

Content Regulation in a Converged World

Discussion Document

This discussion document informs part of the cross-government convergence work programme.



Contents

Contents.....	2
Foreword.....	4
1: Purpose	5
2: Context.....	7
What is convergence?.....	7
Trends: market and competition	8
Trends: content and platforms	9
The impact on regulation and policy	10
3: Classification of content.....	11
Why is it important for content to be rated or labelled?	12
Jurisdiction issues	13
On-demand content.....	13
Online games	14
Addressing the lack of clarity.....	14
4: Options for audio-visual content	15
Principles of classification regulation	15
Criteria for assessment	15
Option 1: Status quo – no regulatory intervention	15
Option 2: Voluntary code – no regulatory intervention	16
Option 3: Extend the Broadcasting Act regime to cover on-demand content	17
Option 4: Extend the Classification Act regime to include on-demand content	19
Option 5: A broadcasting regime with increased self-regulation	20
Option 6: A new Media Content Standards Act.....	21
Overseas models.....	22
Options to discuss	23
5: Advertising restrictions	24
What does the Act restrict?	24
International comparisons.....	24
The impact of convergence.....	25
The effects of inconsistency.....	25
Addressing the inconsistency.....	26
6: Options for advertising restrictions	27
Option 1: Status quo	27
Option 2: Provide an exemption for major events.....	27

Option 3: Remove Sunday mornings restrictions, and protect programming space	28
Option 4: Remove the current restrictions.....	28
Option 5: Extend the current restrictions to online content	29
Administering the regime	29
Options to discuss	30
7: Election programmes - Part 6 of the Broadcasting Act.....	31
Election broadcasting governed by two Acts.....	31
Differences between the two regimes	32
8: New Zealand content: the Government’s toolbox	34
The New Zealand system	35
The impact of convergence.....	35
9: Submissions process	37
Sending your submission	37
Publication of submissions.....	37
10: Summary of questions	38
Chapter 4: Options for audio-visual content	38
Chapter 6: Options for advertising restrictions	38
Chapter 7: Election programmes – Part 6 of the Broadcasting Act	38
Chapter 8: New Zealand content: the Government’s toolbox	38
Annex A – The current regimes.....	39
The Broadcasting Act regime	39
The Classification Act regime	41

Foreword

With New Zealand's media and entertainment sectors merging, access to data increasing and former geographical barriers becoming less relevant, more choices are becoming available to consumers across a variety of platforms.

Consumers now expect access new services from anywhere at any time on any number of devices including smart phones, laptops, tablets and e-readers.

As Communications and Broadcasting Minister, I find it encouraging to see how the traditional broadcasting and telecommunications sectors have adapted to embrace the opportunities presented by convergence.

But in order to help Kiwis make the most of these opportunities we need to ensure our legislation is appropriate in a converged market.

Much of the legislation that governs the telecommunication, information technology, media and entertainment sectors was written before the effects of convergence were present in New Zealand so it's timely now to consider whether our laws remain fit for purpose.

As signalled in our Green Paper, this discussion document is one of a number of workstreams underway to consider the effect convergence is having in New Zealand. It reviews how communications and broadcasting regulation relates to content. It also addresses inconsistencies between how election programmes are treated by the Broadcasting Act and Electoral Act.

We don't want regulation that constrains the sector or dictates how it should develop. We want to ensure businesses are regulated equally, to encourage an innovative and competitive market.

This paper doesn't propose a radical overhaul of our current regulatory framework. Rather, it identifies several areas that may warrant further consideration in order to ensure that our laws accurately reflect the current media landscape and remain fit for purpose in a converging sector.

It examines how existing regulations apply across technology platforms, highlights inconsistencies and considers, on a case by case basis, whether platform distinctions remain appropriate.

I encourage both industry stakeholders and consumers to put forth their ideas on the issues and options we've outlined as well as any relevant points we may have missed.



Hon Amy Adams
Minister of Justice
Minister for Communications
Minister of Broadcasting

1: Purpose

The convergence of the previously separate telecommunications, information technology, media and entertainment (TIME) sectors is opening up exciting possibilities for businesses and individuals and is having an impact on almost every part of the economy. In the media sector it is providing opportunities for business to expand into new markets, and to access and compete on a global scale, and it is giving consumers more choice in the services they use, as well as how they access services and content and from where.

The rapid developments in the market mean it is timely to consider the role of policy and legislation in supporting New Zealanders to take advantage of the opportunities presented by convergence. Legislation should enable competition and innovation, without limiting the sector's development.

A cross government response is in place to consider the impact of convergence on various aspects of legislation. This is set out in the paper *Exploring Digital Convergence: Issues for Policy and Legislation*, which can be accessed at www.convergencediscussion.nz. This cross government response includes:

- Content Regulation in a Converged World (this paper)
- Review of the Telecommunications Act 2001
- A review of Cyber security
- A study of the creative sector use of copyright and design regimes
- The Data Futures Partnership
- Consultation on GST and cross border services and intangibles.

Some of these work programmes form part of the Government's Business Growth Agenda, alongside wider government initiatives. A priority under the Business Growth Agenda chapter on Building Innovation is to ensure market regulation supports and does not hinder the development of new and innovative products and services. More information can be found at <http://www.mbie.govt.nz/what-we-do/business-growth-agenda>.

This paper focuses on the effects of convergence in the media sector on the regulation of content in New Zealand. It looks particularly at the requirements and restrictions relating to the classification of content, broadcasting of election programmes, and advertising times. It also considers government's interventions to support the production of broadcast content.

In this paper, the principle of reasonable access to relevant, high quality local and global content, legally, safely and cost effectively for all New Zealanders is not in question. It is intended to be a "health check" on our existing frameworks, to ensure they reflect the current media landscape and remain fit for purpose. It examines how existing regulations apply across platforms, highlights inconsistencies and considers, on a case by case basis, whether platform distinctions remain appropriate.

This paper focuses on the Broadcasting Act 1989. The Act establishes the broadcasting standards regime and the Broadcasting Standards Authority, and the funding agencies NZ On Air and Te Māngai Pāho. It stipulates restrictions on broadcast advertising times and regulates the broadcasting of electoral programmes.

The paper also considers the Films, Videos, and Publications Classification Act 1993 as it relates to transmitted audio-visual content. This Act establishes a regime for films, and in some cases other publications, to be referred for rating/classification and labelling prior to being supplied to the

public. It establishes the Office of Film and Literature Classification and position of Chief Censor to oversee this regime.

Neither the Broadcasting Act nor the Films, Videos, and Publications Classification Act specifically address content delivered through online transmission methods.

This review considers the requirements of the Acts as they relate to online content, highlighting four areas where distinctions between different platforms are present in legislation:

- **Content classification and standards** – the differing standards and classification regimes for conventional, linear broadcasting, online content, and films and DVDs;
- **Election programmes** – inconsistencies between the provisions in the Broadcasting and Electoral Acts;
- **Advertising restrictions** – the differing treatment of television and radio, in which restrictions apply to some public holidays and Sunday mornings (in the case of television), compared to other media;
- **Policy tools for supporting local content** – among possible ways of supporting desired local content, New Zealand focuses on contestable funding, with a secondary emphasis on owning public broadcasters. In the light of convergence it may be timely to take a fresh look at the range of tools available to government.

This paper requests feedback on the issues highlighted, and also on other issues considered pertinent to the discussion. This paper does not examine the broadcasting standards as set out in the Broadcasting Act, nor the statutory definition of “objectionable” in the Films, Videos, and Publications Classification Act.

This paper also does not cover issues being consulted on through the Review of the Telecommunications Act 2001, creative sector study, or review of GST and cross border intangibles and services. Any feedback received on these issues will be passed to the relevant department with policy responsibility.

2: Context

The Government's long term vision for the media sector is to ensure New Zealanders have reasonable access to relevant, high quality local and global content, legally, safely and cost effectively.

To ensure delivery of this objective, the Government aims to support healthy competition in the sector, encouraging innovation and enabling choice for consumers. In order to do this successfully it must ensure policy and legislation are fit for purpose in a converging sector.

What is convergence?

Convergence is a term used to describe the common delivery of previously discrete service functions such as broadcasting and telecommunications over shared digital infrastructure, and the consequent reduction of boundaries between previously separate industries.

This process is transforming everyday life and is having a profound effect on the economy. Convergence offers a number of benefits to New Zealand. These include improving access to markets for content creators and reducing the barriers to entry for local and international industry players to enter the New Zealand market. This is disrupting traditional business models by enabling greater competition and innovation in industry revenue models and product offerings. Increasingly, telephony, data and audio-visual content are being bundled together in a complementary product offering. Consumers now access different types of content, once only available through different devices and mediums, on a single device via online transmission. This increases both accessibility and potentially choice. (These developments are discussed in more detail in the paper *Exploring Digital Convergence: Issues for Policy and Legislation*.)

However, convergence also present challenges. The rapid development of the sectors means that legislation, which was largely written before the effects of convergence were apparent in New Zealand, may no longer be fit for purpose. The emergence of new transmission methods, which were not envisaged when legislation was written, and the continuing globalisation of the marketplace may mean there are inconsistencies or gaps in legislation, which can detrimentally affect competition and innovation.

Trends: market and competition

Technology and market changes have played a significant role in changing the dynamics across the converging sectors. The rapid entry of telecommunications and internet businesses into the distribution market for online video has addressed many of the previous concerns resulting from the lack of competition in the domestic broadcast sector. There are now four broadcasters transmitting via Freeview or pay to view television, four Subscription Video On Demand (SVOD) providers, and seven Transactional Video On Demand (TVOD)¹ providers.

Freeview (main channels) and pay to view TV	Subscription Video On Demand	Transactional Video On Demand
Māori Television	Lightbox	Easyflix
Mediaworks	Neon	Googleplay
Sky TV	Netflix	iTunes
TVNZ	Quickflix	NZ On Screen
		Quickflix
		Video Ezy On Demand
		Xbox video

Government intervention has also played a role in shaping the competitive dynamics of the market, with funding provided through NZ On Air and Te Māngai Pāho for New Zealand content, as well as through the New Zealand Film Commission and New Zealand Screen Production Grant.

In addition, the Government continues to own TVNZ and owns and funds Radio New Zealand and Māori Television, as well as providing funding to TVNZ for its Pacific Service. In 2015/16, the Government will invest over \$200 million in the New Zealand media and entertainment sectors.

¹ Transactional video on-demand involves single purchases – e.g. “pay per view” – as distinct from subscription.

Trends: content and platforms

Content is driving much of the growth and change in the TIME sectors, enabled by the increase in access to data and the ability to download or stream more data more quickly across a variety of platforms.

The recent increase in the number of providers of audio-visual content – four of the online providers launched in New Zealand in the last nine months – is providing consumers with more choice, and more content to watch. Local infrastructure providers are reporting a huge increase in internet traffic since the start of 2015. This rapid increase in the amount of data-based content consumed is not restricted to audio-visual content: the Radio New Zealand website reported a 57 per cent growth in average unique audience size between 2014 and 2015, and the number of New Zealanders accessing news online continues to increase – it is now at 54 per cent².

Content is now provided not just by professional media companies, but by individuals and amateur groups, and the introduction of platforms such as YouTube, Periscope and Meerkat makes this content easily accessible to consumers in both New Zealand and abroad. Geographic boundaries are becoming less relevant to both consumers and providers.

The rise in popularity of internet-enabled mobile devices, including phones, tablets, e-readers, and other devices, means that both consumers and providers expect content to be readily accessible at any time, from anywhere. The recent Nielsen Media Trends Study 2015 shows that of the 3.7 million New Zealanders watching television content, 20 per cent are watching both online as well as on a television set, and 4 per cent are watching online only. The same study shows that a growing proportion of content viewing is now time-shifted, with consumers choosing not just what they want to watch, but when and from where.

² Nielsen Consumer and Media Insights 2008 – 2014

The impact on regulation and policy

The Government is committed to ensuring New Zealanders have access to relevant, high quality local and global content, legally, safely and cost effectively. To support this, the government has a role to ensure that legislation and policy frameworks are set up to enable innovation and competition, while protecting the rights of New Zealanders.

While TIME markets are rapidly merging into one broad communications market, our regulatory systems remain segmented, reflecting the historic split between traditional services. The delineations in the current framework pose a number of possible risks, including:

- **Misalignment of policy and legislation with market, behavioural and technological realities.** For example, the extensive use of social media during election campaigns has caused some to question the continued relevance of rules relating to campaigning on radio and television.
- **Gaps in the existing framework's coverage of new forms of content, applications, and services.** For example, restrictions on advertising timing and placement, stipulated in the Broadcasting Act, mainly affect television and radio, and do not apply to online platforms, even if they are carrying the same content.
- **Reduction of boundaries between historically distinct devices, services and industry sectors leading to inconsistent treatment of like content, devices or services.** For example, the Telecommunications Act is the only form of sector-specific economic regulation for the sector, and broadcasting networks are specifically excluded from that Act. This issue is being considered as part of the review of the framework for telecommunications.
- **Institutional ambiguity as a consequence of sectoral convergence, such that several regulators - or no regulators - have a mandate to address pressing market or consumer concerns.** For example, requirements for the classification of content stipulated in the Broadcasting Act and the Films, Videos, and Publications Classification Act do not explicitly apply to internet-based video-on-demand services. As such, providers of ostensibly similar content or services over different platforms face uncertainty about their regulatory obligations.

Our regulatory system should 'treat likes alike' across the converged sector, and be flexible and durable enough to cope with future change. Policy and legislation should enable innovation and growth, while ensuring a fair and even playing field for competition. They should enable change in the market without steering it. Policy and legislation should, for the most part, be technology neutral to allow innovation and change within the market, and it should be clear on how it handles cross border issues.

While the fundamental principles of our policy and legislation are not in question, it is timely to consider whether they remain fit for purpose and deliver the outcomes intended in a converging sector.

3: Classification of content

The proliferation in recent years of online content, especially the increasing choice of video on-demand services, as well as games and new sources of audio-visual content, has highlighted a lack of clarity in our regimes for classifying content. Previously there has been a clear line between the classification of broadcast content, which is regulated by the Broadcasting Standards Act 1989, and non-broadcast content, such as films, DVDs and video games, which is regulated by the Film, Videos, and Publications Classification Act 1993 (the Classification Act). That Act provides that any publication (such as books, newspapers, sound recordings and photographs) can be classified, but a film must be supplied to the public with a label demonstrating that it has either an unrestricted rating or a restricted classification. Publications that are deemed or classified as objectionable and injurious to the public good cannot be supplied to the public. Descriptions of both regimes are included as Annex A.

The regulation of film and broadcasting developed separately and has largely remained separate. The volume of broadcast content, the short deadlines for preparing some content, such as news, and considerations of journalistic independence precluded a pre-classification regime by a state body such as that applied to films. (Broadcasters are required to apply classifications themselves, however, in accordance with agreed codes. Broadcasters also cannot broadcast part or all of an objectionable publication without the approval and on such conditions as determined by the Chief Censor.)

The requirements stipulated in the Broadcasting and Classification Acts are administered respectively by the Broadcasting Standards Authority, whose function is to receive and determine complaints from persons who are dissatisfied with the outcome of “complaints about any programme broadcast”, and the Office of Film and Literature Classification, which is responsible for the non-broadcast content - the films and other publications - covered by the Classification Act. These two state regulatory agencies are supplemented by self-regulatory bodies. The Film and Video Labelling Body (FVLB) was set up by industry and approved under the Classification Act to apply ratings to unrestricted films. The Online Media Standards Authority has been set up by broadcasters to receive complaints and maintain codes in relation to news and factual content placed online (and not otherwise broadcast) by its members. The Advertising Standards Authority’s remit extends to advertising in all media, but only the content of the advertisements, not the regulations surrounding restricted times for television and radio advertising, which are covered in the Broadcasting Act and administered by the Ministry for Culture and Heritage. And, as newspapers and magazines have developed their online presence and added audio-visual material, the Press Council has extended its remit accordingly.

There is however a lack of clarity on standards and classification requirements for online audio-visual content, discussed below, which provides uncertainty for both provider and consumer and has led to different providers using different regimes. We need the law to be clear about the requirements for online audio-visual content, so that providers know what their obligations are and consumers can make informed choices. We also want the law to be fair, so that providers offering similar services or content are subject to the same obligations, and that these obligations reflect the realities of a converging sector.

Given the changes to distribution methods and business models, it is timely to consider whether the current legislation remains fit for purpose.

This discussion document relates to the classification of audio-visual content provided professionally to consumers, for the purpose of entertainment and information, including on-demand services. It is not intended to cover content uploaded to the internet by individuals, such as personal videos shared through YouTube, or audio-visual material used online for other purposes, such as e-commerce or news websites. However, the increasing popularity of such unregulated content sources should be considered in determining the appropriate level of regulation of professionally distributed content.

Why is it important for content to be rated or labelled?

Classification provides important public benefits. It allows consumers, especially parents, to quickly and easily determine whether content is safe and appropriate to watch. Recent research by the BSA and NZ On Air showed that 92 per cent of children used the warning messages on television or the various ratings as an indication of what was appropriate for them to watch. The same research showed that 50 per cent of parents frequently used the warnings or ratings to guide what their children watch³.

The Broadcasting Act requires every broadcaster to be responsible for maintaining standards in its programmes and their presentation. The Broadcasting Standards Authority (BSA) is responsible for administering the standards regime, determining formal complaints about programmes on broadcast media and encouraging broadcasters to develop and observe appropriate Codes of Broadcasting Practice. The Codes of Broadcasting Practice establish guidelines for classification standards. For example, under the Responsible Programming standard, “warnings should be considered when programme content is likely to offend or disturb a significant number of the intended audience”. Potential breaches are dealt with by the broadcaster in the first instance and can be referred to the BSA if required.

In addition to the common labels found on films, the Classification Act provides a vital mechanism for ensuring that objectionable material, defined as content that describes or depicts matters such as sex, horror, crime, cruelty or violence in such a manner that the availability of the publication is likely to be injurious to the public good, is identified. This ensures that objectionable material is prevented from entry to New Zealand. In 2013/14, of the 1671 publications (excluding advertising material) examined by the Office of Film and Literature Classification (OFLC), 320 were banned, two of which were mainstream films (*I Spit on your Grave 2* and *House on the Edge of the Park*) which were banned due to their portrayal of sexual violence⁴.

The audience should be able to rely on programme classifications, advisories and other information for an indication of a programme’s likely content, which in turn allows them to regulate their own, and children’s, viewing or listening behaviour. This ensures people are not caught off guard by content they find offensive or disturbing. These different standards and classification regimes operate from the principles that viewers should be able to make informed choices, and children and young people should not be exposed to material intended for adults until they reach a level of maturity and experience that would allow them to cope with such material. In particular children and young people should not be exposed to material they find disturbing.

³ NZ On Air, Broadcasting Standards Authority and Colmar Brunton, Children’s Media Use Study 2015
<http://bsa.govt.nz/publications/research>

⁴ OFLC Annual Report 2014 www.classificationoffice.govt.nz/PDFs/2014-OFLC-Annual-report.pdf

In addition to providing audiences with information, standards regimes also protect the interests of the “real people” who appear in audio-visual content. They provide for accuracy in reporting and the fair treatment of people who become the subjects of content. This is all the more important in an era in which evolving television “reality” genres, for example, are raising complex issues of privacy and consent.

These essential principles underlying classification and standards regimes – including the maintenance of agreed community values, protection of children, fair treatment of people featured in content, and accuracy – are balanced with the right to the freedom of expression as stipulated in the New Zealand Bill of Rights Act 1990.

Jurisdiction issues

Our classification frameworks currently only apply to content providers located within New Zealand. There is a difference between sending material to New Zealand to be screened here, as distributors do when a film is released locally, and allowing material to be accessed, as SVOD and TVOD providers do when they grant New Zealanders access to material stored on overseas servers.

This has implications for competitors and consumers. Overseas providers may be subject to different policy and legislative requirements. They may not incur the same compliance costs as domestic businesses, and they may provide different, or less, information to consumers about the appropriateness of content, which may not be easily comparable to the information provided by domestic providers.

Whether our domestic frameworks are amended or not, overseas providers, like New Zealand on-demand providers, are encouraged to provide information to consumers that lets them make informed decisions about what to watch.

On-demand content

The Ministry for Culture and Heritage and other relevant Government agencies consider that on-demand content, whether available for free or subscription, does not fall within the provisions of the Broadcasting Act or the labelling provisions of the Classification Act.

The definition of broadcasting does not include any transmission of programmes “made on the demand of a particular person for reception only by that person”. The definition excludes content downloaded on-demand, though not live-streamed content. Despite on-demand services being out of scope of the Broadcasting Standards regime, the BSA has a practice of considering complaints about breaches of broadcasting standards if the content is available for free and has previously screened on the same broadcaster’s free-to-air channel in the last 20 working days. The BSA also has a voluntary agreement with SKY to treat any complaints about NEON in the same manner as pay to view television.

On-demand content also does not fit the definition of a “film” required for the labelling provisions of the Classification Act to apply, as that part of the Act only contemplates tangible or physical items on which a label can be displayed, rather than digital copies. There is no legal requirement to submit on-demand content for classification prior to supplying it to the public. However, on-demand content does fall within the definition of “publication”, and if it is “objectionable” the possession and distribution of this content is an offence with maximum terms of imprisonment of 10 and 14 years respectively.

Online games

The Classification Act provides that video games are a type of film. However, video games are exempt from the general requirement that they be supplied to the public with a label, unless they are likely to be restricted. This means that a distributor is required to judge, either from the nature of the game or from classifications given in other jurisdictions, whether the game is likely to have a restricted label in New Zealand. If the game is likely to be restricted, then it must be submitted for classification and labelling. If it is not likely to be restricted, then it can be supplied to the public without a label. Most games that come within the latter category will be supplied to the public with overseas classification labels – predominately Australian G, PG and M labels. Games are treated differently to other films because, at the time the Classification Act was written, video games were very different to the 3D, realistic and immersive experience of games today.

Like other films, video games are often purchased or played over the Internet from a mobile device, computer, or games console from overseas websites that may or may not display a New Zealand classification.

Addressing the lack of clarity

It is important that we clarify the requirements on providers of content and consider whether in a converged communications sector it remains appropriate for different transmission methods to be subject to different classification regimes, and indeed what regimes are appropriate.

The next chapter outlines several options for the classification of audio-visual content provided for entertainment purposes. We welcome comments on these options, as well as alternatives for this type of content.

4: Options for audio-visual content

This chapter considers the rules relating to the classification of audio-visual content and asks whether they remain appropriate in a converged world. In particular the review considers how current rules apply across platforms and whether current inconsistencies in treatment remain appropriate.

Principles of classification regulation

As discussed in the previous chapter, the principles underpinning the classification regime are intended to ensure viewers are able to avoid content likely to be inappropriate or offensive to the audience concerned and prevent young people viewing graphic sexual or violent content inappropriate for their age.

Criteria for assessment

When considering the rules relating to the classification of audio-visual content, consideration needs to be given to the requirement for the regime to be agile, adaptable, and able to deal easily with significant volumes of content.

It should also be platform neutral, treating the same content the same way regardless of the transmission methodology, such as films and television programmes, which may be shown through traditional broadcast methodologies or on online platforms.

The rules should also operate well in a cross border environment and have the minimum compliance costs necessary to achieve the goals and deliver the principles set out above.

Option 1: Status quo – no regulatory intervention

Neither the broadcasting, nor the film and video regime specifically applies to on-demand content. Content providers are responsible for interpreting the existing regimes in relation to new services.

The current lack of clarity means the responsibility is on the provider of the content to determine which, if any, regime applies to their content. This has led to different providers opting to use different regimes, based on their own legal interpretations of the Acts. It could also lead to providers not classifying their content, if, as suggested above, none of the current legislation applies to the labelling of on-demand content.

This lack of clarity may cause unfair competition, with some providers facing the costs associated with pre-classification while others do not, which could harm the sector and stifle innovation. It may also lead to a lack of clarity for consumers, with different ratings systems applying to similar or even the same content, and some content not rated at all.

However, this option does recognise the potential difference in transmission methods, which may justify different requirements for classification. Broadcast content, under the Broadcasting Act, is considered to be transmitted on a “one to many” basis, whereas on-demand content is considered to be transmitted on a “one to one” basis. New Zealand already has different codes of conduct for free to air television compared with pay to view television, to recognise the differences in the accessibility of the content and the proactive choice made by the consumer to access pay content. The same argument could be made for content delivered on-demand, which is at the discretion of the consumer and often requires registration and sometimes payment to access.

Option 2: Voluntary code – no regulatory intervention

Providers could choose to develop a voluntary regime to which they all submit.

The industry might elect to work together on a voluntary classification regime for audio-visual content delivered over the internet, in the same way as the Online Media Standards Authority (OMSA) operates. Such a system might be similar to the existing broadcasting standards system, with an agreed set of standards, a process for classifying content, and a user-friendly complaints process. Whether a new complaints body would be established or the mandate of an existing body such as OMSA would be extended, would be up to the providers to decide.

The system could be flexible and efficient so that it could easily adapt as the market develops and classify content quickly, so that it is available to the public without delay. This is important to ensure New Zealand-based providers are not faced with delays that would disadvantage them compared with their overseas competitors. It could also take into account the differing levels of control consumers have in accessing content, as the current set of standards for broadcast television do.

As with any current classification system in New Zealand, overseas providers would not necessarily be subject to this system, although they may choose to subject their content to it, and a clear, low-cost regime with public value may be attractive to international providers who would likely wish to comply with domestic regulation where possible.

This option would require the industry to maintain a high and consistent standard of content classification, to mitigate the risk that different content providers classified similar content differently, causing confusion for consumers.

Leaving the regime up to the industry would be the least disruptive option to implement, as no legislative change would be required; the Classification Act would continue to apply with respect of objectionable publications. There would be little cost to Government. On-demand providers could be informed immediately that neither current regime requires on-demand content to be labelled and that they were encouraged to be proactive in providing this vital information to consumers.

This option may also be one of the quicker to implement, and could be enacted as an interim measure while legislative change is considered. The Ministry for Culture and Heritage could monitor the situation and, if a satisfactory solution was not delivered from this option, a legislative amendment could be considered at a later stage.

However, this would mean that there was a fourth classification/standards regime for media content, potentially adding to public confusion.

Option 3: Extend the Broadcasting Act regime to cover on-demand content

Video on-demand could be deemed to be a form of broadcasting, or as closely related to it, and placed within the broadcasting standards regime in the Broadcasting Act 1989.

As noted, the current Broadcasting Act applies to content provided on a “one to many” basis, and as such on-demand content falls outside its remit. Live streaming of content is implicitly covered by the Act as it is considered to be provided on a “one to many” basis.

The Act could be amended to extend the BSA’s and the broadcasting standards regime’s jurisdiction explicitly to cover video on-demand and live streaming. This could be done by amending the “one to many” definition of “broadcasting” in the Act, or by extending to the broadcasting standards regime the Act’s definitions of “content” and “transmit on-demand”. These latter terms were added to the Broadcasting Act to allow the broadcasting funding agencies NZ On Air and Te Māngai Pāho to fund video on-demand content that had not also been broadcast in the conventional, linear sense.

Classifications would be assigned to content by the video on-demand providers, as they are now by broadcasters. Complaints could be made by the public in response to content, and the rulings on those complaints would guide the programming of future content. However, content deemed objectionable under the Classification Act or that had been classified as objectionable by the OFLC would be unable to be screened.

The expansion of the broadcasting standards regime would have several advantages:

- It would provide consistent treatment for similar content, ensuring that the public had recourse to a single, already familiar regime.
- It would also provide flexibility: the Broadcasting Act allows for broadcasting codes to be varied in detail and prescriptiveness. This flexibility could be used to recognise the different levels of control an individual exercises over the reception of content, as with the first two options outlined.

This co-regulatory approach, between the provider and a regulator, may be a pragmatic option when considering the large volume and fast-changing content often provided through online platforms. The existing codes, which include journalistic standards such as accuracy, would be extended to factual content placed solely on-demand. As noted, the complaints process of the Broadcasting Act allows for the interests not just of viewers, but of people who may be the subject of factual content, by allowing complaints, for example, about unfair treatment or violations of privacy.

Finally, applying the broadcasting standards regime to on-demand content would be consistent with previous decisions by Parliament to give both the broadcasting funding agencies and the publicly owned broadcasters a role in funding and producing on-demand content.

However, this option does have limitations. When thinking about applying regulation to online content there is always a question of where to draw the line between content that should be under a common regime and that which should be treated differently. Many on-demand services provide “adult” content, or content that is not shown on broadcast television, for example YouTube channels that provide product reviews or clips of music videos. Some objectionable content is also available “on-demand” on the internet. The Broadcasting Act regime is not intended to deal with this type of content.

Objectionable content of this kind was intended to be covered by the definition of “publication” in the Classification Act. A domestic distributor of an objectionable publication commits a serious criminal offence. However, as the Classification Act does not apply outside this country, the onus is on consumers accessing and importing content for their own consumption to avoid accessing “objectionable” material. There is a risk that, in trying to align the regulation of broadcast and on-demand content, a wider range of online content might be captured by a regime that was not established to deal with some of the more extreme, or criminal, content available online.

Another feature of the broadcasting standards regime is that it relies on broadcasters themselves to classify the content in advance, rather than the third party approach taken by the Classification Act. This runs the risk that errors could be made, different classifications applied due to individual interpretation of the standards, or that the interpretation of the regime is subject to the bias of the broadcaster. Such problems have not been evident under the broadcasting regime to date, however.

In addition, while the complaints process can help to steer future classifications, it does not resolve the issue of an individual accessing content inappropriate for him or her. These risks may be less under the Classification Act regime, where all content is classified by a third party in advance of transmission.

There may also be costs for industry associated with this option. Currently, broadcasters whose total revenue for a year exceeds \$500,000 are required to pay a levy to the BSA.⁵ This contributes to the cost of maintaining the broadcasting standards system. On-demand providers might also be required to pay the levy, should the system be extended to cover their content. Further work would need to be done to ascertain whether the thresholds would need to be adjusted to capture on-demand providers.

Finally, this option may take longer to implement than the first two options discussed, due to the length of time required to introduce and implement legislative changes. This could be mitigated, however, by requesting that on-demand content providers voluntarily use the broadcasting standards regime ahead of a law change to make this a requirement. The BSA is well-established and well-placed to respond to what is likely to be a gradual increase in complaints related to on-demand content.

⁵ Levies are calculated by multiplying the broadcaster’s total revenue for the financial year by 0.00051

Option 4: Extend the Classification Act regime to include on-demand content

Under this option the commercial providers of on-demand content would submit that content to the Film and Video Labelling Body prior to allowing the public to access it.

The Classification Act regime provides a very important public service, protecting the community from objectionable content, restricting some content to certain groups of viewers, and labelling films so that people can make informed choices. The labelling regime is already applied to films shown in cinemas, DVDs (including content other than films), and video games. Under this option it could be extended to on-demand providers.

Content providers would be required to submit content to the Film and Video Labelling Body (FVLB – see Annex A) in advance of making it available to consumers. For material that had been classified as unrestricted in Australia or the UK, the FVLB would issue New Zealand ratings by cross-rating to Australian or UK classifications and issue the appropriate label. For material that had either been restricted or not classified in these countries, the FVLB would either examine the content and determine the rating (for material likely to be unrestricted) or refer it to the Office of Film and Literature (OFLC) for classification. For some content this would mean that no label was required (for example, documentaries) or a label would be issued at the cost of \$27 (GST exclusive).

The main benefit of this option is that it allows all online content to be regulated, to some extent, under the same Act. SVOD and TVOD services intending to provide content in New Zealand would be subject to both classification and labelling requirements. Other types of films, videos and other publications would remain subject to the existing requirement that they be not “objectionable”, with the appropriate enforcement measures available to deal with any criminal activity.

The main criticism of this regime in the past has been of cost and time delays. The maximum cost of classifying a film, DVD or BluRay is \$1,124.40 and of rating a video game is \$1,431.10. The Chief Censor has discretion to reduce this fee by up to 75 per cent, for instance for local and festival films. It can take several weeks to classify a film, or three days for an urgent service, for an additional fee.

However the majority of films and videos being distributed in New Zealand have been rated in Australia or the UK, so only a small proportion of them need to go through the OFLC.

Applying the Classification Act regime to on-demand content could cause a problem for broadcasters, whose content could be subject to two regimes, depending on whether it was broadcast or put on their on-demand sites. This could be inefficient and lead to different classifications being applied to the same content.

For the public, this option would have the disadvantage of continuing to treat the same material differently depending on the platform it appeared on - broadly, between linear broadcasting and non-linear, on-demand distribution.

There would also be resourcing pressures on the Labelling Body and the OFLC if these bodies were required to examine a large increase in material. This problem could be exacerbated by the quick turnaround required by broadcasters who receive content very close to the intended broadcast date or wish to release a popular drama series, for example, at the same time it is available in the United States. However, as noted above, much content has already been rated in Australia or the UK, which would speed up the process.

As with option 3, this option requires legislative amendment, which would take several months. However, once legislation is in place, the system could begin working relatively quickly, assuming any staffing pressures could be addressed promptly, as the FVLB and OFLC have been established for many years.

Option 5: A broadcasting regime with increased self-regulation

An option could be to shift the broadcasting standards regime closer to self-regulation by broadcasters and other providers of video on-demand. Legislation could establish a standards body, comprising broadcasters and on-demand providers.

This option is a variation of option 4 - that is, it could encompass linear television and VOD - but with an increased role for content providers.

Content providers would operate a standards body, which would be established by statute. This standards body would consider and rule on most complaints as a collective, rather than have complaints dealt with by individual content providers, or appealed to the BSA.

Alternatively, individual content providers could nominate individuals who could be certified, under a statute, as regulators, or they could individually follow a commonly agreed code or template.

Under this option the BSA could still potentially be retained to address more complex complaints or those involving fundamental matters of principle or rights such as freedom of expression and privacy.

There are several benefits of this option for content providers. Self-regulation can be cost and time efficient. It is also flexible, allowing standards and processes to develop as required, and as the media environment evolves. Community involvement in the development of standards would still be important.

Having decisions made by a collective body, rather than individual providers as under a regime of complete self-regulation, would allow for consistent responses to complaints and might lead to fewer decisions being appealed.

With fewer individual decisions to consider, the BSA could focus on fundamental matters of principle. The conclusions it reached might inform updates to the standards developed by the standards body.

There are risks involved with this option. Increased self-regulation places a great deal of trust in content providers to act responsibly and in the public interest. The risk can be mitigated by retaining the BSA, which could still consider “hard cases”. Current practice also suggests that the risk would be limited. Broadcasters currently work with the BSA to develop standards codes, which they undertake to maintain. The majority of complaints received are dealt with in a timely and effective manner, with only a minority being appealed to the BSA.

Implementing this option would take time. Legislative amendments would be needed to establish a standards body and amend the role of the BSA.

Option 6: A new Media Content Standards Act

A new piece of legislation, referred to here as the Media Content Standards Act, could be enacted to replace the two existing regimes and create a single media standards and classification regime.

Under this option a single Act would cover all audio-visual content and would ensure that content is subject to the same regulation, regardless of the platform it appears on. It would be important that the regime be user-friendly, both for consumers relying on the ratings and for providers who need a timely and reliable service.

This option would be free from the constraints the other regimes have in being required to work within definitions of “broadcasting”, “films” and other terms defined in a way that does not reflect the current environment. “Starting from scratch” would allow the government to devise a technology-neutral regime that regulates the classification of content without reference to how that content is accessed or delivered. This would ensure an even playing field between different providers.

Further consultation would be needed on whether the new legislation requires content to be pre-vetted, and whether it is self-regulated by the industry or by another standard-setting body. One possibility would be to use an international self-regulation tool, such as the IARC rating tool used in the gaming industry. This would provide the benefits of self-regulation, such as speed and cost, and at the same time would help to ensure consistency of ratings provided by different distributors.

The concept of a new regime encompassing a range of media raises the question of the print media’s status. The print media, which is currently self-regulated by the Press Council, is also converging: broadcast and print media have moved online and are posting audio-visual content, and the lines between traditional media and new forms of media such as blogs and social media sites is blurring. In 2013 the Law Commission tabled a report⁶ that investigated the impact of technological convergence on the news media and proposed a single regulatory regime, though applying only to news and current affairs. It is not proposed that the Press Council would be made part of a statutory system under this option, although it might opt to be part of a fully self-regulatory regime.

Creating a converged Media Content Standards Act would take longer than the other options to put in place, especially as consultation with a wide range of interested parties would be required. In the meantime, on-demand providers would still be uncertain about which, if any, regime they should apply to their content. However, it could provide a comprehensive and enduring solution to the inconsistencies described in this section.

⁶ *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013)

Overseas models

There are several overseas jurisdictions which already use regulatory systems designed to reflect a converged market. These can provide examples to us in considering the optimal option for the New Zealand sector.

The most commonly cited examples of “converged regulators” are Ofcom, the independent regulator and competition authority for the United Kingdom’s communications industries, and the Australian Communications and Media Authority (ACMA).

However, while both countries have responded to convergence by placing broadcasting, telecommunications and online regulatory functions under the same body, they still have different classification regimes for different platforms.

Ofcom - UK

Regulation of broadcasting in the United Kingdom is very similar to New Zealand. Ofcom develops broadcasting codes and responds to public complaints if broadcasters are not considered to have addressed initial complaints adequately.

Ofcom is also involved in the regulation of internet and telecommunications services. This does not extend to classifying on-demand content. That role is performed by the British Board of Film Classification (BBFC). The BBFC examines and rates films and videos before they are released. The format of the content has an impact on classification. Decisions on the age rating of DVDs can occasionally be stricter than at the cinema because there is a higher risk of underage viewing in the home.

Classification of films, television and music videos available online is not compulsory. The BBFC works with a number of on-demand services to provide voluntary age ratings for video content available for download and streaming online.

While Ofcom is a good example of one body regulating broadcasting and telecommunications, classification is platform-specific and is not compulsory for on-demand services.

ACMA - Australia

Australia maintains a broadcasting standards regime similar to our model, with broadcasters developing codes of practice in consultation with ACMA. Once implemented, ACMA monitors these codes and deals with unresolved complaints made under them.

A separate regime exists for classifying film and video content, set out in the Classification (Publications, Films and Computer Games) Act 1995. A Classification Code sets out the different classification categories. A Classification Board makes decisions about films, computer games and publications, including those available online. Decisions can be reviewed by the Classification Review board. The Classification Branch manages the application process, handles complaints and promotes compliance and education.

ACMA also has a role in monitoring other types of online content. People can make complaints about online content that may be offensive or illegal to the ACMA Hotline. ACMA can investigate complaints and take action on potentially illegal content, including directing removal of prohibited content (if hosted in Australia), notifying prohibited URLs to ISP filters, or notifying the police.

Options to discuss

There are important choices to be made about how audio-visual content in New Zealand is regulated, and the interests of citizens are protected, in the future. We therefore welcome your views on the issues for classification of content outlined above, and any others not mentioned. We also welcome comments on the potential options for resolving these issues, and again welcome other options.

One additional consideration should be the time it will take to implement any change, and whether an interim solution is needed in the short term.

Questions for readers:

- Do you think on-demand content should be classified in some way?
- If so, should similar content across different platforms be regulated in the same way?
- Do you have a preferred option or concerns with any of the options presented?
- Do you have any other options or suggestions?
- Creating a new legislative regime would take time to get right. Should the Government take any action in the meantime to ensure on-demand content is classified?
- If so, which option would be best? Are there any other options?
- Are there any overseas models you think we should look at? Which ones?
- Are there any other comments you wish to make?

Please give reasons for your answers.

5: Advertising restrictions

The Broadcasting Standards Act 1989 restricts advertising times on television and radio, but not on other platforms. In a converged sector, where the same content may be shown across multiple platforms, either at the same time or time-shifted, it is pertinent to consider whether the restrictions on television and radio broadcasting remain appropriate.

What does the Act restrict?

Section 81 of the Act prohibits advertising on television on Sunday mornings between 6:00 am and 12 noon, as well as on the morning of Anzac Day, and all day on Good Friday, Easter Sunday and Christmas Day. Radio advertising is also prohibited on Anzac Day morning and on Good Friday, Easter Sunday and Christmas Day.

Section 81(4) of the Broadcasting Act permits programmes broadcast on radio or television during the times in question to carry sponsorship or underwriting credits, although what constitutes programme sponsorship and what constitutes advertising have become increasingly unclear with sponsorship credits often resembling spot advertising in the manner of their presentation.

Section 81(5) of the Act also allows advertising on television at any time where the signal for a programme originates from outside New Zealand, is transmitted simultaneously to both New Zealand audiences and overseas audiences, but is targeted primarily at audiences outside New Zealand. This means that where New Zealand is “streaming” an international feed without, for instance, adding its own commentary and inserting advertisements, the restrictions for domestic programming do not apply.

Section 81 of the Broadcasting Act only applies to content broadcast through traditional linear television transmission and not to other platforms.

International comparisons

These restrictions are not common internationally. Most comparable countries do not limit advertising on particular days, but rather enforce a maximum number of minutes per hour at all times, and/or stipulate when advertisements can be shown in relation to programme content. For example:

- Australia’s Special Broadcasting Service (SBS) may only broadcast advertisements and sponsorship announcements before or after programmes or during “natural” breaks. It may also only show five minutes of advertisements per hour.
- The UK restricts advertisements to 12 minutes per hour, and 8 minutes per hour during the peak times of 20:00 to 23:00.
- Canada limits speciality services, community television and low power television to 12 minutes of local advertisements per hour.
- USA has no restrictions.

With the exception of voluntary agreements in relation to children’s programming, New Zealand does not have restrictions on advertising minutes per hour. Many other countries also have public television channels that do not carry advertising.

The impact of convergence

With the impact of convergence, programmes are now shown across multiple platforms, both simultaneously with traditional broadcasting methods and/or time-shifted. The current restrictions in the Act treat advertising on linear television and radio differently to other forms of advertising, which are mostly unrestricted as to timing or placement. (An exception is outdoor advertising, the placement of which is subject to local by-laws.⁷) This raises the question of whether this inconsistency is appropriate.

Under the current legislation, a broadcaster might broadcast content during the restricted times without advertising on television, but stream it online at the same time with advertising. Content shown only online during these times could also be shown with advertising.

At present, however, there appears to be little to no advertising during these hours: broadcasters are not currently introducing advertisements into content streamed on Sunday mornings online, and SVOD and TVOD services tend not to carry advertising at all.

The issue may become more pertinent in the future, however, as content providers seek to do more online.

The effects of inconsistency

This discrepancy between restrictions for different platforms could adversely affect competition in the sector. Advertising revenues can be an important source of revenue, especially to free to air providers, and the restrictions on television advertising on Sunday mornings may mean lost revenue, which could potentially damage competition, particularly between those providers whose revenue is primarily based on advertising, as opposed to subscriptions.

Limited analysis suggests that there is a relatively stable level of advertising revenue. The Advertising Standards Authority reported total television advertising revenue in 2010 at \$607 million, and in 2014 at \$614 million. It is not clear that altering the restrictions on advertising times would impact that – it may simply alter its distribution over the time period. However, there is a greater potential for lost revenue during major events broadcast during these times. For example, the Rugby World Cup 2015 is being hosted in the Northern Hemisphere, which means the main finals matches will be broadcast on Sunday morning, New Zealand time. Advertising during these events is a potentially lucrative source of revenue for the rights holder.

Another consideration is whether the different platforms justify different restrictions. As noted in the previous chapters on classification, traditional television broadcasting is usually considered to be transmitted on a one to many basis, compared to on-demand content, which is transmitted on a one to one basis. This additional choice and control by the consumer may justify less stringent restrictions on the on-demand content. Whether this applies also to online streamed content, which is considered to be transmitted on a one to many basis, should be considered.

⁷ Another example of regulation applied to advertising, though not to do with timing or placement, is that promotional material relating to films (i.e. trailers, posters and the covers of DVD boxes) must be submitted for classification under the Classification Act before being supplied to the public.

It is also true that traditional television transmission remains the most popular method for watching audio-visual content in New Zealand. Nielsen's Media Trends Report 2015 shows that 75 per cent of New Zealanders over 5 years of age watching television do so on a television set⁸, and advertising in linear broadcasting could also be considered different to most other forms of advertising, in that it interrupts content and thus restricts the formats of programmes, in comparison to advertising online, which is often only preceding or surrounding content.

However, viewing figures show the average viewing figures for Sunday mornings peak at just over 200 000, compared with an average peak viewing figure, for example in December 2014 of 1.3 million. These numbers also include relatively large numbers of young viewers, particularly during the hours of 07:00 and 09:00, and TV 2 is the most popular channel, which screens children's programmes and programmes popular with younger audiences for most of its Sunday morning schedule. The voluntary code relating to advertisements during children's programming would continue to protect this programming space, regardless of a change to wider legislation.

One other aspect to consider is that the Section 81 restrictions on Sunday morning advertising effectively create a non-commercial space in television programming, which can be used for minority or special interest content that, without high rating support, is not popular with advertisers. One of the statutory roles of the funding agency NZ On Air is to fund content for minority interests within the total audience, and there is a risk that removing the Section 81 restrictions on advertising would make it even more difficult for the agency to place such programmes on television channels. Parliament's purpose in including Section 81 was, in part, to maintain a place in the television schedules for such programmes.

It is appropriate however to consider whether the imposition of this requirement on one content business type (television) but not competitors (online services) is equitable.

Addressing the inconsistency

It is timely now to consider whether the different restrictions applying to advertising on different platforms remain appropriate.

The following pages outline the options for addressing this inconsistency, and we welcome your comments on these and any other options.

⁸ Nielsen Consumer and Media Insights 2008 – 2014

6: Options for advertising restrictions

This chapter outlines five options to address the differences in advertising restrictions for audio-visual programming intended for entertainment purposes. These options are intended to provide alternatives to discuss when considering whether existing regulations apply across platforms, and, where there are inconsistencies or discrepancies, whether these remain appropriate.

Option 1: Status quo

Existing legislation is maintained with no change, so that television and radio are subject to specific restrictions.

This option recognises the differences between transmission methods, and the benefits of maintaining an advertising-free portion of the week which preserves a space for minority-interest programming. It assumes these benefits outweigh the potential costs to competition at this time. It also assumes there is no need to extend the existing restrictions to other platforms.

No change is required to legislation or policy.

Option 2: Provide an exemption for major events

Current restrictions relating to television and radio are maintained.

An exemption is put in place for special events.

This option proposes a limited loosening of the current restrictions. It would allow exemptions to the restrictions in the case of special events, such as major international sporting fixtures, where a case could be made that advertising revenue was needed to support the broadcasting of the event during the restricted times.

This option would potentially improve the impact on competition in the market, as the expected advertising revenue from advertisements linked to the special event might enable more providers to bid for the rights to broadcast the event.

This option is unlikely to affect the programming space for special or minority interest programmes, as this option would only occur in situations where an event was to be broadcast on a Sunday morning (i.e., instead of the normal programming).

This option would require a change in legislation that may take time to enact.

Option 3: Remove Sunday mornings restrictions, and protect programming space

The Broadcasting Standards Act is amended to remove the restrictions on advertising on Sunday mornings, but with the addition of stipulated time periods for minority interest programming.

This option provides consistency across platforms, and is likely to affect a small number of consumers, given the low viewing numbers for Sunday mornings. It potentially improves the impact on competition in the market.

However, in recognition of the value of the commercial-free programming space to special interest or minority interest programming, this option proposes requiring that there be certain blocks in the television schedules each week for this programming.

This could be stipulated in legislation, or through multi-year agreements between the Government and broadcasters, and would need to stipulate the acceptable time periods in which the blocks could be aired, to avoid commercial interests pushing these programmes to the time slots of lowest value, for example in the early morning hours. Should this be enacted through multi-year agreements with broadcasters, it would provide flexibility to respond to changing requirements in future as more content is provided through non-traditional transmission methods, which may reduce the need for protected programming space.

The removal of the restrictions on Sunday morning would mean an amendment to legislation, which may take time to enact.

Option 4: Remove the current restrictions

Amend the Broadcasting Standards Act to remove the current restrictions on advertising times either completely, or for Sunday mornings only.

This option would improve consistency across platforms, and so improve competition. It does, however, run the risk of reducing the available programming space for special interest and minority interest programmes.

The option would bring New Zealand more in line with other jurisdictions, and an alternative to consider would be whether to replace the current day-specific restrictions with maximum time allowances as in some other jurisdictions.

This option presumes there is no longer a justification for different restrictions across different platforms.

It would be enacted through legislation.

Option 5: Extend the current restrictions to online content

Amend the Broadcasting Standards Act to apply the advertising restrictions across all platforms.

As with option 4, this option proposes making the restrictions consistent across all platforms. However, it does so by extending the current restrictions, rather than removing them.

This has the benefit of consistency in legislation. However, it does not recognise the potential different control a consumer has in accessing content across different platforms.

It continues to protect programming space, and in fact potentially increasing this protected space, as more content is transmitted via online platforms. However, it may restrict the ability for New Zealand providers to fund the purchasing of rights through advertising content, and thus restrict competition for content provision in New Zealand.

As with the other options, this would require legislation to enact.

Administering the regime

Under the present system, the Ministry for Culture and Heritage administers the regime under Section 81 of the Act.

Should a complaint be made regarding advertising being transmitted during restricted hours, the Ministry will investigate this complaint and, should it be concluded that a breach has occurred, can take action against the broadcaster.

This action is undertaken through criminal prosecution and can result in a fine not exceeding \$100,000.

To date any breaches that have occurred have in the most part been accidental, and the Ministry has not prosecuted. In the one case where a prosecution did occur, the costs of doing so were high. While costs can be awarded in the case of a successful prosecution, this poses the question of whether the Ministry administering the regime is the best use of public funding.

It would be possible to delegate responsibility to an alternative agency. However, in this case, the agency would still require the Ministry to take compliance actions on the occasions broadcasters did not comply with the decision of the delegated agency, and on the assumption the agency is a Crown agency, this approach would not reduce costs.

Options to discuss

We welcome comments on the issues related to advertising restrictions as outlined above, and any others not mentioned. We also welcome comments on the potential options for resolving these issues, and again welcome other options.

Questions for readers:

- Does the nature of linear television still justify an advertising-free period during the week, or should advertising be permitted on Sunday mornings?
- Should the main religious holidays and Anzac Day morning still be marked by an absence of advertising on television and radio?
- Should the advertising-free period be extended to cover broadcasters' online content as well?
- If you favour the liberalisation of broadcast advertising restrictions, should blocks in the television schedule be set aside for special-interest programming?
- If you do *not* favour the liberalisation of broadcast advertising restrictions, should exemptions be allowed in the case of major events, such as international sports fixtures?

Please give reasons for your answers.

7: Election programmes - Part 6 of the Broadcasting Act

Political programmes or advertisements can have a large effect on individuals' political views, especially in the lead up to an election. The effect of the Broadcasting Act 1989 is that there are special rules that apply to the allocation of time and funding for election material appearing on television and radio, in addition to those that apply to election advertisements generally.

These Broadcasting Act rules were developed at a time when television and radio broadcasting, along with print media, were the dominant forms of media in New Zealand. It is timely to consider whether special rules for television and radio are still required, given the proliferation of other ways that candidates, political parties and members of the general public are now able to share their views. Online news sites, blogs, Twitter and many other sources provide a constant stream of information and opinion. The question is not whether to have rules, but rather whether they should be made more consistent in the era of convergence.

This section does not propose fundamental reform of Part 6; rather, it focuses on the impact of convergence and whether existing provisions apply in equivalent ways across all types of communications. However, any review of how convergence impacts election broadcasting regulation may raise other issues regarding Part 6 of the Broadcasting Act (e.g. the allocation of time for opening and closing addresses and funding for the broadcasting of election programmes to political parties at general elections). While issues such as these are not directly related to convergence, any response to convergence needs to be mindful of wider issues and concerns about election broadcasting.

Election broadcasting governed by two Acts

Part 6 of the Broadcasting Act 1989 governs the broadcasting of "election programmes".⁹ Part 6 sets out rules for the broadcasting of election programmes as well as procedures for the allocation of time for opening and closing addresses at a general election, and money for political parties to purchase broadcast time. It is important to note that Part 6 applies only to television and radio and does not apply to on-demand services, podcasts, and so on. Unlike the rest of the Broadcasting Act, which is administered by the Ministry for Culture and Heritage, Part 6 is administered by the Ministry of Justice.

⁹ Excerpt from section 69:

Election programme means, subject to subsection (2), a programme that-

- (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of any person at an election; or
- (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of any person at an election; or
- (c) advocates support for a candidate or for a political party; or
- (d) opposes a candidate or a political party; or
- (e) notifies meetings held or to be held in connection with an election

Part 6AA of the Electoral Act 1993 governs the publication of “election advertisements”.¹⁰ The definition of election advertisement in the Electoral Act is media neutral. That is, the rules are consistent regardless of medium. The Electoral Act therefore covers publication of election advertisements in all media including television, radio, internet, billboards, newspapers and leaflets.

Differences between the two regimes

There are a number of differences between the regimes for election programmes under the Broadcasting Act and for election advertisements under the Electoral Act. While there are many specific issues, some of the broader differences are outlined below.

The Broadcasting Act has a narrower scope than the Electoral Act. As noted above, the definition of election advertisement in the Electoral Act is media neutral and therefore covers publications of advertisements in all media, whereas Part 6 of the Broadcasting Act applies to television and radio only. However “election programmes” are not simply a subset of “election advertisements” which appear on television and radio. This is because of different statutory tests and exemptions for each.

The statutory tests of the two regimes are not aligned. The tests for what is an “election programme” in the Broadcasting Act and an “election advertisement” in the Electoral Act *appear* to be similar. Both ask whether the programme or advertisement appears to encourage voters to vote or not vote for a party or candidate. However, they differ on the nature and scope of the exemptions. For example, the definition of “election programme” in the Broadcasting Act includes an exemption for news, comment or current affairs programmes. The equivalent definition in the Electoral Act exempts “the editorial content” of a periodical, radio or television programme, or news media Internet site.

The difficulties in interpreting what constitutes “election programme” in the Broadcasting Act and/or an “election advertisement” in the Electoral Act have been highlighted in some recent court cases.¹¹

The focuses of the two regimes are different. Part 6 of the Broadcasting Act is primarily about restricting election broadcasting, except broadcasting for about a month before the election¹², which falls within highly prescribed parameters. The Electoral Act sets spending limits, and restricts advertising on election day, but otherwise permits election advertising as long as it complies with the requirements for promoter statements and disclosure.

¹⁰ Section 3A

Election advertisement

- (a) means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
 - (i) to vote, or not to vote, for a type of candidate described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the candidate is stated);
 - (ii) to vote, or not to vote, for a type of party described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party is stated); and
- (b) includes-
 - (i) a candidate advertisement; and
 - (ii) a party advertisement

¹¹ *Watson & Jones v Electoral Commission* [2015] NZHC 666. See also *Greenpeace of New Zealand Incorporated v Electoral Commission* [2014] NZHC 2135

¹² The ‘Election Period’ runs from the Issuing of the Writs, to the close of day before Polling Day. In practical terms, the period is about 27 to 36 days before polling day.

The differences between the two regimes can result in complications

The practical result of having these two regimes is that broadcasters, when broadcasting election programmes, can be subject to different rules and regimes depending on which medium the programme is broadcast on. For example:

- due to the restrictions in Part 6 a situation can arise where a broadcaster can publish election programme content online that cannot be broadcast on television or radio.
- an election advertisement put on TVNZ OnDemand would be regulated by the Electoral Act only. However, if the same election programme were shown on TV One it would also likely be regulated by Part 6 of the Broadcasting Act.

Reform of election programme regulation has been recommended in the past

As has been noted throughout this paper, the world today is very different from 1989 when the Broadcasting Act came into force. While some minor changes have been made to Part 6 since it was enacted, there have been no major changes since 1989, despite the changes in social expectations, technology and the rise of new media and use of social media since that time.

In recent years, questions have been asked as to whether reform of election programme and advertising regulation is desirable. The Electoral Commission's reports into both the 2011 and 2014 General Elections¹³ recommended consideration of the differences between the statutory tests of election programmes and advertising. The Justice and Electoral Committee Inquiry into the 2011 General Election also recommended that consideration be given to aligning the statutory tests¹⁴. The Broadcasting Standards Authority's 2014 Annual Report noted that in its view the legislation is not satisfactory and needs to be addressed and that "Parliament will, we expect, in time be faced with the very challenging task of deciding what limits there should be on political broadcasts and broadcasts about or involving politicians".¹⁵

While these comments have stemmed from specific issues, at a wider level it is timely to consider whether the current approach to the regulation of election broadcasting is still appropriate in light of increasing media convergence.

In relation to election programmes, a standard process for reviewing electoral legislation is through the routine Justice and Electoral Select Committee inquiry following each general election. The 2014 election inquiry has received several submissions regarding Part 6 of the Broadcasting Act. In reviewing the convergence aspects of Part 6 of the Broadcasting Act the Government will also take into account any recommendations the inquiry may make on these provisions.

¹³ The Electoral Commission's report on the delivery of the 2011 General Election and Referendum on the Voting System <http://www.elections.org.nz/events/past-events-0/2011-general-election/reports-and-surveys-2011-general-election/electoral-0> and the Electoral Commission's report on the delivery of the 2014 General Election <http://www.elections.org.nz/events/2014-general-election/election-results-and-reporting/electoral-commission-report-2014-general>

¹⁴ Justice and Electoral Committee. 2013. *Inquiry into the 2011 general election*, p. 39.

¹⁵ Broadcasting Standards Authority 2014 Annual Report http://bsa.govt.nz/images/BSA_Annual_Report_2014.pdf

Questions for readers:

- Should the current television and radio-specific regulation of election broadcasting under the Broadcasting Act continue? If not, which media should be covered? Should the definition of an election programme in the Broadcasting Act be media neutral?
- Should there continue to be separate rules for regulating 'election programmes' in the Broadcasting Act, in addition to the rules for governing 'election advertisements' in the Electoral Act?

Please give reasons for your answers.

8: New Zealand content: the Government's toolbox

Governments in most developed countries seek to ensure that high quality content that reflects and explores all aspects of their nation's life is available on television and radio and on the other platforms used by broadcasters.

There are several policy tools that governments can use to achieve this:

- Maintaining publicly owned broadcasters with mandates to provide a range of content; generally these are combined radio and television entities, now with online and mobile services as well.
- Making subsidies available contestably to producers and/or broadcasters for making certain kinds of content.
- Licensing broadcasters with conditions: in return for being allocated frequencies they agree to feature certain kinds of content.
- Quotas: broadcasters are required to feature specified levels of local content.

These tools can be used in combination. For example, rules that require content to be featured can be backed up with subsidies; public broadcasters can be established but also made eligible for contestable funding; and so on.

The New Zealand system

In New Zealand, in the past quarter century, governments have mostly used the first two of these tools, with a strong emphasis on the second, contestable funding, through the funding agencies NZ On Air and Te Māngai Pāho. The Broadcasting Act established these two agencies and gives them their functions.

The third tool, licence conditions, is mainly used in allocating spectrum to regional broadcasters. Publicly owned broadcasters have been maintained, and a major new one, Māori Television, established during this period. But, while Radio New Zealand is a public broadcaster in the classic, international sense, Television New Zealand now has a largely commercial remit. (While RNZ receives the bulk of its revenue – approximately \$35 million – from the Government, TVNZ is almost entirely dependent on commercial revenue, the exception being funding for its service to the Pacific.)

In 2014/15 the Government invested approximately \$207 million in public broadcasting.

The impact of convergence

The impact of convergence on how the media and entertainment sectors are shaped and operate has relevance to Government's interventions in the sectors. It is important to ensure that government policy, as with legislation, remains fit for purpose, as the relationship between content creation and distribution is uncoupled, and content creators have increasingly diverse options to connect with audiences.

In some areas this may be increasing the public value of government intervention, and especially funding, as content produced is transmitted over a wider variety of platforms and so is available to a potentially greater audience. However, it may also pose the risk that publicly funded content that is spread across a large number of platforms becomes more difficult for audiences to find.

To date, the Government’s interventions have adapted to convergence by, over the past few years, updating the remits of the funding agencies and broadcasters. As noted earlier, NZ On Air and Te Māngai Pāho are able to fund content intended for online distribution, while the statutory functions of TVNZ and Radio New Zealand (the latter through an amendment that is currently before Parliament) are encouraged to use all available platforms to reach their audiences.

It is timely now to consider whether further updates to policy are required to ensure it remains fit for purpose in a converging sector. This is not intended to be a review of the fundamental principles behind government intervention in the media sector, nor is it a review of the funding of the sector. Government remains committed to supporting a sustainable media sector, and forecasts continuing support of approximately \$207 million to the public broadcasting sector in the 2015/16 financial year.

This paper seeks to act only as a “health check” to the existing policy frameworks, to ensure they reflect the current media landscape and remain fit for purpose. In particular the questions below are intended to start discussion on whether there are now inconsistencies in policy as a result of convergence, and whether the current trends in the sector suggest further policy amendments may be required in future.

Question for readers:

- Are the current policy interventions in the media sector fit for purpose in a converging sector?
- Are there alternative or additional policy interventions you consider appropriate in the emerging media environment?

Please give reasons for your answers.

9: Submissions process

You are invited to make a written submission on the issues raised in this document. The closing date for submissions is 5pm, 16 October 2015.

Specific questions are listed at the end of relevant sections, and the full set of questions is listed below. The Government welcomes comment on some or all of the questions raised, as well as broader comments on the issues.

Where possible, you should provide specific examples and evidence to support your views. If these examples are commercially sensitive, we encourage you to provide two versions of your submission: a full version and a publishable version (see below).

Sending your submission

Comments should be submitted in writing, no later than 5pm on 16 October 2015, as follows:

Email (preferred):

convergence@mch.govt.nz

Post:

Convergence Review Team, Media Policy, Ministry for Culture and Heritage, PO Box 5364, Wellington 6145, New Zealand

Delivery address:

Reception, Level 4, ASB House, 101 The Terrace, Wellington 6011

If you post your submission, please also send it electronically if possible (as a PDF or Microsoft Word document).

Publication of submissions

Except for material that may be defamatory, the Ministry for Culture and Heritage will post all written submissions online. The Ministry will consider you to have consented to publication by making a submission, unless you clearly specify otherwise in your submission. If sensitive material in your submission cannot be published, please provide two versions of your submission – a full version (with that material clearly identified) and a publishable version with redactions.

Submissions are also subject to the Official Information Act 1982 (OIA). If you have any objection to the release of any information in your submission, please set this out clearly with your submission. In particular, identify which part(s) you consider should be withheld, and explain the reason(s) why you consider we should withhold the information by reference to section 9 of the OIA. The Ministry will take such reasons into account when responding to requests under the OIA.

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure by various agencies, including the Ministry, of information relating to individuals and access by individuals to information relating to them, held by such agencies. Any personal information you supply to the Ministry in the course of making a submission will be used by the Ministry only in conjunction with consideration of matters covered by this document. Please clearly indicate in your submission if you do not wish your name to be included in any summary the Ministry may prepare for public release on submissions received.

10: Summary of questions

Chapter 4: Options for audio-visual content

1. Do you think on-demand content should be classified in some way?
2. If so, should similar content across different platforms be regulated in the same way?
3. Do you have a preferred option or concerns with any of the options presented?
4. Do you have any other options or suggestions?
5. Creating a new legislative regime would take time to get right. Should the Government take any action in the meantime to ensure on-demand content is classified?
6. If so, which option would be best? Are there any other options?
7. Are there any overseas models you think we should look at? Which ones?
8. Are there any other comments you wish to make?

Chapter 6: Options for advertising restrictions

9. Does the nature of linear television still justify an advertising-free period during the week, or should advertising be permitted on Sunday mornings?
10. Should the main religious holidays and Anzac Day morning still be marked by an absence of advertising on television and radio?
11. Should the advertising-free period be extended to cover broadcasters' online content as well?
12. If you favour the liberalisation of broadcast advertising restrictions, should blocks in the television schedule be set aside for special-interest programming?
13. If you do not favour the liberalisation of broadcast advertising restrictions, should exemptions be allowed in the case of major events, such as international sports fixtures?

Chapter 7: Election programmes – Part 6 of the Broadcasting Act

14. Should the current television and radio-specific regulation of election broadcasting under the Broadcasting Act continue? If not, which media should be covered? Should the definition of an election programme in the Broadcasting Act be media neutral?
15. Should there continue to be separate rules for regulating 'election programmes' in the Broadcasting Act, in addition to the rules for governing 'election advertisements' in the Electoral Act?

Chapter 8: New Zealand content: the Government's toolbox

16. Are the current policy interventions in the media sector fit for purpose in a converging sector?
17. Are there alternative or additional policy interventions you consider appropriate in the emerging media environment?

Annex A – The current regimes

The Broadcasting Act regime

Broadcasters, in collaboration with the Broadcasting Standards Authority (BSA), develop codes of broadcasting practice based on the standards in the Broadcasting Act. Broadcasters are responsible for implementing these codes. The broadcasters themselves make the decisions about whether their content complies with these standards. If a person considers that broadcasting standards have been breached, they must lodge a complaint with the broadcaster in the first instance. If a complainant is not satisfied with the broadcaster's decision or has not received a response, s/he may refer the complaint to the BSA for review.

The BSA regime differs from the Classification Act regime because there is no external classification or rating decision made before broadcast: broadcasters are relied upon to make responsible decisions about whether their content is appropriate and meets agreed standards. The BSA only becomes involved in assessing content if a complaint is made and not resolved satisfactorily between the complainant and the broadcaster.

The BSA may make several orders if it upholds a complaint. It can direct the broadcaster to publish a statement that addresses the complaint, order a broadcaster to refrain from broadcasting the relevant content for a period of up to 24 hours, or direct the broadcaster to reconsider the complaint. In the event that the BSA finds a broadcaster failed to maintain the privacy of an individual, it may order the BSA to pay compensation of up to \$5,000.

Broadcasting standards

The Broadcasting Act gives broadcasters responsibility for maintaining standards that are consistent with:

- The observance of good taste and decency; and
- The maintenance of law and order; and
- The privacy of the individual; and
- Balance in the presentation of controversial issues; and
- Any approved code of broadcasting practice applying to the programmes.

There are four codes of practice for free-to-air television, pay television, radio and election programmes. The free-to-air and pay television codes both contain standards with requirements relating to programme classification and warnings. These standards require broadcasters to ensure that programmes are appropriately classified, and to consider the use of warnings when appropriate. As radio broadcasts are unclassified, the Radio Code does not contain a similar provision.

Requirements for free-to-air broadcasters

Free to air broadcasters are required to ensure that programmes are appropriately classified or rated. They must use one of the agreed classification symbols and must display this at the beginning of each programme and after each ad break. They must also consider using a warning if the programme content may disturb or offend a number of people. If a programme is classified as anything other than G (General) there are restrictions on what time it can be shown.

G	GENERAL Programmes which exclude material likely to be unsuitable for children. Programmes may not necessarily be designed for child viewers but should not contain material likely to alarm or distress them. <i>G programmes may be screened at any time.</i>
PGR	PARENTAL GUIDANCE RECOMMENDED Programmes containing material more suited for mature audiences but not necessarily unsuitable for child viewers when subject to the guidance of a parent or an adult. <i>PGR programmes may be screened between 9am and 4pm, and after 7pm until 6am.</i>
A0	ADULTS ONLY Programmes containing adult themes and directed primarily at mature audiences. <i>A0 programmes may be screened between midday and 3pm on weekdays (except during school and public holidays as designated by the Ministry of Education) and after 8.30pm until 5am.</i>
A0 9.30PM	ADULTS ONLY 9.30PM-5AM Programmes containing stronger material or special elements which fall outside the A0 classification. These programmes may contain a greater degree of sexual activity, potentially offensive language, realistic violence, sexual violence, or horrific encounters.

Requirements for pay television broadcasters

Pay television broadcasters in New Zealand are required to ensure that programmes are appropriately classified. They must use one of the agreed classification symbols and must display this at the beginning of each programme and in all electronic programme guides and printed guides where possible. They must also consider using a warning label if the programme content may distress or offend a number of people.

CLASSIFICATIONS	WARNING LABELS
G APPROVED FOR GENERAL VIEWING	C CONTENT MAY OFFEND
PG PARENTAL GUIDANCE RECOMMENDED FOR YOUNGER VIEWERS	L LANGUAGE MAY OFFEND
M SUITABLE FOR MATURE AUDIENCES 16 YEARS AND OVER	V CONTAINS VIOLENCE
16 PEOPLE UNDER 16 YEARS SHOULD NOT VIEW	VL VIOLENCE AND LANGUAGE MAY OFFEND
18 PEOPLE UNDER 18 YEARS SHOULD NOT VIEW	S SEXUAL CONTENT MAY OFFEND

Exemptions to the requirements for free to air and pay television

News and current affairs programmes are not required to be classified. However, broadcasters must be mindful that young people may be watching during children's ordinary viewing hours and should give consideration to include warnings where appropriate.

Sports and live programmes are not classified but broadcasters must take all reasonable steps to ensure the programme conforms to the timeslot in which it is being shown.

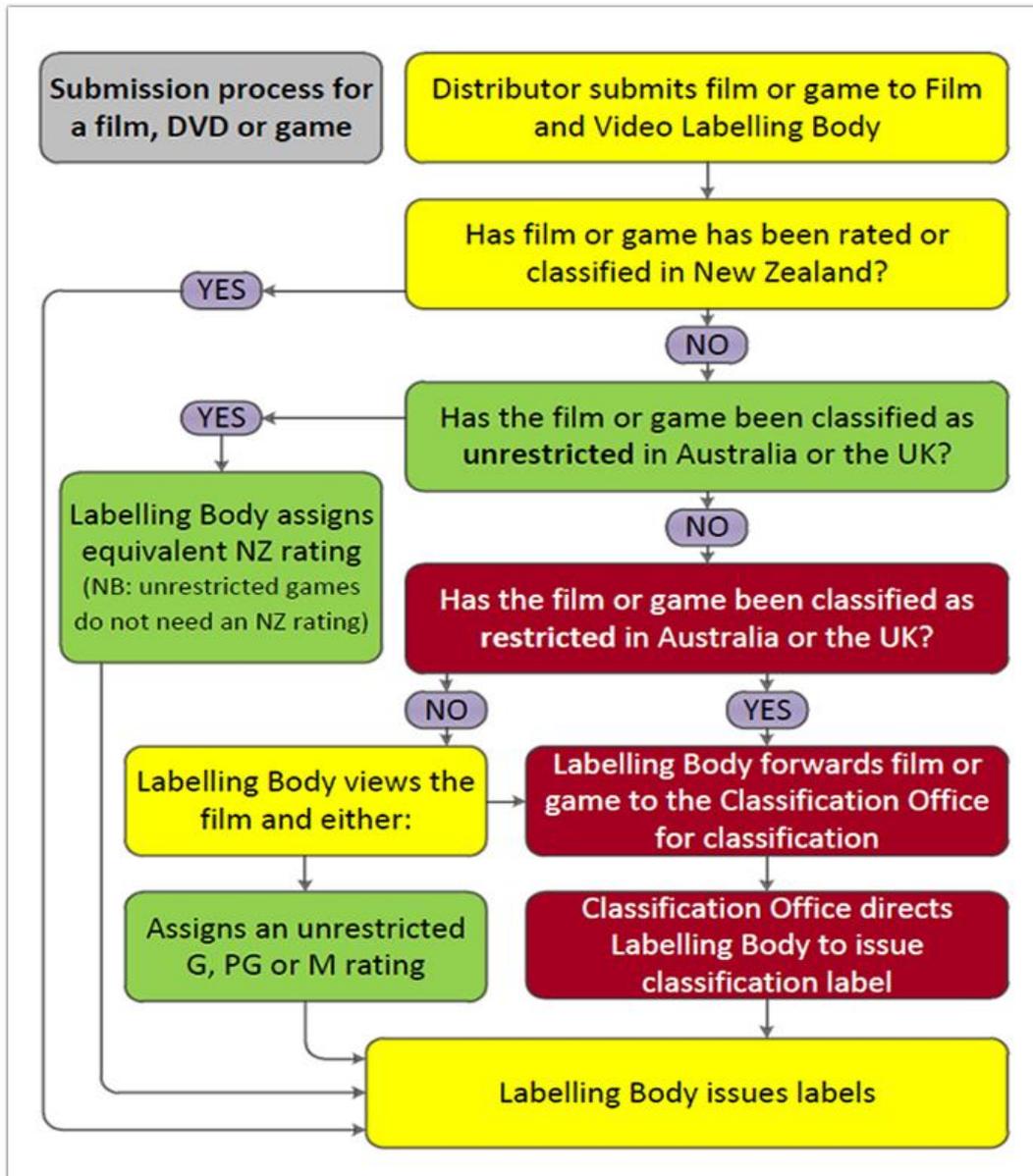
The Classification Act regime

The Classification Act seeks to maintain a balance between the control of objectionable and restricted publications, and individual freedom of choice, as described in section 14 of the New Zealand Bill of Rights Act 1990. The Act's structure of policy, semi-judicial and enforcement agencies is intended to promote this balance.

The key features of this Act are:

- With a few exceptions, all 'films' supplied to the public in the course of any business must be submitted for rating/classification and carry the appropriate label.
- The rating of films and videos by an industry-based body (the Film and Video Labelling Body (FVLB)). It assigns ratings and descriptions to film, videos and related material that are not subject to restricted classifications using ratings issued in Australia and the UK as a guide, and issues labels showing these ratings.
- The classification of publications to restrict availability to particular persons or groups of persons. Classifications are determined by the Office of Film and Literature Classification, an independent Crown entity that is deemed to exercise expert judgement in respect of determining whether or not a publication is objectionable, and are legally enforceable.
- The definition of 'objectionable' and categories or material which may be objectionable if they 'tend to promote' activities such as the sexual exploitation of children.
- The banning of material that is deemed objectionable (determined by the OFLC).
- Rights to apply to the Film and Literature Board of Review (FLBR) to re-examine the classification of publications.
- The creation of offences and enforcement powers.

The flow chart on the following pages shows the labelling process.



Film and video labels:

Unrestricted labels



Restricted labels

