Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal & Constitutional Affairs
Parliament House
Canberra ACT

INQUIRY INTO THE CLASSIFICATION (PUBLICATIONS, FILMS & COMPUTER GAMES) AMENDMENT (ONLINE GAMES) BILL 2011

Thank you for the invitation of 7 November 2011 to make a submission to the Senate Standing Committee on Legal & Constitutional Affairs regarding the 'Mobile Games' Bill.

Overall the Bill is commended as a forward-looking and positive interim response to the challenges posed by adoption of digital technologies in an increasingly globalised environment.

The following comments reflect my academic and private sector research on the regulation of new technologies, industry development and measures that foster the development of resilient and capable Australian young people (ie children and young adults).

They are consistent with extensive peer-reviewed Australian and international research regarding consumer uptake of mobile devices, harms facing minors, an effective principle-based content regulation regime and national competitiveness in production/dissemination of online content such as computer games.

They are also consistent with previous submissions with my colleague Asst Professor Sarah Ailwood, eg to the Legal & Constitutional Affairs committee and to the Australian Law Reform Commission regarding the ALRC's current 'Classification' inquiry.

The comments are made on an individual basis; the submission is not made on behalf of the University of Canberra.

Content Regulation in the Digital Environment

The Bill should be considered in the context of five developments.

Consumers are going mobile

The first is ongoing consumer uptake of mobile devices, with for example many Australian children (including those whose families are economically disadvantaged) regarding it as a given that they will have access to and use mobile phones and a shift among consumers to internet-connected tablet devices such as the iPad.

Devices are blurring …

The second is the rapid demise of traditional demarcations between mobile phones and personal computers.

As the Minister's Second Reading Speech and the Explanatory Memorandum note, the days when there was a clear distinction between a mobile phone and a computer are over. The period when a mobile phone was only used for voice calls or for SMS is long gone; it is

heartening to see the Government recognising that change. It is clear that adult and young Australians use smartphones such as the iPhone for activities such as checking the weather forecast, taking/viewing photographs, paying bills, watching the cricket (or what's happening in the Senate), reading law lectures online, checking email and playing games.

The increasingly 'converged environment' is reflected in the blurring of tablet devices (such as the iPad) and mobile phones and other devices. We can for example expect that the next generation of tablets will include access to free to air broadcast television (followed by the scope for storing recordings 'in the cloud', potentially outside Australia), that videos will be made/displayed on both tablets and smartphones, and that cloud-based games will operate across a range of platforms.

… and so are borders

Notions that the state is or should be irrelevant are naïve. There is little empirical data in support of the idea that states, such as the Commonwealth, should throw up their hands in despair when confronted by the internet and declare regulatory 'game over'. There is a persistent need to manage online activity; as one analyst commented more than a decade ago, we will have governments as long as we have things to protect. However, it is important to recognize that digital technology is blurring national and provincial boundaries.

Gaming (along with other content/activity) is increasingly taking place on a global scale across borders. As the Explanatory Memorandum notes games may be hosted outside Australia and accessed through a range of mobile and/or non-mobile devices. Restrictions within a particular Australian jurisdiction such as Queensland or Tasmania may provide comfort to politicians and journalists but in practice are unlikely to be particularly effective. I suggest that the Committee notes the need, in looking beyond the **interim** arrangements represented by the Bill, to consider regulation when improved network performance induces more Australians to 'go global'. We need to consider issues now, rather than on an reactive basis.

Industry is going mobile

Alongside consumer uptake of that 'converged' technology Australian industry is embracing – and in practice often driving – mobile technology, in the same manner that it led the world in a shift from traditional payment systems to use of ATMs and online payment.

That embrace is significant because major telecommunication service providers – facing competition, demands for significant investment in administrative systems (evident in recent high profile data breaches at Vodafone and Telstra), and disruptions associated with developments such as Skype and the National Broadband Network – are contemplating a shift to services (including mobile games) away from the traditional 'line rental + billed call' revenue model. There is money to be made from providing content for mobile devices, whether it's from a one-off payment to download an application that might only be used once or from a more engaging service that is paid for through subscription, extra functionality or advertisements (the latter resembling free to air broadcasting and exemplifying the 'attention economy').

An Australian games industry

Revenue opportunities are also reflected in the revival of the Australian games industry, which bravely refuses to die despite global competition and indifferent encouragement from the national and state/governments.

It is important to recognize that the products of that industry (and ancillaries such as online security services, billing, accounting and massive data storage) are economically and culturally significant.

The industry is on occasion misunderstood as something that markets trivia to small children (something that keeps the kids out of mum's hair when *PlaySchool* and Humphrey B Bear aren't available) or caters to sullen adolescents with a taste for shooting zombies, green-skinned aliens or hordes of soviet warriers in an endless replay of 1941-1945.

The reality is that computer games – accessed through a range of devices rather than traditional desktop machines – and often involving very large numbers of people rather than alienated individuals – are now a mainstream recreational activity. They are just as likely to involve law professors, merchant bankers, firecrew and ambulance drivers, farmers and the Senators' own advisers as they are to involve a spotty kid in a black tshirt in a smelly bedroom. Apart from community engagement, they can be as aesthetically noteworthy as entries for the Archibald Prize or the latest production from the Australian film industry (an industry itself converging with the games sector, not least through the same ICT skills that give us movies about singing penguins with happy feet).

The Committee should accordingly treat the digital games sector with some seriousness rather than assuming that the sector is commercially insignificant, culturally marginal and of interest only to minors who would otherwise be delinquents.

A Principled, Forward-looking Regulatory Regime

The Bill is commendable because it is founded on a recognition of the Australian Law Reform Commission's current and in-depth inquiry into content classification.

Regrettably the history of content classification and of day by day policing in Australia at the Commonwealth and state/territory levels has featured a greater emphasis on news bites than it has on principle. That has resulted in inconsistencies between jurisdictions and inconsistent treatment regarding different content delivery mechanisms or types of content. Given that we are all Australians it remains perplexing that law about what you can see, what you can buy, what you can sell varies from one location to the other and whether it's for a PhD seminar or a night home with the mates after a day at TAFE.

Regulation of content in Australia should address substantive harms rather than be driven by moral panics or by the political power of particular interests such as the commercial broadcasters. The convergence noted above should encourage Australian regulators to adopt a technologically neutral regime that recognizes the blurring of traditional delivery platforms and is informed by credible data about substantive harms, rather than by headlines.

The ALRC review offers an opportunity to move towards such a principled regime, recognising that content will increasingly be delivered on a global basis and that there is a fundamental role for parents/guardians in building discernment and resilience on the part of young Australians rather than relying on the state to intervene and make choices for all, particularly choices that are readily subverted by minors. Wrapping children in cotton wool will not work. Giving both them and their parents some guidance – and a sense of what to do if something bad is encountered – will.

The Bill offers an **interim** solution that should be strongly endorsed by the Committee. In essence, there is little point having a Law Reform Commission (and a large-scale community consultation exercise) if it is disregarded. In that respect I again note the importance for effective policy development in Australia of adequately resourcing the ALRC; ongoing

cutbacks in funding of the Commission are of substantive concern, inhibit advice to Parliament and are not matters of which the Government should be proud.

I suggest that the Committee should resist the temptation to develop an alternate regulatory framework that is independent of the ALRC inquiry or that implicitly demonises mobile devices, mobile games and mobile game participants.

Regulatory Incapacity

The Government correctly notes concerns about costs to industry regarding classification, costs that would erode the viability of small developers and that would be passed on consumers. The Government also notes the administrative burden associated with classification of all games, particularly if classification was to take place on a timely basis. Timeliness is of concern for industry; delay inhibits commercial viability. Problems at the Classification Board should not punish Australian consumers, producers or intermediaries.

In looking ahead to the ALRC report the Committee may wish to note the desirability of the Government identifying the cost of content regulation, an issue underlying the Bill. The Productivity Commission and other bodies have in the past usefully identified the cost of 'red tape', a metric that is usefully considered when determining public policy on the basis of the balance between costs and outcomes. How much are we prepared to pay for the regulation of games, films, books, broadcasts and other content? If we know the cost of the regulation, can we devise better outcomes?

Refused Classification

Pending delivery of the ALRC report the Bill represents a credible approach to the management of games that are innocuous or that should be refused classification, for example through a 'call in' and through investigation by ACMA. It does not open the floodgates to content that is appropriately criminalized.

Bruce Arnold
Lecturer, Law Faculty
University of Canberra