

## **EXPLANATORY STATEMENT**

Issued by the Authority of the Minister for Justice  
*Classification (Publications, Films and Computer Games) Act 1995*  
*Classification (Approved Classification Tools) (Application for Revocation of Classification)*  
*Determination 2015*

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

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

Subsection 22CH(8) of the Act enables the Minister, by legislative instrument, to determine either or both of the following:

- a specified period for the purposes of subparagraph 22CH(3)(b)(ii) of the Act;
- a specified class of persons for the purposes of paragraph 22CH(3)(c) of the Act.

### **Legislative context**

Division 2AA in Part 2 of the Act sets out the scheme for classification by approved classification tools. Under subsection 22CA(1) of the Act the Minister may approve a classification tool for the purposes of classifying publications, films and/or computer games. Under subsection 22CF(1) a decision made by an approved classification tool is taken to be a decision of the Classification Board (the Board).

Under subsection 22CH(1) of the Act, the Board has the power to revoke a decision made by an approved classification tool if it is of the opinion that, had the material not been classified by the tool, it would have given the material a different classification or consumer advice. This power is discretionary and may be exercised on the Board's own initiative or on application pursuant to subsection 22CH(2). Under subsection 22CH(4), if the Board revokes a classification made by an approved classification tool it must classify the material.

Under paragraph 22CH(3)(b) of the Act, an application to the Board to revoke a classification by an approved classification tool must be made within 3 months after the day the decision made by the approved classification tool takes effect or, if another period is specified in a determination under subsection 22CH(8) of the Act, within that longer period.

Under paragraph 22CH(3)(c) of the Act, an application to the Board to revoke a classification by an approved classification tool must, if a class of persons is specified in a determination under subsection 22CH(8) of the Act, be made by a person included in that class.

### **Purpose of instrument**

This instrument specifies the class of persons who may make an application to the Board to revoke a classification made by an approved classification tool pursuant to paragraph 22CH(3)(c) of the Act. The specified class of persons comprises the Minister for Justice, a participating Minister and the publisher of the classified material. A participating Minister is a minister responsible for censorship matters in a state or territory participating in the

National Classification Scheme. A publisher means a person who has published or intends to publish classified material.

This instrument also extends the amount of time (after a classification by an approved classification tool) for a person from the specified class of persons to make an application to the Board to revoke a classification made by an approved classification tool, from 3 months to 2 years pursuant to subparagraph 22CH(3)(b)(ii) of the Act.

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

The entire and only purpose of subsection 22CH(8) of the Act is to enable the Minister to limit the persons who may make an application to revoke a classification by an approved classification tool and to extend the period of time for those persons to make an application.

The Explanatory Memorandum to the Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014, which created the classification tool scheme in law, articulated a clear intention that not everyone should necessarily be able to apply to revoke a classification, stating:

Paragraph 22CH(3)(c) will also allow the Minister to determine (or limit) by legislative instrument the class of persons who may apply to the Board to consider revoking the classification decision produced by an approved classification tool. For example, the legislative instrument may be used by the Minister, if necessary, to minimise applications from persons who are vexatious or may have no bona fide interest in the classification.

Publishers clearly have an interest in the classification and consumer advice given to their products and should be able to apply for revocation. Participating Ministers should also be able to apply for revocation to ensure that the interests of the states and territories and the broader community are represented. By specifying a class of persons, this instrument will prevent applications from persons who are vexatious or may have no genuine interest in the classification.

It is noted that section 22CH of the Act is not a review mechanism. It simply articulates the Board's specific and limited discretionary power to revoke a classification by an approved classification tool. The determination also does not affect the rights of publishers, ministers or other persons to obtain a review of the merits of a decision of a classification tool. A review of such a decision by the Classification Review Board (the Review Board) is available pursuant to section 43 of the Act.

The determination also does not prevent any person from making a complaint to the Board and asking that it act on its own initiative to consider revoking a classification by an approved classification tool. This approach was identified in the Explanatory Memorandum to the Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014 as a key purpose of the Board's power to revoke a classification on its own initiative, stating:

The intended purpose of subsections 22CH(2) and (3) is to enable the Board to act on its own initiative (for example, in response to consumer complaints) to consider whether it is appropriate to revoke a decision made by an approved classification tool.

Given the significant volume of content that may be classified by approved classification tools, a period of 3 months (after a decision is made by an approved classification tool) may

not be sufficient to enable potential applicants to identify classifications which they consider should be revoked and for content to be classified by the Board. Ministers and publishers may be reliant on members of the community and consumers to identify potentially contentious classifications made by an approved classification tool. On the other hand, it may not be appropriate (nor permitted under the Act) for the specified period to be open-ended.

Two years is a reasonable amount of time to allow for issues with classifications and consumer advice given to lower profile content to be identified and an application for revocation to be made. The instrument therefore strikes a balance between public confidence in classifications made by approved classification tools and the need to reduce uncertainty around these classifications.

Details of the determination are included in the [Attachment](#).

### **Consultation**

The Department consulted the Director of the Board, state and territory classification officials and the following other stakeholders. Consumer groups: the Australian Christian Lobby (ACL) and Australian Council on Children and the Media (ACCM). Industry bodies: the Interactive Games & Entertainment Association (iGEA). Those consulted were given the opportunity to view the draft instrument and provide comments.

One stakeholder suggested that the definition of ‘publisher’ may be too broad for the purposes of the determination. It is considered that the definition is appropriate as the specified class of persons who may make an application for revocation needs to be sufficiently broad and flexible to include the different persons involved in the sale and distribution of material who may have a commercial interest in the classification given to the material by an approved classification tool.

Another stakeholder suggested that the specified class of persons who may make an application for revocation in the determination should also include ‘a person aggrieved by the decision’. Under the Act, a person aggrieved by a decision of the Board may already apply to the Review Board for a review of the decision. This right to apply for a review applies to classifications made by approved classification tools and will not be affected by the determination. It is not considered that ‘a person aggrieved by the decision’, should be able to apply for a revocation of a classification made by an approved classification tool when they already have access to the more appropriate merits review process.

The purpose of the discretionary power at section 22CH of the Act is to enable the Board to better oversee and manage the classification tool scheme. It is not meant to provide an additional merits review mechanism. As raised in the Explanatory Memorandum to the Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014, the Board could still act on its own initiative, for example where a matter is brought to its attention, to consider whether it is appropriate to revoke a decision made by an approved classification tool.

### **Commencement arrangements**

The determination commences on the day it is registered.

This 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, the determination is not subject to disallowance or sunseting because the 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.

This instrument does not require a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Hon Michael Keenan MP  
Minister for Justice

## ATTACHMENT A

### Details of the *Classification (Approved Classification Tools) (Application for Revocation of Classification) Determination 2015*

#### Section 1 – Name

This section provides that the title of the determination is the *Classification (Approved Classification Tools) (Application for Revocation of Classification) Determination 2015*.

#### Section 2 – Commencement

This section provides for the determination to commence on the day it is registered on the Federal Register of Legislative Instruments.

#### Section 3 – Definitions

This section sets out the definitions of terms referred to in the determination.

#### Section 4 – Class of persons who may make an application for revocation

This section specifies that, for the purposes of paragraph 22CH(3)(c), the class of persons who may make an application for revocation comprises the Minister, a participating Minister and the publisher of the classified material.

An application for revocation means an application made under paragraph 22CH(2)(b) of the *Classification (Publications, Films and Computer Games) Act 1995* (the Act) for the Classification Board to exercise its power to revoke a classification made by the operation of an approved classification tool.

A participating Minister is a minister responsible for censorship matters in a state or territory participating in the National Classification Scheme. A publisher means a person who has published or intends to publish classified material. The definition of ‘publish’ includes sell, offer for sale, let on hire, exhibit, display, distribute and demonstrate.

#### Section 5 – Time period to make an application for revocation

This section specifies that, for the purposes of subparagraph 22CH(3)(b)(ii) of the Act, the period of time for making an application for revocation is within 2 years after the day the decision made by the operation of the approved classification tool takes effect.

Under subsection 22CF(4) of the Act, a classification made by an approved classification tool takes effect when it is included in the National Classification Database or any replacement register.