainment choices. Subclause 2.7(2) sets out the circumstances where the industry will not be required to update the advertising message.

For example, the subclause clarifies that print advertisements which may appear after classification do not have to be updated if the print deadline had passed by the time the product was classified. In-store kiosks, trailer loop reels, demonstration discs and in-store retail loops do not have to be updated because the cost to industry of remastering and redistributing these products would outweigh any benefit to consumers. These are not forms of advertising that consumers generally rely on for classification information.

### **Clause 2.8**

This clause contains general requirements for legibility and clarity of the message. It also requires that it be displayed for a sufficient period to allow it to be read. The requirements are those in clause 2.9 of the Unclassified Films Instrument.

### **Clause 2.9**

This clause sets out the requirements for advertising unclassified films and computer games together with a classified film or computer game.

The clause provides that where industry wishes to show an advertisement for unclassified material together with a classified work (eg. a trailer with a cinema release film, on a DVD or on a computer game disc), this will be permitted only where the likely rating of the classified work is the same or lower than that of the unclassified work. Informally, this has been referred to as the commensurate audience rule. The clause requires that the likely classification be assessed either by the Classification Board or by an authorised advertising assessor.

Under the previous arrangements for exemptions for cinema release films, there was an anomaly that allowed films likely to be classified PG to be advertised during exhibition of a G rated film. In effect, this meant that a G audience could be exposed to inappropriate material. The Advertising Determination removes this anomaly.

Examples of material that is subject to the commensurate audience rule include: trailers and other advertisements for unclassified films or computer games shown before films in cinemas; trailers and advertisements on classified DVDs and computer game discs; trailers and advertisements on separate discs packaged together with classified DVDs and computer game discs; and printed advertisements inserted into classified DVD and computer game containers.

#### **Clause 2.10**

This clause contains technical requirements for the display of the long message box. The requirements are those in clause 2.17 of the Unclassified Films Instrument.

## **SCHEDULE 2 – ASSESSMENT BY INDUSTRY OF LIKELY CLASSIFICATION OF FILMS AND COMPUTER GAMES**

#### **Clause 1.1**

This clause defines a barring notice as having the same meaning as in paragraph 31(3)(d) of the Act. Subsection 31(3) permits the determination to provide for the Director to issue such notices and specify their effect, including but not limited to barring a person from being an authorised advertising assessor.

#### **Clause 2.1**

This clause empowers the Director of the Classification Board to authorise a person as an ‘authorised advertising assessor’. Consistent with the existing authorised assessor schemes, completion of training approved by the Director is a prerequisite for authorisation.

#### **Clause 3.1**

This clause sets out how assessments of the likely classification of unclassified films or computer games are to be made.



An assessment of the likely classification of an unclassified film or computer game must be based on the best information reasonably available at the time, reasonable assumptions, or both.

An assessment must not be made if there is insufficient information available to enable the assessor to assess the likely content of the unclassified film or computer game. If no assessment can be made, the product cannot be advertised with a classified film or computer game.

### **Clause 3.2**

This clause requires an assessor, when assessing likely classification, to identify the likely classifiable elements and their likely impact.

### **Clause 3.3**

This clause allows the assessor to revoke or amend an assessment. This is necessary because the content of a film or computer game can change during production, in ways that affect its likely classification.

### **Clause 3.4**

This clause requires the assessor and distributor to retain a copy of each assessment and the information on which it was based for at least 12 months. This is necessary to enable the operation of clause 4.1.

### **Clause 3.5**

This clause imposes an onus on the distributor not to rely on an assessment if the distributor has information unavailable at the time of the assessment that he or she reasonably believes would lead to a different assessment of the likely classification of the unclassified film or computer game. In this circumstance, if they wish to advertise the unclassified film or computer game with classified products, the distributor would need to obtain a new or amended assessment.

### **Clause 4.1**

This clause allows the Director to ask an authorised advertising assessor for copies of assessments the person has made in the preceding 12 months, and the information on which the assessments were based, if the Director has reason to believe that the person has made an assessment that did not reasonably apply the Classification Act, the Classification Code, and the Classification Guidelines.

This ensures that if the Director becomes aware of concerns about whether the commensurate audience rule is being complied with, he is able to, in effect, audit assessments made by the relevant assessor.

## **Clause 4.2**

This clause allows the Director to issue a barring notice to an unauthorised advertising assessor. The notice has the effect of terminating or suspending the assessor's authorisation for a period of time specified in the notice. While it is important to include this robust sanction, it is anticipated that it would be used only where it is clear that the scheme is being abused.

The Classification Board currently indicates its view of the likely classification of some unclassified cinema release films when granting an advertising exemption. While the Board makes the best assessment possible at the time, the final product may have a different impact than was anticipated and on occasion it subsequently classified the film at a higher or lower level. The scheme does not seek to hold authorised advertising assessors to a higher standard than the Board can achieve.

In the first instance, it is anticipated that the Director or the Board would discuss any issues with assessments with the assessor and assist the assessor to improve the quality of their assessment. If appropriate, the Director may ask an assessor to undertake further training as a starting point for resolving problems. If the assessor does not attend further training when requested to do so, or there are repeated instances where the assessment is not reasonable, the Director may suspend or revoke the assessor's authorisation. Procedural fairness requirements apply, so that the assessor must first be given an opportunity to show why the Director should not issue a barring notice.

The clause is similar to the approach in the Authorised Television Series Assessor scheme and the Additional Content Assessor scheme.

## **Clause 4.3**

This clause allows the Director to issue a barring notice to a distributor in serious cases of abuse of the scheme. This could have the effect of requiring the distributor to apply to the Board for assessments, rather than using authorised advertising assessors, or, in extreme cases, would prevent the distributor from advertising unclassified films or computer games together with classified films or games for a specified period.

It is envisaged that a barring notice would be an action of last resort, used in cases of wilful abuse of the system. The primary responsibility for the standard of assessments rests with the assessor. However, one reason for including a clause to sanction distributors is to ensure that distributors take their responsibilities regarding provision of information to assessors seriously, and accept an assessor's judgment that there is insufficient information on which to base an assessment, if this is the case.

The Director's power to issue a barring notice is subject to procedural fairness requirements. It is anticipated that if the Director had concerns about a distributor's approach, the Director would discuss this with the distributor. Before the Director issues a barring notice, there would also be a formal process of notifying a distributor of the intention to issue a notice and an opportunity for the distributor to put the case why it should not be issued.

This clause is similar to the approach in the Authorised Television Series Assessor scheme and the Authorised Content Assessor scheme.

**Clause 4.4**

This clause provides that AAT review is available for administrative decisions made by the Director under the advertising scheme. These are the Director's decisions not to authorise a person as an assessor, to terminate or suspend a person's authorisation and to prohibit distributors from advertising unclassified material.