

David Tennant

7 June 2011

Secretary
Senate Legal and Constitutional Affairs Committee
Inquiry into the Australian film and literature classification scheme
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email: legcon.sen@aph.gov.au

URGENT LATE SUBMISSION

Dear Ms Dennett

Re: Submission regarding the classification standards of the ABC

Please find attached a late submission to the Committee's inquiry into the national classification scheme. My submission focuses on the ABC's classification standards which I maintain are inconsistent with those of the National Classification Board. This submission is highly relevant to term of reference "I" and provides key evidence in relation to topics discussed with the ABC, the ACMA and the Attorney-General's Department at hearings of the Committee in April 2011. My submission also addresses the ABC's internal classification inconsistencies between ABC television and iView.

I realise that submissions to the Committee were due on 4 March 2011. However, due to various factors explained in my submission, unfortunately I have not been able to send this submission earlier.

It is my view that the ABC has been extremely unhelpful to the Committee's inquiry at best, and has actually misled the Committee at worse.

In addition to my submission, please also find attached a folder of supporting documentation. I have redacted the names and contact details of ABC and ACMA employees in the attached documents, except the names of Mr Michael Brealey, Head of Strategy and Governance, ABC TV and Mr Fenton, Manager of Content Classification, ACMA. Mr Brealey is the author of an attached letter (document A27) and Mr Fenton is the author of five ACMA investigation reports (documents A11, B55, B59, C79 and C85) and one letter (document R355). The names of these two persons have not been redacted as they have both given evidence to the Committee and their identity is relevant to certain parts of my submission.

2.

I have copied this submission to the members of the Committee who attended one of all of the Committee's hearings, in order that this submission is received as soon as possible. I have also copied the submission to Mr Michael Brealey and Mr Michael Millett, Director of Communications at the ABC, in case the ABC wishes to make submissions to the Committee in response to my submission. I have copied them directly in order that they receive my submission as soon as possible.

I have provided both hard copies and electronic versions of this submission and supporting documentation, in order that it can be uploaded to the Committee's website.

Yours sincerely

David Tennant

Enc: (1) Submission to Committee; (2) Index to attached documents, (3) Attachments A-R (pp 1-360)

Classification standards of the ABC

How the ABC's classification standards
are inconsistent with the Classification Board

Submission

to the

Senate Legal and Constitutional Affairs Committee's

Inquiry into the National Classification Scheme

7 June 2011

David Tennant

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ABBREVIATIONS

Abbreviations or short-hand references used in this submission

The following abbreviations and short-hand references have been used in this submission:

Australian Communications and Media Authority	ACMA
Classification Board	Board
Australian Broadcasting Corporation	ABC
Office of Film and Literature Classification (now replaced with the Classification Operation Branch of the Attorney-General's Department)	OFLC
<i>Classification (Publications, Films and Computer Games) Act 1995 (Cth)</i>	<i>Classification Act</i>
<i>Broadcasting Services Act 1992 (Cth)</i>	<i>Broadcasting Services Act</i>
<i>Freedom of Information Act 1982 (Cth)</i>	<i>Freedom of Information Act or FOI Act</i>
<i>Guidelines for the Classification of Films and Computer Games</i>	"national classification guidelines" and "national guidelines" (used interchangeably)
Classification provisions found in the ABC code of practice	"ABC classification guidelines" and "ABC guidelines" (used interchangeably)

INTRODUCTION

1. Overview of submission

- 1.1. I wish to make a late submission to the Senate Legal and Constitutional Committee's inquiry into the Australian film and literature classification scheme. My submission addresses the following Term of Reference:
 - 1.) *the interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority in supervising broadcast standards for television and Internet content.*
- 1.2. The key thesis of my submission is that the Australian Broadcasting Corporation ("ABC") has a history of classification standards which are inconsistent with the Australian Classification Board. My submission includes supporting documentation which outlines 39 episodes of 15 different programs which I believe the ABC has incorrectly classified under its code of practice over the past year.
- 1.3. One of the issues the Committee has been examining has been the inconsistency of classification standards across different media. This submission provides concrete examples of such inconsistency between the Classification Board and the ABC.
- 1.4. In this submission, I outline how there is no good reason for such inconsistency. I address a series of arguments made by the ABC in its correspondence to me and in several cases to the ACMA, and explain that these arguments do not justify the serious inconsistency of standards between the Board and the ABC.
- 1.5. I also address the internal classification inconsistency between ABC television and the ABC's iView service.
- 1.6. After showing that Australians recognise the virtue of consistency, I make some recommendations for reform. I conclude by looking at the ways that the ABC has avoided public scrutiny on this issue, in both its recent changes to its code of practice and also its refusal to release its classification documents and policies.
- 1.7. I summarise the various proposals for reform or action by the ABC in the final section.

2. Explanation for delay in lodging submission

- 2.1. I realise that submissions to the Committee's inquiry should have been received by 4 March 2011, three months ago. However, there are good reasons for the delay in lodging this submission:
 - 2.1.1. Unsatisfactory responses from the ACMA on 16 and 29 March 2011
 - 2.1.1.1. Over the past year I have made numerous complaints to the ABC regarding classification standards, quoting from Classification Board Reports which demonstrate inconsistency of standards. Unsatisfied with the ABC's responses, I referred my complaints regarding certain episodes of the programs *Criminal Justice (Series 1)*, *Spooks (Series 7)* and *Criminal Justice (Series 2)* to the ACMA in November and December last year.
 - 2.1.1.2. The ACMA informed me of its investigations into *Criminal Justice (Series 1)* and *Spooks (Series 7)* by letters dated 16 and 29 March 2011 respectively. Unfortunately, the ACMA only upheld my complaint with respect to one of the six episodes of which I complained. In the case of *Criminal Justice (Series 1)*, the ACMA completely disregarded the findings of the Classification Board in completing its investigation.

- 2.1.1.3. As a result of the ACMA's unsatisfactory conclusions in its investigations, I believed that it was in the public interest that I refer the numerous instances of poor ABC classification standards to this Committee.

2.1.2. The ABC's appearance before hearing of Committee on 7 April 2011

- 2.1.2.1. When I received the ACMA's notification of its investigation outcome into *Criminal Justice (Series 1)* in early April, I also became aware that Mr Michael Brealey, Head of Strategy and Governance – ABC TV, was to give oral testimony before a hearing of the Committee on 7 April 2011.
- 2.1.2.2. I was interested in hearing the evidence of Mr Brealey, as it was he that had written the ABC's response to my complaint regarding *Criminal Justice (Series 1)*, dismissing it, without any reference to the substantive comments of the Classification Board regarding the program.
- 2.1.2.3. Unfortunately, the transcript of the hearing of 7 April 2011 was only made available on the Committee's website on 15 April 2011. However, upon reading it, I was most disappointed with the misleading evidence that Mr Brealey gave to the Committee.
- 2.1.2.4. The ABC took several questions on notice at the 7 April hearing. An important question was whether the ABC could give any examples of where the ABC had differed from the Classification Board on a particular classification for a program.

2.1.3. The ABC's late submission of answers to question on notice on 13 May 2011

- 2.1.3.1. The ABC only provided its answers to the questions it took on notice on 13 May 2011, over a month after the date of the hearing when such questions were asked.
- 2.1.3.2. One of the most disappointing aspects of the ABC's answers was its failure to mention *any* of the more than 35 times that the ABC has differed with the classification standards of the Board, which are referred to in this submission.
- 2.1.3.3. This serious omission has resulted in the ABC giving misleading evidence to the Committee of a most serious nature. In light of the ABC's failure to provide any useful evidence to the Committee on this important topic, I believed that it was necessary for me to outline specific examples of such inconsistency, to correct the misleading evidence given by the ABC.

2.1.4. The significant work involved in making this submission

- 2.1.4.1. Finally, in addition to the series of events discussed above, the delay in making this submission can be explained by the significant work involved in making such submission. I have had to collate numerous correspondence between me, the ABC and the ACMA; research many different aspects of the classification system on television; and prepare useful summary documents showing the inconsistent classifications, in order to assist the Committee.

INCONSISTENCY BETWEEN THE ABC AND THE CLASSIFICATION BOARD

3. Summary of inconsistency

- 3.1. Over the past year, one has been able to observe a significant inconsistency of classification standards between the ABC on the one hand and the Classification

Board on the other hand.

- 3.2. One can see that the Committee was aware of the issue of inconsistent classification over different media. During the Committee's hearing of 7 April 2011, Mr Michael Brealey, Head of Strategy and Governance – ABC TV, was asked whether there were any examples of where the Classification Board and the ABC had disagreed on the classification of a program. Mr Brealey took the question on notice.

- 3.3. The ABC answered the question on 13 May 2011 by stating inter alia:

In providing examples of different classifications of programs it should be noted that the content classified by the Board may not be the same material viewed by the ABC. Often there is more than one version of a program or film in existence and subtle differences can alter the classification given. Examples include:

Wind in the Willows, (BBC made for television version). This was classified G by the ABC and PG by the Classification Board.

The Veronicas: Revenge Is Sweeter Tour: Live In Australia. The ABC classified 'M; Coarse language' and the Classification Board classified 'PG; Mild coarse language'.

Saddle Club. The ABC classified G and the Classification Board classified PG.

Grizzly Tales for Gruesome Kids. The ABC classified PG and the Classification Board classified G.

Dance Academy. The ABC classified G and the Classification Board classified PG.

- 3.4. The ABC's response to this question taken on notice is not only extremely disappointing but is misleading. Over the past year, there have been no less than 39 occasions where the ABC has given a different classification to a program than that given by the Classification Board. In the majority of the cases of inconsistency, it has been programs classified by the Board as MA15+ which have been classified by the ABC as M and broadcast at 8.30pm. In the case of one series broadcast during the 2010/11 school holidays, content which was classified as M by the Board was broadcast as PG by the ABC at 7.45pm.

4. List of programs demonstrating inconsistent classification

- 4.1. Over the period from August 2010 to the present,¹ I have complained about the classification of 39 episodes in 15 different programs on the ABC. These are outlined below. I have attached supporting documentation which includes letters of complaint to the ABC, responses from the ABC and, in case of three programs, the outcomes of the ACMA's investigations. These are outlined below:

4.1.1. Complaints dealt with by the ABC and the ACMA

4.1.1.1. **Criminal Justice (Series 1)**

(Episodes 1, 2, 3 and 5: Broadcast on ABC2 on 31 August 2010, 7, 14 and 28 September 2010, each at 8.30pm).

4.1.1.2. **Spooks (Series 7)**

(Episodes 6 and 7: Broadcast on ABC1 on 20 and 27 July 2009 respectively, each at 9.30pm). I referred this complaint to the ACMA in November 2010, after discovering the pattern of inconsistent classification in August-November 2010.

4.1.1.3. **Criminal Justice (Series 2) (2-part version)**

(2-part version of series) (Episodes 1 and 2: Broadcast on ABC1

¹ Apart from two complaints made in relation to *Spooks (Series 7)*, which were made in July 2009.

on 15 and 22 August 2010, each at 8.30pm)

4.1.2. Complaints dealt with only by the ABC at this stage

- 4.1.2.1. **Criminal Justice (Series 2) (5-part version)**
(5-part version of series) (Episodes 1, 2 and 3: Broadcast on ABC2 on 5 and 12 October 2010, each at 8.30pm)
- 4.1.2.2. **Breaking Bad (Series 2)**
(Episodes 2 and 7: Broadcast on ABC2 on 10 September and 15 October 2010, each at 9.30pm)
- 4.1.2.3. **Spooks (Series 8)**
(Episodes 1, 2, 3 and 4: Broadcast on ABC1 on 30 October 2010, 6, 13 and 20 November 2010 respectively, each at 8.30pm)
- 4.1.2.4. **Luther**
(Episodes 3 and 4: Broadcast on ABC1 on 29 October and 5 November 2010 respectively, each at 8.30pm)
- 4.1.2.5. **Breaking Bad (Series 1)**
(Double episode containing episodes 6 and 7: Broadcast on ABC1 on 23 December 2010 at 9.30-11.00pm)
- 4.1.2.6. **The Tudors (Series 1)**
(Episode 1: Broadcast on ABC2 on 7 January 2011 at 9.30pm)

4.1.3. Complaints recently made to the ABC (no reply received yet)

- 4.1.3.1. **Whitechapel (Series 1)**
(Episode 1: Broadcast on ABC1 on 4 March 2011 at 9.25pm)
- 4.1.3.2. **Republic of Doyle (Series 1)**
(Episodes 3, 5, 9, 10 and 12: Broadcast on ABC2 on 20 November and 4 December 2010, 8, 15, 29 January 2011 respectively, each at 7.45pm or 7.50pm)
- 4.1.3.3. **Durham County (Series 1)**
(Episode 1: Broadcast on ABC1 on 5 March 2011 at 11.00pm)
- 4.1.3.4. **Durham County (Series 2)**
(Episodes 1, 4 and 6: Broadcast on ABC1 on 16 April, 7 and 21 May 2011, each at or after 10.30pm)
- 4.1.3.5. **Whitechapel (Series 2)**
(Episode 1: Broadcast on ABC1 on 25 March 2011 at 9.25pm)
- 4.1.3.6. **Being Human (Series 3)**
(Episodes 1-6 and 8: Broadcast on ABC2 18, 25 March, 1, 8, 15, 22 April and 13 May 2011 each at 8.30pm)

- 4.1.4. All relevant correspondence regarding these complaints above is attached to this submission.

5. The ABC has misled the Committee

- 5.1. It was Mr Brealey himself who wrote the ABC's response to me in January 2011 regarding my complaint on the classification of *Criminal Justice (Series 1)* broadcast on ABC1 in August and September 2010. In this letter, Mr Brealey justified the ABC's action in giving episodes of the series M classifications, despite being classified by the Board as MA15+.
- 5.2. Mr Brealey was in a position himself to answer the Committee's question regarding inconsistency on 7 April 2011. It may have been appropriate to have taken the question on notice so he could provide the Committee with all the details in a document. However, the ABC's answers to questions on notice does not mention the case of *Criminal Justice (Series 1)* at all. This is a serious omission.

- 5.3. However, its failure to mention *any* of the serious and justified allegations of inconsistent classification, referred to in this submission, is even more serious. The ABC's failure to mention these has resulted in it misleading the Committee into thinking no such inconsistency exists.

THERE IS NO GOOD REASON FOR THIS INCONSISTENCY

6. Introduction

- 6.1. In its submissions to the Committee and in correspondence to me and to the ACMA, the ABC has consistently submitted that the classifications given by the Classification Board to particular programs, and the reasons for such classifications given in the Board's Decision Reports, are not relevant to ABC classification decisions because:
- 6.1.1. the *Guidelines for the Classification of Films and Computer Games* made under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ("the Classification Act") which are applied by the Board ("the national classification guidelines"), are different to the classification guidelines contained in the ABC Code of Practice ("the ABC classification guidelines"). Specifically:
 - 6.1.1.1. the ABC classification guidelines reflect the independence of the ABC;
 - 6.1.1.2. the ABC guidelines take into account the production environment for television; and
 - 6.1.1.3. the national guidelines address classification categories that do not apply to television and include standards that only apply to computer games.
 - 6.1.2. the ABC classification guidelines do not focus on an "impact test" as is contained in the national classification guidelines;
 - 6.1.3. the content classified by the Board is different to that broadcast on ABC;
 - 6.1.4. the Board classifies compilations of episodes in distinction to the ABC which classifies each episode individually. The significance of this is that:
 - 6.1.4.1. first, the Board only considers the highest classifiable elements in a compilation of episodes, and
 - 6.1.4.2. secondly, the cumulative impact of multiple episodes is not present in individual episodes.
- 6.2. In this section of the submission, I will seek to show how each of these contentions made by the ABC are either untrue, misleading or their significance over-stated.

7. The ABC classification guidelines were originally those of the national scheme

- 7.1. The ABC's contentions that its classification guidelines are different to the national classification guidelines, and that some significance can be made of this, fails to take into account the history of the ABC guidelines. Its claim that the difference is a result of the ABC's independence and television production environment, completely disregards the fact that the national classification guidelines were themselves part of various ABC codes of practice regulating programming on ABC television for more than a decade.
- 7.2. History of the ABC classification guidelines
- 7.2.1. In 1992, the Commonwealth Parliament passed the new *Broadcasting Services Act 1992* (Cth). A consequential amendment to this Act included an amendment to the *Australian Broadcasting Act 1983* (Cth), which required the ABC Board to develop a code of practice relating to programming matters and to notify that code to the Australian Broadcasting Authority ("ABA"), the predecessor of the Australian Communications and

Media Authority ("ACMA"). The ABC notified the ABA of its initial code of practice in December 1992 and an amended version in March 1993.² This first code of practice appears in the ABC's Annual Report for 1992/93 and includes the following section regarding classification:³

7. Television Program Classifications

This system of television program classification **applies** the Guidelines for the Classification of Films and Videotapes issued by the Office of Film and Literature Classification. Programs having a particular classification under the Office of Film and Literature Classification Guidelines may be modified so that they are suitable for broadcast or suitable for broadcast at particular times.

(Emphasis added)

- 7.2.2. Therefore, the classification guidelines applied by ABC Television were identical to those guidelines made under the *Classification Act*.⁴ This continued for more than a decade until 2003. As a result of this uniformity, the Classification Board and the ABC both made classification decisions according to substantially identical guidelines up until 2003.
- 7.2.3. However, with the introduction of new national classification guidelines made under the *Classification Act* in 2003, which combined the guidelines for *films* with the guidelines for *computer games*, the Television Program Classifications section of the ABC Code of Practice was amended on 1 July 2004 so that the "Guidelines for the Classification of Films and Videotapes" now referred to the "Guidelines for the Classification of Films and *Computer Games*". The amended ABC classification guidelines provided:⁵

8. Television Program Classifications

This system of television program classification applies the Guidelines for the Classification of Films and **Computer Games** issued by the Office of Film and Literature Classification and current at the time of publication of this Code of Practice.

(Emphasis added)

- 7.2.4. However, this amendment to the title of the OFLC guidelines was misleading. Despite purportedly applying the new OFLC guidelines at that time currently in force (i.e. as at 1 July 2004), the Television Program Classifications continued to apply the old more detailed OFLC guidelines that were in force up until 29 March 2003. The *Guidelines for the Classification of Films and Computer Games* issued by OFLC and current at the time of 1 July 2004 were the new guidelines that commenced on 30 March 2003.
- 7.2.5. Despite the misleading statement, it was clear that the ABC intended to continue to use the more detailed pre-2003 guidelines, as it specifically included the actual wording of the old guidelines into its Code on 1 July 2004. Before this date, the ABC codes of practice had only ever *referred* to the OFLC classification guidelines, without actually *including* the wording.

² See ABC Annual Report for 1992/92, at p 63.

³ Ibid, p 101.

⁴ Compare the *Guidelines for the Classification of Films and Videotapes (Amendment No 3)* (in force from 18 September 2000 to 29 March 2003) at http://www.ag.gov.au/www/agd/agd.nsf/Page/Classificationpolicy_Classificationlegislation with the *ABC Code of Practice 2008* at http://www.abc.net.au/corp/pubs/documents/200806_codeofpractice-revised_2008.pdf

⁵ See ABC Television Program Classifications in the *ABC Code of Practice* in ABC Annual Report 2004/05 at http://www.abc.net.au/corp/annual_reports/arindex.htm (Emphasis added)

- 7.2.6. It was only three years later that the ABC actually amended the introductory section of the Television Program Classifications section of its code of practice to reflect that the ABC guidelines did not actually adopt the new OFLC guidelines introduced in 2003, but continued to apply the old pre-2003 guidelines. The *ABC Code of Practice 2007*, which came into operation in March 2007, made clear that its classification guidelines were *based* on the classification guidelines made under the *Classification Act*, to reflect the fact that the ABC had retained the more detailed pre-2003 national classification guidelines. The new Code introduced in 2007 provided that:⁶

6. Television program classifications

- 6.1 The ABC applies the classifications listed below to all its domestic television programs with the exception of news, current affairs and sporting events. The ABC classifications are **based** on the Guidelines for the Classification of Films and Computer Games issued by the Office of Film and Literature Classification (OFLC), made under the *Classification (Publications, Films and Computer Games) Act 1995*.

(Emphasis added)

- 7.2.7. In its most recent code of practice, the *ABC Code of Practice 2011*, which came into operation on 11 April 2011, the ABC has re-branded its classification guidelines as the "Associated Standard: Television Program Classification". It has sought to distance its classification guidelines from the national classification guidelines through this re-branding and also through a change in the introductory section which now provides that the ABC guidelines are *adapted* from the national guidelines:

Principles:

The ABC applies the classifications listed below to the broadcast of all its domestic television programs with the exception of news, current affairs and sporting events. The ABC classifications are **adapted** from the Guidelines for the Classification of Films and Computer Games issued by the Classification Board made under the Classification (Publications, Films and Computer Games) Act 1995.

(Emphasis added)

- 7.2.8. Despite the changes to the introductory sections of the classification provisions in ABC codes of practice over the years from 1992 to the present, the actual content of the ABC's classification guidelines have not substantially changed since 1992.⁷ Furthermore, the ABC classification guidelines contained in the *ABC Code of Practice 2011* are substantially identical to the first ever classification guidelines made under the *Classification Act 1995* which came into operation on 12 July 1996. The statement that its guidelines are adapted from the national guidelines in the

⁶ See ABC Television Program Classifications in the *ABC Code of Practice 2007* in ABC Annual Report 2006/07 at http://www.abc.net.au/corp/annual_reports/arindex.htm

⁷ From a perusal of the various ABC classification guidelines from when the wording was introduced in 1 July 2004, one can see that certain minor amendments have been made. For example, when the *Code of Practice 2007* was introduced, the following words were added to the "themes" section under the "G" classification: "The presentation of dangerous, imitable behaviour is not permitted except in those circumstances where it is justified by context. Any depiction of such behaviour must not encourage dangerous imitation." A few formatting changes were made in the new *Code of Practice 2011* to list adjectives in dot points, for clarity. Also, the adjective "high" in the "violence" section under the "M" classification was replaced with the adjective "strong" to reflect the terminology changes which were introduced into the national classification guidelines in 2003. Furthermore, the sentence "Realistic treatments may contain detailed depictions, but these should not be prolonged" was deleted from the "violence" section under the "MA15+" classification, and the treatment of themes at an MA15+ level, rather than being "discreet", must now "not be gratuitous".

2011 code is misleading and fails to recognise this important history of the ABC classification guidelines.

7.3. Despite this history, the ABC maintains that the different guidelines justify the inconsistency of classification standards

7.3.1. However, despite the fact that the current ABC classification guidelines are substantially the same as those applied by the Classification Board before 2003, the ABC relies on the current difference between the two sets of guidelines to justify its inconsistent classification standards.

7.3.2. The ABC provided the following submission on 21 December 2010 to the ACMA's investigation into the classification of the two-part version of the program *Criminal Justice (Series 2)*, broadcast on ABC1 on 15 and 22 August 2010:⁸

... [A]ny reliance on the Classification Board's decisions disregards the important distinctions between the Guidelines for the Classification of Films and Computer Games applied by the Classification Board and the ABC's Code of Practice. Although the classifications in the Code of Practice are based on the Guidelines for the Classification of Films and Computer Games, they are different in numerous ways; ...

7.3.3. With respect, the only important distinctions between the ABC guidelines and the current national guidelines are the differences between the pre-2003 national guidelines and the post-2003 national guidelines. The combined national guidelines introduced in 2003 simplified the classification guidelines and made the "impact test" (which was already present in the pre-2003 national guidelines) more explicit. However, as I will demonstrate in the next section, independent research has indicated that these new combined guidelines were never intended to alter classification standards.

7.4. The differences between the two guidelines are not due to the ABC's independence

7.4.1. In evidence to the Committee, the ABC has suggested that the reason it has different classification guidelines is due to its independence. In its written submissions to the Committee dated 11 March 2011, Mr Michael Millett, Director of Communications at the ABC stated:

[T]he ABC's Code of Practice sets out the classification regime that the Corporation applies to its television program. This regime is based on the Guidelines for the Classification of Film and Computer Games issues by the Office of Film and Literature Classification, but has important differences **which reflect the ABC's independence as a public broadcaster.**

(Emphasis added)

7.4.2. When asked by Senator Barnett at the hearing on 7 April 2011 why the ABC's independence as a public broadcaster qualified and allowed it to have different guidelines, Mr Michael Brealey's response was less than satisfactory:⁹

As Mr Meagher [of the SBS] said before, it is in our legislation to be independent in editorial content matters. Part of that is being able to make decisions around our content that we know suits our audience and that we think are the most appropriate for our audience and for the ABC.

⁸ See http://www.acma.gov.au/WEB/STANDARD/pc=PC_310290 for the ACMA's investigation reports.

⁹ See <http://www.aph.gov.au/hansard/senate/commtee/S13770.pdf> , p 28.

- 7.4.3. In light of the history of the ABC classification guidelines above, it is disingenuous to say that the difference between the national and ABC classification guidelines is due to the public broadcaster's independence. If that were the case, then the ABC would have lacked independence for over a decade when it applied the national guidelines by referencing them in its code of practice!
- 7.4.4. The ABC's contention that the difference is due to its independence fails to recognise that its guidelines are "based on" the current national guidelines not because the ABC had modified its guidelines to reflect its independence, but because the ABC made a decision in 2003 to retain the more detailed guidelines of the national scheme which had been replaced with the combined guidelines which emphasised the "impact test". The change on 1 July 2004 from "applying" the national guidelines to merely being "based on" them, was actually the result of the ABC's inaction and staying with the status quo.

7.5. The differences are not due to two other reasons contended by the ABC

- 7.5.1. Finally, the ABC has argued that the reason for the difference between the two sets of guidelines is due to two other factors, namely:
 - 7.5.1.1. the fact that the ABC guidelines take into account the production environment for television; and
 - 7.5.1.2. the national guidelines address classification categories that do not apply to television and include standards that only apply to computer games.
- 7.5.2. Both of these reasons are either untrue or irrelevant in assessing the inconsistency of standards between the Classification Board and the ABC.
- 7.5.3. In Mr Brealey's letter of 11 January 2011 to me regarding *Criminal Justice (Series 1)*, he said:

While the ABC Code of Practice is based upon the Board's Guidelines for the Classification of Films and computer Games, the Code and the Guidelines are not identical. For example, **the code takes into account the production environment for television. It provides more detail at each of the classification levels to ensure that program makers have better guidance on elements that affect classification.** Other differences include that **the Guidelines address classification categories that do not apply to television, include standards that only apply to computer games...**

(Emphasis added)

- 7.5.4. In relation to the first stated reason, it is simply not true that the reason for the difference in guidelines is because the ABC guidelines take "into account the production environment for television". This disregards the history of the guidelines above and in particular the fact that the more detailed guidelines of the ABC were more or less the guidelines that the Classification Board applied from 1996 to 2003. Finally, there may be more detail in the ABC guidelines compared with the guidelines that the Board currently applies. However, this is a result of the introduction of the combined national guidelines in 2003, and is not a justification for inconsistent classification standards.
- 7.5.5. In relation to the first part of the second stated reason, the fact that the national guidelines address classification categories that do not apply to television is immaterial. The codes of practice of the subscription television stations (i.e. pay TV) and the SBS both incorporate the current combined national classification guidelines, according to which programs are classified. However, both codes indicate that the X18+ and RC categories

(and R18+ category in the case of SBS) are not to be broadcast. Indeed, from 1992 to 2004 (when the various ABC codes of practice only *referenced* the national guidelines and did not include the actual wording), the ABC codes of practice themselves have all contained a section specifically indicating that X and unmodified R programs are not suitable for television. Therefore, for a decade, the ABC classification guidelines referred to classification categories which did not apply to television. The fact that the national guidelines contain categories that are not applicable to television is indeed a point of the whole classification regime – a regime which prohibits content of a certain nature from broadcast on television.

7.5.6. In relation to the second part of the second stated reason, the fact that the new combined national guidelines are applicable to computer games is not a reason for disregarding classification decisions made under those guidelines. The reason for this is while the combined guidelines are used for computer games, they are also used for film (cinematographic and TV series). The ABC's contention would be legitimate if it were suggested that the Board apply the ABC guidelines to the classification of a computer game. However, it is not so contending.

7.5.7. In conclusion, the ABC's two contentions regarding the differences between the ABC and national classification guidelines should both be rejected.

8. Both the ABC and current national classification guidelines have an "impact test"

8.1. Apart from the differences addressed above, the ABC has also contended in correspondence with me and the broadcasting regulator that the decisions of the Classification Board are not relevant to ABC classification decisions because the Board applies an "impact test" which the ABC does not.

8.2. Therefore, in its submission to the ACMA concerning its investigation into *Criminal Justice (Series 2)*, already referred to above, the ABC further submitted:

Although the classifications in the Code of Practice are based on the Guidelines for the Classification of Films and Computer Games, they are different in numerous ways; most notably, **the ABC's classification system does not focus on the 'impact test' which is central to the Guidelines for the Classification of Films and Computer Games.**

(Emphasis added)

8.3. And in his letter of 11 January 2011 to me regarding *Criminal Justice (Series 1)*, also already referred to above, Mr Brealey said:

While the ABC Code of Practice is based upon the Board's Guidelines for the Classification of Films and Computer Games, the Code and the Guidelines are not identical. ...**the Guidelines...assess the impact of scenes using different criteria.**

(Emphasis added)

8.4. In its answers to questions taken on notice at the hearing of the Committee on 7 April 2011, the ABC was more categorical and actually went as far as to deny that the ABC even applied the "impact test". It said (in answer to question 7):¹⁰

There are a number of factors that may lead to variation in classification between the ABC and the Classification Board. These differences do not necessarily come about as a result of either the Classification Board or the ABC making an error. ...

¹⁰ Available on the Committee's website at:
http://www.aph.gov.au/senate/committee/legcon_ctte/classification_board/submissions.htm

For example the Classification Board applies an “impact test” which the ABC does not.

(Emphasis added)

8.5. Two submissions can be made in response to these misleading contentions of the ABC. First, the new combined guidelines applied by the Classification Board were not intended to introduce a new “impact test” or alter classification standards. Secondly, the ABC classification guidelines do apply an “impact” test, despite it being less explicit, because its guidelines are substantially the same as the pre-2003 national classification guidelines, which always contained an “impact test”.

8.6. The new 2003 combined national guidelines did not introduce a new “impact test”

8.6.1. Independent research commissioned by the Office of Film and Literature Classification (OFLC)¹¹ in 2004 held that no change in standards had been detected since the introduction of the 2003 combined classification guidelines. This research was conducted by Ms Kate Aisbett of Entertainment Insights.¹²

8.6.2. In addition to concluding that there had been no change of classification standards with the introduction of the new guidelines, Ms Aisbett also concluded that the “impact test” which was made explicit in the combined guidelines, had always been part of the classification guidelines. She said:¹³

The explicit inclusion of what has colloquially become known as the ‘impact test’ in the 2003 Guidelines was intended to more clearly capture this longstanding concept used in classification. The words used to describe the concept in the previous guidelines (at Attachment B) are recast in what is intended to be a more accessible and explicit form.

...

The previous guidelines described the concept of ‘impact’ in terms of the strength of classifiable elements, **but the explicit usage in those guidelines was intermittent.** The 2003 Guidelines have made the role of impact more explicit by establishing the classification hierarchy in terms of impact and by listing the key factors of impact. **However, the previous guidelines always used the concept when defining ‘the gradation of content’ (ie the degrees of intensity of impact from mild to high), but specifying certain factors that contribute to the impact of the depiction of the content.** They noted the level of detail, frequency or treatment appropriate for classifiable elements for a given classification category.

(Emphasis added)

8.6.3. The above research makes clear that the pre-2003 national guidelines (from where the ABC classification guidelines are derived) always contained an “impact test” and that the new combined guidelines were only meant to make this test more explicit.

¹¹ This office not longer exists. It is now the Classification Operations Branch of the Commonwealth’s Attorney-General’s Department.

¹² Kate Aisbett, *Report on the Review of the Operation of the 2003 Guidelines for the Classification of Films and Computer Games* (Entertainment Insights) (December 2004). (Available at: [http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~80000CPB+~+on+Review+of+the+Operation+of+2003+Guidelines+for+Classification+of+Films+and+Computer+Games256785.pdf/\\$file/80000CPB+~+on+Review+of+the+Operation+of+2003+Guidelines+for+Classification+of+Films+and+Computer+Games256785.pdf](http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~80000CPB+~+on+Review+of+the+Operation+of+2003+Guidelines+for+Classification+of+Films+and+Computer+Games256785.pdf/$file/80000CPB+~+on+Review+of+the+Operation+of+2003+Guidelines+for+Classification+of+Films+and+Computer+Games256785.pdf))

¹³ Ibid 5.

8.7. The ABC classification guidelines do contain an "impact test"

- 8.7.1. After recognising that the combined national classification guidelines were never intended to alter the "impact test", it is therefore clear that the ABC classification guidelines *do* in fact apply the "impact test" in classifying material, albeit less explicit than in the current national guidelines.
- 8.7.2. Despite the statements of the ABC above which played down the role of the "impact test" in the ABC classification guidelines, Mr Brealey conceded that the ABC did in fact apply an "impact test". In oral submissions before the Committee's hearing on 7 April 2011, Mr Brealey stated:

That is not to say that we do not assess impact. We do; we just do not apply the impact test. We look at impact on all of the themes that might apply in a particular program. We still take those things into consideration but there is no impact test.

(Emphasis added)

- 8.7.3. With respect, Mr Brealey was trying to have it both ways: denying that the ABC applied the same "impact test" as outlined in the national classification guidelines, and yet conceding that the ABC does have an "impact test" because it assesses impact. His statement is disingenuous to say the least, and at worse it is misleading.
- 8.7.4. That the ABC classification guidelines do implicitly recognise the "impact test" is confirmed by the Standing Committee on Environment, Communications and the Arts inquiry entitled *The effectiveness of the broadcasting codes of practice*.¹⁴ That Committee stated in its report in 2008:¹⁵
- 'Impact' is also considered by all broadcasters in determining classifications—explicitly in the subscription television Codes of Practice, and implicitly with other broadcasters.
- 8.7.5. The Committee cited the ABC *Code of Practice* as well as the *Commercial Television Industry Code of Practice* and the *SBS Code of Practice*, being codes which implicitly consider the "impact test".
- 8.7.6. Furthermore, one only needs to refer to the current ABC classification guidelines in the *ABC Code of Practice 2011* to see that "impact" is referred to no less than 12 times as a factor in differentiating between the various classification levels.
- 8.7.7. To see the impact test being applied by the ABC itself, one only needs to read the ABC's letter of 3 February 2011, in which it disagreed that episode 2 of *Breaking Bad (Series 2)* should have been classified as MA15+ because of violence and drug use. In, arguing that the program was correctly classified M, the ABC referred to the impact of the violence no less than six times:

Several factors reduced the **impact** of the depiction of Jesse hitting Tuco with a rock.

...

The depiction was very brief, using rapid, momentary shots edited together, **reducing the** level of detail visible and the **impact**...

...

¹⁴ See http://www.aph.gov.au/senate/committee/eca_ctte/broadcasting_codes/report/report.pdf

¹⁵ Ibid 22.

... Audience & Consumer Affairs considers that the **impact** of the depiction was not high.

Similarly, the **impact** of the depiction of Jesse shooting Tuco was not high due to several factors.

...

Owing to the blood detail, this shot was the most **impactful** of all shots in the scene, but its **impact** was not high.

...

(Emphasis added)

8.7.8. The ABC then took issue with my characterisation of the drug use in the episode as having a "strong viewing impact". The ABC said that "There is no requirement in relation to viewing impact" – making this comment, despite it having only just assessed the violence in the episode according to its impact.

8.7.9. In conclusion, the ABC's contention that the Classification Board's decisions on programs are not relevant to the classification of the same on the ABC because the Board applies an "impact test" which the ABC does not, should be rejected.

8.8. Difference in terminology is a result of streamlined 2003 combined guidelines

8.8.1. In some of its correspondence with me, the ABC has taken issue with the wording of my complaints where I have contended that certain material should have been classified as MA15+ because it contained "*strong* violence" or "*strong* themes". It has taken issue on the basis that the ABC classification guidelines at the MA15+ level do not refer to whether material is "strong" in impact or not.

8.8.2. However, this is simply a difference in terminology – not in the classification hierarchy – and simply reflects the introduction of the streamlined guidelines in 2003, which adopted consistent adjectives.

8.8.3. In fact, amongst the minor changes to the ABC classification guidelines in the new *ABC Code of Practice 2011*, the ABC has actually changed the word "high" in the "themes" and "violence" sections of the M classification. So, now the impact of the treatment of themes at M level "should not be *strong*". And depictions of violence that contain detail should "not have a *strong* impact". This minor change shows that the ABC is trying to make its guidelines more consistent with the wording of the national classification guidelines. For the ABC to take issue with my description of content as being "strong in impact" is a little hypocritical, when considering these changes.

9. Content on the ABC and in DVD releases: there is no relevant difference

9.1. Another reason the ABC has given in contending that this inconsistency of classification standards is justified is that the content that the Classification Board assesses is different in several respects. The ABC contends that:

- 9.1.1. First, the DVDs classified by the Classification Board often contain commentary and special features which are not broadcast by the ABC;
- 9.1.2. Secondly, in some cases the summary of scenes in the Board's Decision Reports do not align with what the ABC has broadcast; and
- 9.1.3. Thirdly, in some cases the ABC has modified the programs classified by the Board so that they can be classified at a lower level.

9.2. Unfortunately, as with other contentions made by the ABC, these arguments above are either not relevant, misleading or exaggerated in dealing with the question of

inconsistency of classification standards, for the reasons outlined below.

- 9.3. In this section I also outline how the ABC codes of practice since 1992 have either explicitly or implicitly required the ABC to apply the Board's classifications regarding a particular program unless such program has been modified.
- 9.4. I conclude by saying that these three contentions made by the ABC are really a distraction from the fact that in all 39 episodes of the 15 different programs of which I have complained, apart from three episodes, the material which caused the Board to reach a certain classification has been broadcast in identical form on ABC television.

9.5. Additional material and scenes on DVD releases are in most cases irrelevant

- 9.5.1. In its reply to me (dated 18 November 2010) regarding my complaint regarding the **two-part version** of the program *Criminal Justice (Series 2)*, broadcast on ABC1 on 15 and 22 August 2010, the ABC justified the discrepancy of classification standards by referring to the additional material and scenes contained in DVD releases of series:¹⁶

Furthermore, the Classification's Board's decisions about DVD releases, such as the Criminal Justice DVD releases, are based on different content to that which is classified by ABC Television; for example, DVD releases often contain additional material and scenes,...

- 9.5.2. In my respectful submission, this contention would only be relevant to the issue of inconsistency of classification standards, where it could be shown that such additional material and scenes did *in fact* lead to a higher classification for the DVD release. It is simply not appropriate to say that a Decision Report of the Board is irrelevant to the determination of the correct classification of a program to be broadcast on ABC because the DVD release contained additional material and scenes.
- 9.5.3. Despite making this blanket submission, the ABC has not been able to identify any scenes of any DVD release of programs of which I have complained, which contributed to a higher classification by the Board than that given by the ABC. This is because in none of the Board Decision Reports that I have provided with my complaints to the ABC, has there been any finding relating to content other than the series episodes themselves, in contributing to the classification given.
- 9.5.4. In other words, at least with respect to the Board Decision Reports concerning my complaints, the Board has only ever found scenes in particular episodes of the actual series to have caused a program to have reached a particular classification.
- 9.5.5. Where those scenes are broadcast by the ABC in identical format (which is the case in all but three episodes of which I have complained), the ABC should give due weight to the Board's remarks where they are available, but should nevertheless be maintaining roughly similar standards even without the availability of the Board's reports.
- 9.5.6. In conclusion, the ABC's unqualified contention that the presence of additional material on a DVD release of a television series justifies inconsistent classification standards, is irrelevant, unless it can be shown that such material did *in fact* contribute to a higher classification by the

¹⁶ See http://www.acma.gov.au/WEB/STANDARD/pc=PC_310290 for the ACMA's investigation reports. (Included in the attached documents at C85 and C79).

Board.

9.6. Differences in describing scenes do not make the Board's findings irrelevant

- 9.6.1. The ABC has also sought to disregard the Classification Board Decision Reports, by claiming that the content described by the Board, in some cases, does not correspond to that broadcast by the ABC.
- 9.6.2. For the reasons below, this statement is disingenuous and ought to be rejected.
- 9.6.3. With respect to this topic, the ABC is not referring to where it has actually modified the program itself, but is simply taking issue with the fact that the Board sometimes describes content more succinctly than the ABC has in responses to my complaints.
- 9.6.4. In its letter of 3 February 2011¹⁷ regarding *Breaking Bad (Series 2)*, the ABC stated that the descriptions of the drug use in the second episode (entitled "Grilled") contained in the Board's Decision Report did not correspond with the episode broadcast on ABC2. ABC Audience & Consumer Affairs stated:

I should also point out that the description of drug use scenes quoted in your letter does not correspond to the content of the episode broadcast on ABC2. At no point did Tuco eat powder from his finger, crush tablets, or snort powder while firing his gun randomly at a cow.
- 9.6.5. In making this statement, the ABC has attempted to make the Board's decision irrelevant by unfairly focussing on the difference in the way the Board has described a particular scene, which is often written in summary form.
- 9.6.6. The difference in the descriptions of scenes by the Board and the ABC can be seen in the attached *Chart: Classification Inconsistency between the Classification Board and the ABC in relation to Breaking Bad (Series 2)*.¹⁸ One can see that the difference lies merely in the way the material is described, not in a difference of content.
- 9.6.7. So, in the lead up to first depiction of drug use in the episode, Tuco does put his finger into the packet and raise to his nose to smell it. He almost puts in his mouth, justifying the Board's comment that he "eat[s] powder" which is probably technically incorrect.
- 9.6.8. Also, Tuco does crush the crystals – it is merely to point out a technicality to say that they were not "tablets", as described the Board. In fact, Tuco crushed the crystals with his knife in both the first and third scenes, as the ABC states itself.
- 9.6.9. And finally, Tuco did fire his gun at a cow *after* the first scene of drug use; it is extremely technical and misleading of the ABC to suggest that something can be made of the fact that he was not firing his gun at the *exact* same time as snorting the powder.
- 9.6.10. It is important to note that the ABC did not contend that the Board report was irrelevant because it had modified this episode for broadcast. It did not state so and could not state so either – the episode was identical to the form in which it was classified by the Board as part of the DVD release

¹⁷ Incorrectly dated as "3 February 2010".

¹⁸ See E149.

– it was not modified for broadcast by the ABC. Therefore, the technical differences in descriptions did not detract from the relevance of the Board's finding that these three scenes of drug use together in one episode were cumulatively strong in impact and were at an MA15+ level.

- 9.6.11. The ABC also attempted to disregard the Board's findings in respect of a scene of violence in episode 2 of *Criminal Justice (Series 1)*. The ABC commented:

The scene as described in the Board report which you quote in your complaint appears to be different to the version screened by the ABC. There is no shaving of Ben's body or his scrotum, as described in the Board report.

- 9.6.12. The Board report included the following comment:

Ben is dragged into a shower by Milroy and fellow inmates. They remove all of Ben's clothes and shave and scrape his body including his scrotum.

- 9.6.13. However, again this is purely a difference in the way that the Board and the ABC described the content. It is important to remember that episode 2 was broadcast by the ABC in identical form to the episode on the DVD release and classified by the Board. The ABC did not contend otherwise.

- 9.6.14. One can see that the ABC's contention that the scenes described by the Board are in some cases not the same as that broadcast on the ABC, is a result of the different ways of describing the same material. It is misleading and is not a valid reason in dismissing the Board's findings.

- 9.6.15. What is important is the Board's findings about particular scenes and how they contributed to a particular classification level, not whether the Board may have made a technical error in describing a scene.

9.7. Only material in three of the 39 episodes of which I have complained were modified by ABC

- 9.7.1. Out of the three contentions the ABC makes under this topic, the only one which is partially valid is the contention that the Board's findings as contained in its reports, might need to be applied differently if material has been modified for broadcast on television.

- 9.7.2. The ABC provided the following submission on 21 December 2010 to the ACMA's investigation into the classification of the two-part version of the program *Criminal Justice (Series 2)*, broadcast on ABC1 on 15 and 22 August 2010:

In several cases, the descriptions of scenes in the Classification Board Reports supplied by [the complainant] do not accurately reflect the content broadcast by the ABC, often because the content of DVD releases differs from the content acquired and broadcast by the ABC (for example, scenes may be edited differently or not present at all).

- 9.7.3. In the case of the two-part version of *Criminal Justice (Series 2)*, the ABC's contention that the Board's descriptions of scenes might not accurately reflect the material broadcast on ABC is partially valid.

- 9.7.4. I referred my complaint regarding these two episodes, broadcast in August 2010, to the ACMA in December 2010. In January 2011, the ACMA decided that my complaint was not upheld.¹⁹ My complaint had relied upon the

¹⁹ See Investigations Nos 2522 and 2523 at http://www.acma.gov.au/WEB/STANDARD/pc=PC_310290 (Included in the attached documents at C85 and C79).

Classification Board's decision to classify the five part version of the series as MA15+.

- 9.7.5. In respect of the two-part version of the series, it is legitimate to recognise that the ABC did in fact broadcast a different version of the series to that classified by the Board, despite my reservations as to whether such difference did in fact reduce the classification of the episodes to M, especially the first of the two episodes.
- 9.7.6. However, regardless of whether the **two-part version** of this series was materially different affecting its classification level, the **five-part version** which was broadcast commencing the week following, this time on ABC2, was identical to the content classified by the Board, except for episode 3, from which a suicide scene was removed from the original version. In this case, there is no reasons to apply the Board's findings regarding certain scenes in the episodes which were at an MA15+ level. I have not yet referred my complaint regarding the **five-part version** of *Criminal Justice (Series 2)* to the ACMA.
- 9.7.7. The only scene of any other program, out of the 39 of which I have complained, that has been modified from the version as classified by the Board, was episode 3 of *Luther*. However, not only was it only one of the three scenes which caused the episode to be classified as MA15+ by the Board, but the modified scene broadcast on ABC was only marginally different. The Board agreed with the report prepared by the authorised television series assessor, who made the following comments with respect to the third scene in episode 3:

At 17'29" satanic themes are shown when a man who is implied to have harmed a woman is seen drinking, what appears to be, her blood. The scene is gruesome as the man has copious amounts of blood splatter surrounding him and dripping down his face and clothes. Although there is no injury detail shown the sense of the violence is strong and the scene is realistic which creates a disturbing sense of threat. The woman is later heard screaming and seen bound in a confined space. The impact is strong.

- 9.7.8. Although we may not have seen the full extent of the scene as described above, the audience saw most of the disturbing elements of the scene. The audience saw Lucien Burgess (the man) cover the box in which Kirsten Ross (the woman) was, with tape and then press a button, which caused Ross to be frozen to death. The audience heard Kirsten screaming, as the assessor's report cites. The audience may not have seen "copious amounts of blood splatter...dripping down his face and clothes" but it did see Burgess wearing an apron which had significant blood marks on it in reasonably close-up detail.
- 9.7.9. What is important to remember is that despite the minor modifications made to this third scene, the other two earlier scenes which were strong in impact and at the MA15+ level, were *not* modified. The ABC did not contend to the contrary. These scenes were described by the assessor as follows:

At 0'59" themes are used when a man enters a house under false pretences. Once inside it is implied that he is a psychopath when he begins to lick the woman's face whilst threatening her with a flip razor. The woman is so scared that she urinates during the scene. The scene is very realistic and holds a strong sense of threat and menace. The impact is strong.

At 3'29" Luther enters what appears to be a crime scene. A narrow hallway is revealed to be covered from floor to ceiling in "satanic" hand writing, it is implied

that this has been done in blood. The theme is treated with a strong sense of threat and menace and as such, the impact is strong.

- 9.7.10. These two scenes were sufficient to cause the program to be classified as MA15+.
- 9.7.11. In conclusion, although the ABC has broadcast certain episodes where it has modified the scenes contained therein which caused the episodes to receive a particular classification by the Board, this has only been on three out of 39 occasions. On the other 36 occasions, the scenes which the Board identified as materially contributing to a particular classification have appeared the same on ABC television.

9.8. Implicit in ABC codes of practice that ABC will apply Board's classifications

- 9.8.1. Implicit in the current ABC code of practice, and explicit in the ABC codes of practice in existence before 2007, is a provision which requires the ABC to apply the classification given to a program by the Classification Board, unless it has been modified for broadcast.

- 9.8.2. The *ABC Code of Practice 2011* contains a section which provides for the modification of programs so that they are suitable for broadcast:

7.3.2 Implementation Guidelines

...

Programs, including those having a particular classification under the Classification Board's Guidelines for the Classification of Films and Computer Games, may be modified so that they are suitable for broadcast or suitable for broadcast at particular times.

- 9.8.3. This section, or a similar version of it, has appeared in all of the ABC codes of practice from 1992 to the present. However, an understanding of the history of the section is again helpful in explaining its intended application.
- 9.8.4. The television program classifications section of the *ABC Code of Practice 1992* (the first ABC code of practice) commences with the following statement which, although reproduced already above, is repeated here with a different emphasis:

7. Television Program Classifications

This system of television program classification applies the Guidelines for the Classification of Films and Videotapes issued by the Office of Film and Literature Classification. **Programs having a particular classification under the Office of Film and Literature Classification Guidelines may be modified so that they are suitable for broadcast or suitable for broadcast at particular times.**

(Emphasis added)

- 9.8.5. The intention of the statement emphasised above was to ensure that the ABC applied the classification given by the Classification Board to a particular program and made under the national guidelines, unless the ABC had modified such program. It is implicit that the ABC will follow the classification given by the Board, unless the program is modified.
- 9.8.6. The words expressing this concept first appearing in the *ABC Code of Practice 1992* were amended for the first time in 2007 when the phrase

was amended to then read:²⁰

6.3 Implementation Guidelines

Programs, **including those** having a particular classification under the OFLC Guidelines, may be modified so that they are suitable for broadcast or suitable for broadcast at particular times.

(Emphasis added)

- 9.8.7. It may be inferred that the introduction of the words "including those..." was intended to make the application of the section more broad, to encompass the modification of any program, regardless of whether it had been classified by the Classification Board (OFLC), to make it suitable for broadcast. This would allow the provision to apply to say an unclassified film or program which in its original version might be classified MA15+, but which the ABC might modify so that it could be classified M and broadcast at 8.30pm.
- 9.8.8. However, despite the modification in 2007, it is my submission that it is still implicit in the section in the current ABC code of practice that the ABC will apply the classifications given by the Board to particular programs unless modifications (either done by the ABC itself or by a distributor, as demonstrated in the case of the two-part *Criminal Justice (Series 2)* series) have been made to such programs. Such requirement is clear from the first version of the section in the 1992 code, and this concept cannot be said to have been changed with the modification in 2007, which only broadened its application to programs not classified by the Board.
- 9.9. Distraction from main issue: only in three out of 39 episodes was the relevant material modified for broadcast
 - 9.9.1. The ABC has attempted to justify its disregard for the Classification Board's decisions and findings based on contentions regarding the additional material found on DVD releases and the fact that the Board may describe a scene differently. These contentions are either irrelevant or misleading. However, more importantly, these contentions are a distraction from the fact that in only three out of 39 episodes of which I have complained has the ABC modified the material which the Board found had materially contributed to the particular classification.
 - 9.9.2. The only modifications to material scenes were the **two-part version** of *Criminal Justice (Series 2)* and a minor modification to episode 3 of *Luther*, as discussed above.
 - 9.9.3. One can see from the attached charts entitled *Classification Inconsistency between the Classification Board and the ABC*, the way in which the Board and the ABC classified each program, and that the ABC only modified the material scenes of the two episodes of *Criminal Justice (Series 2)* and *Luther*.
 - 9.9.4. In a recent letter to me dated 13 May 2011, ABC Audience & Consumer Affairs has stated that it is its *understanding* that three episodes of *Republic of Doyle (Series 1)* were modified before broadcast. However, as stated in my reply letter dated 20 May 2011, whether in fact that is the case, whether such modification extended to the scenes as identified by the Board, or whether such modification was sufficient to reduce the

²⁰ See ABC Code of Practice 2007 at <http://www.abc.net.au/corp/pubs/documents/codeprac07.pdf> (p 15).

classification, is yet to be determined.

10. Compilations vs individual episodes: differences of form not of substance

- 10.1. In addition to (misleadingly) contending that the *content* broadcast on ABC is materially different to that classified by the Classification Board, the ABC has also contended that the different *format* of individual episodes compared with compilations on DVD releases, is also a reason why the Classification Board Decision Reports are not relevant.
- 10.2. The ABC has said that such difference is significant because the classification of the compilation of a series of episodes can take into account the cumulative impact of classifiable elements across the series. The second significance to this difference, although not noted by the ABC, is that the Board Decision Reports generally only list the scenes or material that caused the series to be classified at a particular classification level and not scenes or material of a lower classification level.
- 10.3. For the reasons that follow, while these two factors are certainly important and should be considered, they can only qualify the relevance of the Board's findings – they do not make the Board's findings irrelevant. Furthermore, the ABC has not contended that any of the Board's findings in any of the programs in question refer to the cumulative impact occurring over the entire series. This is generally because the Board's findings are equally valid when assessing a particular episode individually. Finally, I will show below that the fact that the Board usually assesses only the highest classifiable elements of a series does not make the Board's findings as to those elements irrelevant. It simply means that, for example, where the Board has not found MA15+ content in one of a series of episodes, that that episode may be classified at a lower classification.

10.4. The cumulative impact of a series of episodes

- 7.5.8. In its letter to me regarding the two-part version of the program *Criminal Justice (Series 2)*, already referred to above, the ABC also said:²¹

... each release is classified in its entirety, whereas ABC Television classifies each episode of a series individually.

- 10.4.1. In Mr Brealey's letter of 11 January 2011 to me regarding *Criminal Justice (Series 1)*, he said:

Also, in the case of *Criminal Justice*, the Board report applies to a different version of the series to that broadcast by the ABC. It has a different duration overall (it is longer than the ABC version) and is **in a compiled format as opposed to weekly broadcasts**.

(Emphasis added)

- 10.4.2. In its submission to the ACMA into the classification of the **two-part version** of the program *Criminal Justice (Series 2)*, also referred to above, the ABC said:

In addition, it is important to note that the Classification Board classifies each DVD release in its entirety, including special features, and having regard to **cumulative impact of storylines which take place over the course of several episodes**. On the contrary, under the ABC's Code of Practice episodes are classified individually, without giving consideration to the content of previous episodes.

²¹ See http://www.acma.gov.au/WEB/STANDARD/pc=PC_310290 for the ACMA's investigation reports.

10.4.3. *Generally speaking the Board's findings apply equally to individual episodes*

- 10.4.3.1. The difference between a compilation and individual episodes is primarily a difference of mere form rather than substance. It is true that in some cases the cumulative effect of classifiable scenes may lead to a stronger impact and therefore a higher classification than if the episodes were to be classified individually. For example, the description in the Classification Board Decision Report into *Criminal Justice (Series 1)* of Ben running head first into a steel door in episode 3, might in isolation fit within an M classification, but could also contribute to an MA15+ classification when present with other classifiable scenes.
- 10.4.3.2. However, generally speaking, the classifiable scenes that the Board has identified as strong in impact in respect of a program in question, are strong in impact *per se*. They provide a good guide to the classification of a particular episode on ABC television, and cogent reasons why a separation of the episodes decreases the impact of a classifiable scene should be made before departing from the Board's assessment.
- 10.4.3.3. In respect of the programs in question, although the Board has not assessed the episodes individually, it has listed, for example, the scenes that are "strong in impact" and at the MA15+ level. When making such findings, the Board has not stated that the scenes are cumulatively strong. And where "cumulative impact" is mentioned by the Board in the attached cases (eg. in *Republic of Doyle (Series 1)* and *Being Human (Series 3)*) it is the cumulative impact within *one particular episode*, not the whole series, that has resulted in the strong impact.

10.4.4. *There is often more than one classifiable scene in each episode*

- 10.4.4.1. Secondly, the proposition that the change to an individual episode format reduces the impact of classifiable scenes because of the lack of cumulative effect is weakened for another reason. That is because in many of the episodes of which I have complained, there have been two to four classifiable scenes which the Board has identified as being strong in impact. Therefore, the cumulative effect of these scenes remained, despite the absence of the remaining classifiable scenes in the other episodes, which would normally appear together on the DVD release.
- 10.4.4.2. For example, in episode 3 in *Criminal Justice (Series 1)*, the Board made three separate comments about the themes, violence, drug use and nudity in the episode. When combined, these scenes increase the overall impact of the individual scenes. Furthermore, in relation to episode 1, although there is only one paragraph in the Board's report which relates to violence and themes, that paragraph related to two scenes in the episode. The impact of the two scenes is increased because of the cumulative impact of the two scenes, even though each of the scenes is strong in impact individually. In episode 5 in *Criminal Justice (Series 1)*, although there was only one

classifiable scene, it remained strong in impact. It was a scene of Ben with a plastic tube in his mouth which he heats with a cigarette lighter. The later verbal reference to "smack" in the episode confirms that Ben was engaging in drug use. This content was not a discreet portrayal of drug use as required by the M level but was rather a "showing" of drug use, as permitted within the MA15+ classification.

10.4.5. Reduced context may actually increase the impact of a scene

10.4.5.1. Finally, while considerations of the cumulative effect of scenes remain important, so too are considerations of increased impact because of reduced context or justification. Although the impact of classifiable scenes may be reduced because of the lack of or lower number of other classifiable scenes, it is fundamental to remember that the presentation of an episode individually may in some cases increase the impact of a scene. When episodes forming part of a DVD release are broadcast individually, not only are there less classifiable scenes but there is also reduced surrounding context that may serve as context or justification for a particular classifiable scene. When a classifiable scene appears in the context of a relatively short 55 minute episode in comparison to a 289 minute DVD, its impact may actually be increased. This factor should also be considered in assessing the significance of the different format.

10.4.6. ABC has not identified any program where the individual episode format reduced the impact

10.4.6.1. Regardless of the submissions above, the ABC has not contended in any of its letters of reply to me that as a result of presenting an episode individually, the impact of certain scenes contained in certain episodes identified by the Board, was reduced.

10.5. Board only considers highest classifiable elements

10.5.1. Although not noted by the ABC, the other significance of the Board classifying a series of episodes together rather than individually is that the Board only identifies the highest classifiable elements across the whole DVD.²²

10.5.2. However, such a finding does not mean that the Board's findings as to those particular scenes become irrelevant. Just because there are some episodes in a DVD release which are at an MA15+ level does not mean that some episodes of the same series might also be legitimately classified as M.

10.5.3. However, where the Board has identified a scene(s) as being of an MA15+ level, unless the impact of that scene(s) is reduced by the individual format, the Board's finding is relevant in determining the classification of that episode when broadcast on ABC television.

²² This was referred to in the SBS's submission to the Committee.

11. Time zone restrictions is not a valid reason for inconsistent standards

11.1. The ABC said in its answers to questions taken on notice (answer to question 7):²³

There are a number of factors that may lead to variation in classification between the ABC and the Classification Board. These differences do not necessarily come about as a result of either the Classification Board or the ABC making an error. Differences in approach may be due to **the differences in** presentation, transmission medium, **timeslots**, intended audience and context may lead to marginally different classification outcomes.

(Emphasis added)

- 11.2. It is unclear whether the ABC meant that it classifies MA15+ programs as M so that those programs can be broadcast at 8.30pm, as the code requires MA15+ programs to be broadcast after 9.30pm. Regardless of whether this is what the ABC meant, it certainly appears that the 9.30pm classification time zone provision in the ABC's code has been a relevant factor in poor classification standards of the ABC.
- 11.3. One can see from the attached documents that the ABC has often classified programs as M, which have been classified as MA15+ by the Board, and has then broadcast them at 8.30pm. So, certain episodes of *Spooks (Series 7 and 8)*, *Luther* and *Being Human (Series 3)* were classified as M by the ABC. One might infer that this was done so that these programs could be shown at 8.30pm.
- 11.4. In the case of *Spooks (Series 8)*, the majority of the episodes were at an M level. However, there were four episodes that were at the MA15+ level. The Classification Board recognised this. However, to correctly classify these four episodes as MA15+ would cause the ABC scheduling problems. It would mean that it would have to schedule the entire series after 9.30pm, or modify those four programs so that they were at the M level. The ABC broadcast *Spooks (Series 8)* on Saturdays at 8.30pm, a time in which MA15+ programs may not be shown. This may be a reason for the inconsistent classification, but it is certainly not a justified reason. If this is truly a reason for such mis-classification, it is unacceptable that the ABC is broadcasting MA15+ material as M at 8.30pm on a Saturday night, when parents might think that a particular episode is suitable for a teenager when it is not. How are viewers to make informed choices when the ABC is not correctly classifying programs?
- 11.5. It may also be the case that scheduling was a reason for the mis-classification of certain episodes of *Republic of Doyle (Series 1)*. While the majority of the episodes of the series were correctly classified as PG, there were some that should have been classified as M. However, as the series was scheduled on a Saturday at 7.45pm, this would have caused the entire series to be re-scheduled to 8.30pm or after, or a modification of the episodes in question.
- 11.6. If the ABC is justifying its inconsistent classification of programs because the time zone provisions of its code are restrictive, the ABC is misunderstanding the reason for the time zone provisions. They are designed to ensure that MA15+ content is not broadcast before 9.30pm. It is not appropriate for the ABC to simply classify differently so as to bypass these provisions.
- 11.7. Finally, it is entirely inappropriate for the ABC to contend that the differences in timeslots lead to "marginally different classification outcomes". To characterise the placing of violent bloody scenes or a scene of strong sex – mature content which is legally restricted to persons over 15 years – at the time slot of 8.30-9.30pm when children are watching TV, as a "marginally different classification" outcome is inexcusable.

²³ Available on the Committee's website at:
http://www.aph.gov.au/senate/committee/legcon_ctte/classification_board/submissions.htm

12. Conclusion

- 12.1. In this section of my submission to the Committee, I have contended that the ABC has not shown how the inconsistency of classification standards compared with the Classification Board is justified.
- 12.2. It follows that the classification standards on the ABC over the past year are out of line with the standards of the Classification Board and there should be change. I outline some proposals for reform later on in this submission. However, before that I will address the internal classification inconsistency between ABC television and its catch-up service iView, available online.

INCONSISTENCY BETWEEN ABC TV AND iVIEW

13. Introduction

- 13.1. My focus throughout this submission has been on the inconsistency of classification standards between the Classification Board and the ABC on *ABC television*. However, the ABC has also demonstrated internal classification inconsistency between *ABC television* and the ABC's catch-up *online program iView*. This is relevant to term of reference I.) which relates to broadcasting standards for internet content.
- 13.2. Over the past nine months, the ABC has on six occasions placed content on iView which has been classified differently to when it was originally broadcast on *ABC television*. It has also provided different consumer advice in one case in addition to those six cases. This internal inconsistency is an area beyond the reach of the ACMA's jurisdiction. When I first become aware of this internal inconsistency and enquired whether I could make a complaint to the ACMA regarding it, I was informed that the ACMA had no jurisdiction to investigate content available at iView (see P315).
- 13.3. Such internal inconsistency is again disappointing because increasing Australians are turning towards the internet to watch television. iView is now available not just on internet browsers on home computers, but is now available on select TV models which are connected to the internet.²⁴ This allows people to view repeats of programs broadcast on ABC television on demand through iView on the television. However, currently, evidence suggests that the ABC does not always apply the same classification to the same program appearing on iView as it does when it appears on ABC television. This is unacceptable. That the ACMA is unable to regulate this inconsistency leaves the Australian public with no assurance that programs will be correctly classified on iView.
- 13.4. It is true that I have only observed six examples of internal inconsistency between ABC television and iView. However, besides the fact that each of these examples are serious in their own right, these are only the examples that I have discovered. There may be more occasions of such inconsistency, considering the first example occurred in September 2010 and the most recent in June 2011.
- 13.5. All of the examples below (except for *Durham County (Series 1)*: Episode 4) appear in the attached documentation (see P309), with screen shots showing the classification both on ABC television and iView.

²⁴ Such as Sony's Bravia range of TVs and soon to be available on Samsung TVs.

14. Programs classified MA15+ on TV and repeated with M classification on iView

14.1. *Torchwood (Series 2): Episode 2*

(Broadcast on ABC2 on 20 September 2010 at 10.20pm)

14.1.1. This was the first time that I became aware that the ABC had classified the same program differently on TV to iView. The episode was classified on TV as MA15+ with consumer advice for "Frequent violence". However, when the program appeared on iView the next day, it was classified as M with the same consumer advice.

14.1.2. As mentioned above, I inquired whether I could make a complaint about this with the ACMA. I was informed that the ACMA did not have jurisdiction over content on iView.

14.1.3. One reason the ABC may have classified the program as M on iView is possibly due to its caution approach to Schedule 7 of the *Broadcasting Services Act*, which requires commercial providers of MA15+ content on the internet to have a "restricted access system" in place. The intention behind this requirement is that only persons above the age of 15 years are able to access MA15+ content online.

14.1.4. However, the provisions in Schedule 7 apply only to cases where the content is provided on payment of a fee. Obviously, iView is a free service, which is therefore not subject to the regulation in Schedule 7.²⁵

14.2. *Durham County (Series 1): Episode 4*

(Broadcast on ABC1 on 26 March 2011 at 10.45pm)

14.2.1. This episode was classified as MA15+ on television, but was then repeated on iView with the classification M and consumer advice for "coarse language".

14.3. *Durham County (Series 3): Episode 1*

(Broadcast on ABC1 on 28 May 2011 at 10.50pm)

14.3.1. This episode was classified as MA15+ on television with consumer advice for "violence", but was then repeated on iView with the classification M and consumer advice for "violence, coarse language and nudity".

15. Programs classified M on TV and repeated with MA15+ classification on iView

15.1. *Strike Back: Episode 3*

(Broadcast on ABC1 on 12 March 2011 at 8.30pm)

15.1.1. This episode was classified as M on television with consumer advice for "coarse language and violence", but was then repeated on iView with the classification MA15+ and consumer advice for "violence".

15.2. *Party Down (Series 2): Episode 10*

(Broadcast on ABC2 on 19 May 2011 at 8.30pm)

15.2.1. This episode was classified as M on television with consumer advice for "coarse language and drug references", but was then repeated on iView with the classification MA15+ and consumer advice for "coarse language".

²⁵ This is of course subject to occasions where the ABC has placed links on its iView program to episodes of programs which can be downloaded for a fee. I refer back to this later in this section.

- 15.3. *Durham County (Series 3)*: Episode 2
(Broadcast on ABC1 on 4 June 2011 at 10.50pm)

15.3.1. This episode was classified as M on television with consumer advice for "coarse language, sexual references and violence", but was then repeated on iView with the classification MA15+ and no consumer advice.

16. Programs with different consumer advice on TV and iView

- 16.1. *Spooks (Series 9)*: Episode 1
(Broadcast on ABC1 on 2 April 2011 at 8.30pm)

16.1.1. This episode was classified as M both on television and on iView. However, on television it was preceded with consumer advice for "violence" and on iView it was preceded with consumer advice for "strong violence".

- 16.2. I have not repeated here the cases above where in giving programs different classifications, there has also been different consumer advice attached to those different classifications.

17. iView and Schedule 7 of the *Broadcasting Services Act*

- 17.1. It may be that the reason for the inconsistency of classifications between TV and iView in September 2010 was due to the ABC's concern not to infringe Schedule 7 of the *Broadcasting Services Act* by placing MA15+ content online without an age verification system. Schedule 7 of the Act was introduced in July 2007 with the passing of the Communications Legislation Amendment (Content Services) Bill 2007. The explanatory memorandum to that bill stated:²⁶

Objectives

29. The first objective of the proposed new regulatory framework is that providers of convergent content services should be required to respect community standards and to establish measures that protect children from exposure to content that would be inappropriate or harmful to them. In so doing, the framework will be consistent with content regulation over other media in Australia.

- 17.2. Schedule 7 is clear that it does not apply to broadcasting services provided by the ABC in accordance with s 6 of the *Australian Broadcasting Corporation Act 1983* (Cth). However, s 6 of the *ABC Act* only refers to the ABC's broadcasting services. Broadcasting services are defined in the *ABC Act* in the same way as they are defined in s 6(1) of the *Broadcasting Services Act*. Under s 6(1) of the *Broadcasting Services Act* a broadcasting service does not include a service, or a class of services, that the Minister determines, by notice in the *Gazette*, not to fall within this definition. On 21 July 2000, the Minister for Communications, Information Technology and the Arts announced that internet audio and video streaming would not be regarded as a broadcasting service for the purposes of the Act. The *Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000)*²⁷ was gazetted on 27 September 2000 and was tabled in Parliament on 3 October 2000. Therefore, the exclusion of the operation of Schedule 7 to the ABC only applies in respect of the ABC's broadcasting content (on TV and radio) – it does not exclude the operation of Schedule 7 to the ABC's online content, which is not considered to be broadcasting.

- 17.3. Although it is true that the content available on the ABC's iView service is generally available free of charge, there have been occasions in the past where the ABC has also provided hyperlinks on iView which link to paid content, available for

²⁶ See <http://www.comlaw.gov.au/Details/C2007B00081/Explanatory%20Memorandum/Text>

²⁷ See <http://www.comlaw.gov.au/Details/F2004B00501>

downloading. In this case, questions arise as to whether the ABC is providing content which should be subject to an age verification system. However, regardless of these occasions of linked paid content, there is no good reason why Schedule 7 of the *Broadcasting Services Act* should not apply to its iView service. One of the main objectives of Schedule 7 is to protect children from harmful content. The ABC's iView service is easily accessible to children and there are currently no safeguards from children accessing MA15+ content on iView. Perhaps worse than the availability of MA15+ content accessible to children on iView is MA15+ content which has been incorrectly branded as M content on iView. This has happened three times.

- 17.4. The ABC's iView service became available in July 2008, a year after the introduction of Schedule 7 of the *Broadcasting Services Act*. Therefore, Schedule 7 was introduced before iView had become as popular as it is today. Had iView been in existence when Schedule 7 was introduced, it may have been extended to regulate content on iView.

CONSISTENCY OF CLASSIFICATION STANDARDS IS A GOOD THING

18. The ABC has itself recognised the virtue of consistency in the recent past

- 18.1. Despite its present position, the desire to have a consistent classification system across media was actually endorsed by the ABC in its submissions to the Senate Standing Committee on Environment, Communications and the Arts' inquiry into *The effectiveness of the broadcasting codes of practice*. In oral submissions made before the Committee in 2008, Mr Ward, Head of Television Policy at the ABC, said on 23 May 2008, in Adelaide (at p ECA46):²⁸

I know that over the last few years, there has been quite an amount of work that has been done. **We have aligned our symbols, terminology and colours with the Office of Film and Literature Classification so that there is a consistent look and feel;** so that the community is understanding that when you look at a computer game or a DVD, or if you see something come up at the cinema, you are getting a message about this being a PG program or it is an M program.

(Emphasis added)

- 18.2. It is entirely hypocritical of the ABC to make such a submission only three years ago and yet now attempt to justify its inconsistent classification standards with a variety of arguments, as outline above.
- 18.3. If the ABC recognises consistency and sees the benefit in aligning its symbols and terminology with the national classification scheme, this is certainly not coming through in its correspondence regarding the complaints attached to this submission.
- 18.4. At the moment, despite what Mr Ward said three years ago, there is certainly no consistency of classification standards between the Classification Board and the ABC. The ABC does use the same colours and symbols as the Board uses, but that is where the consistency ends.

19. Australians recognise the benefits of consistency in the classification system

- 19.1. More importantly than what the ABC think on the issue of consistency, it is clear that the Australian public wish to see a uniform classification scheme across all media. The Senate Standing Committee on Environment, Communications and the Arts' 2008 inquiry, referred to above, wrote in June 2008 that:²⁹

²⁸ See <http://www.aph.gov.au/hansard/senate/commtee/S10873.pdf>

²⁹ See http://www.aph.gov.au/senate/committee/eca_ctte/broadcasting_codes/report/report.pdf at p 28.

A qualitative research study among people of all ages in 2004 found that there was a common request to make film/video/DVD, TV and computer games classification symbols and advice the same, so that the system was as simple as possible for everyone to understand.

- 19.2. The Committee's statement above cited research that had been conducted by the then Office of Film and Literature Classification which held:³⁰

After exposure to the three classification systems, film/video/DVD, TV and computer games, the most common request was to make all three the same – symbols and advice where possible – and to keep the one system as simple as possible so it was easy to understand for everyone.

- 19.3. Despite this desire for consistency, the ABC continues to apply standards which are inconsistent with those of the Classification Board.

PROPOSED REFORMS: ACHIEVING GREATER CONSISTENCY

20. Introduction

- 20.1. In light of the fact that consistency of classification standards across different media is a virtue endorsed by both the Australian public and also by the ABC (albeit hypocritically by the latter) I have proposed some reforms to the classification system as it applies to the broadcasting industry generally and the ABC specifically, below.
- 20.2. In summary, these proposals for reform are:
- 20.2.1. The ABC should have the same classification guidelines as the national guidelines;
 - 20.2.2. The ABC and the ACMA should consider the reasons for a particular classification given in Classification Board Decision Reports; and
 - 20.2.3. The Classification Board should adjudicate complaints about the classification of broadcast content, in order to maintain consistency of standards across different media.

21. The ABC should have the same classification guidelines as the national guidelines

- 21.1. The ABC should be required to have the same classification guidelines that are applied by the Classification Board.
- 21.2. It might legitimately be argued that the current ABC classification guidelines are more objective than the current combined national classification guidelines. The ABC maintained such a position in its answers to written questions taken on notice when it said:

For the classification of TV content the ABC and its audiences are best served by the standards described in its Code which codify a **more objective approach**.

(Emphasis added)

- 21.3. Indeed, the ABC has recognised the benefit of its guidelines containing more detail at each of the classification levels in order to help its classification staff make decisions.
- 21.4. However, this is not a reason to keep the current ABC guidelines, but is rather a reason for changing the national guidelines to make them more objective as they

³⁰ See Office of Film and Literature Classification, *Community Attitudes towards Media Classification and Consumer Advice*, March 2004, p 7.

were before the changes in 2003.

- 21.5. It is certainly not true that the ABC's more objective guidelines have provided ABC viewers with more safeguards than the more subjective national guidelines. If that were the case, there would not be 39 instances of ABC classification decisions which are inconsistent with the decisions of the Classification Board, which are attached to this submission.
- 21.6. Having identical classification guidelines with more detail at each classification level will ensure that there is greater consistency of classification standards between the ABC and the Classification Board.

22. The ABC should consider the reasons in Classification Board Decision Reports

- 22.1. One proposal for reform that would improve consistency of classification standards between the Classification Board and the ABC would be to require the ABC to have regard to Classification Board Decision Reports, where available. Specifically, it should be required to consider the reasons given by the Board in deciding on a particular classification for a series, episodes of which are broadcast on the ABC.
- 22.2. The ABC's current approach to this
 - 22.2.1. Currently, not only does the ABC Television department not follow the Board's Decision Reports in originally classifying programs, but ABC Audience & Consumer Affairs also ignores such Reports when responding to a complaint about classification.
 - 22.2.2. This current practice of the ABC is unsatisfactory considering the ABC has the same classification scheme as the Board (despite the variance in wording of the respective guidelines) and uses the same classification symbols as the Board. It is also disappointing as the Board is an independent statutory body representative of the Australian community. The Board makes independent decisions free from influences that are present in a broadcaster such as the ABC.
- 22.3. What the ABC should do
 - 22.3.1. When determining classifications for programs, the ABC should have regard to the Board's Decision Reports where available and take into account the comments that the Board has made about particular scenes in particular episodes. There should be good reason to depart from the Board's findings in respect of particular scenes of an episode which warranted a particular classification. Such reasons might be that the impact of an episode is reduced because of an absence of cumulative effect, that no findings have been made by the Board about certain episodes, or the fact that there has been a modification to an episode. These may be legitimate reasons for classifying an episode differently to the Board. However, in all of the cases attached to this submission, not once did the ABC refer to the Board's decision or findings and then justify its different decision because of any of these reasons.
 - 22.3.2. The *ABC Act* or the *Broadcasting Services Act* could be amended to require the ABC to have regard to the Board's Decision Reports and follow its findings unless good reason exists for not so doing.

23. The ACMA should consider the reasons in Classification Board Decision Reports

- 23.1. In addition to the ABC being required to maintain the standards of the Board, the Content Classification Section of the ACMA, should also be required to have regard

to the Board's Decision Reports, where available.

23.2. The ACMA's current approach to this

- 23.2.1. The ACMA's evidence on its current approach to this topic was disconcertingly at odds with its approach in assessing my complaint regarding four episodes of *Criminal Justice (Series 1)* broadcast on ABC2 in August and September 2010. At the hearing of the Committee on 27 April 2011, Mr Jeremy Fenton, Manager of Content Classification at the ACMA said:³¹

The codes of practice under which industry are classifying content reference and are underpinned by the National Classification Scheme, and in particular the classification guidelines, so **there is a nexus there between the National Classification Scheme and those codes of practice in terms of community safeguards and the standards applied.**

(Emphasis added)

- 23.2.2. He then said later on:³²

I would like to qualify as well that we are talking about inconsistency between the Board and the ACMA. I think the question, as I have heard it, is actually about potentially an inconsistency between what is broadcast and the Classification Board. We can certainly testify to the fact that **the ACMA strongly reference the Board's decisions through formalised and informal arrangements such as training.**

(Emphasis added)

- 23.2.3. One would infer from the above comments that the ACMA would have due regard to the reasons of the Board in conducting a classification investigation. However, in its Investigation Report into *Criminal Justice (Series 1)*, which was prepared by Mr Fenton, the ACMA did not once refer to the Board's comments regarding the classification of the DVD release of the series on which my complaint to the ABC was based. Although I had cited the Board's findings in my letter to the ABC, Mr Fenton did not include *any* of these findings under the "Complainant's submissions" heading in his report.

- 23.2.4. I have since lodged a freedom of information request with the ACMA (see R357) seeking access to documents that the ACMA uses when conducting an investigation into an alleged classification breach. I specifically asked for policy documents concerning the relevance of the Classification Board's Decision Reports when conducting such an investigation. I would respectfully agree with the submission of ASTRA, which stated in its written submission to this Committee:³³

ASTRA further submits that, when making determinations on the classification of programs that are the subject of subscriber complaints, the ACMA should have regard to determinations made by the Classification Board if that program has been classified by the Classification Board. It would be desirable for the ACMA to release a statement of policy on its use of Classification Board decision in its investigation processes.

- 23.2.5. One of the most concerning aspects of the ACMA's investigation into both *Criminal Justice (Series 1)* was its failure to justify the difference between the Board's and the ACMA's different classifications in its *actual* report, and

³¹ Page 32.

³² Ibid.

³³ Page 6.

yet expressly include such justification *outside* of the investigation report, in its letter to me.

- 23.2.6. So while not citing the Classification Board's reasons, the ACMA explained in its letter to me dated 25 March 2011 that:

The Classification Board's decisions are based on the Guidelines for the Classification of Films and Computer Games (the Guidelines). **While the classification clauses of the Code are based on the Guidelines, the Code differs from the Guidelines. Most notably the Code does not focus on an 'impact test' which is integral to classification under the Guidelines.** Therefore a Classification Board decision made using the Guidelines will not necessarily determine a classification made under the Code.

(Emphasis added)

- 23.2.7. The ACMA was providing a reason for the different classifications given by the Board and the ACMA – the reason being that the guidelines used by each are different and therefore the results might also be different. As explained earlier in my submission, having regard to the history of both guidelines, this submission should not be accepted.
- 23.2.8. For the ACMA to completely ignore the Board Report in its *actual* investigation which is published on its website, and then to surreptitiously explain away the Board's decision in its personal letter to me, is a failure of the ACMA to provide adequate reasons for its decision.
- 23.2.9. If this purported justification for the inconsistent classifications was a decisive factor in the ACMA's decision, it ought to have mentioned it in its report, in the interests of open and accountable governmental decision making.
- 23.2.10. Another concerning aspect of the ACMA's investigation into *Criminal Justice (Series 1)* was that the ACMA's comment to me in its letter (reproduced above), was virtually almost an identical repetition of the ABC's submission to the ACMA regarding its investigation into the **two-part version** of *Criminal Justice (Series 2)*, such submission including the following (already reproduced elsewhere in this submission):

Furthermore, any reliance on the Classification Board's decisions disregards the important distinctions between the Guidelines for the Classification of Films and Computer Games applied by the Classification Board and the ABC's Code of Practice. **Although the classifications in the Code of Practice are based on the Guidelines for the Classification of Films and Computer Games, they are different in numerous ways; most notably, the ABC's classification system does not focus on the 'impact test' which is central to the Guidelines for the Classification of Films and Computer Games.**

(Emphasis added)

- 23.2.11. It is most concerning that the ACMA appears to be simply reproducing a submission of the ABC to me in a letter, without in anyway explaining or justifying it. Another example of where the ACMA seemed to simply agree with the ABC's submission without giving reasons was when it concluded on p 10 in its investigation report into *Criminal Justice (Series 1)* that:

At 55:00 Ben is offered heroin by fellow prisoners. After Ben refuses he is held down by two prisoners who then inject him with the heroin against his will. **This scene is considered to be a depiction of violence rather than drug use.** Ben does not voluntarily use the drugs. Rather they are forced upon him by two assailants in an assault, the heroin being used as a weapon.

(Emphasis added)

- 23.2.12. In making this conclusion, the ACMA was agreeing with the ABC's submission at p 7 of the report, which said:

Drug use is one of the elements considered by the ABC in classifying program content, however, it **is typically considered to apply when someone uses drugs voluntarily**. The Code requirement that any such depictions should not 'promote or encourage drug use' reflects this and is intended to ensure that such voluntary use is not glamorised.

(Emphasis added)

- 23.2.13. To suggest that this scene is not a depiction of drug use is an extraordinary interpretation of the ABC classification guidelines, which are in substance the same as the national guidelines. With respect, the ACMA was plainly wrong here, and it should have given reasons as to why it disagreed with the Board, when the Board found this scene to be an example of drug use that was "strong in impact" and at an MA15+ level.
- 23.2.14. Despite Mr Fenton's assurance given to the Committee that the ACMA does "reference" the national guidelines and the Board's decisions, it appears that they have been instances where this is not the case and where the ACMA has simply agreed with a submission put forward by the ABC, without in any way justifying it.

23.3. What the ACMA should do

- 23.3.1. The ACMA should be required to have regard to the Board's Decision Reports, where available, in conducting its investigations into whether the ABC has breached the classification provisions of its code.
- 23.3.2. This proposal for reform should be implemented pending the implementation of my next suggested reform – giving the role of adjudicating on classification complaints regarding broadcast material to the Classification Board.

24. The Classification Board should adjudicate complaints on TV classification

- 24.1. My final recommendation for reform in this section is that the Classification Board be the new adjudicator of complaints regarding the classification of programs broadcast on the ABC, and other stations generally.
- 24.2. Already there is in place a system whereby the ACMA refers to the Classification Board the task of classifying online content which is the subject of a complaint by a member of the public or an investigation instigated by the ACMA itself. It would make sense to extend this to complaints regarding broadcast content, where a complainant has already made a complaint to a television station, such as the ABC.
- 24.3. This would ensure greater consistency of classification standards, as the Board would be able to refer to its previous decisions in determining whether there was a classification breach.
- 24.4. The Board would still have the flexibility to depart from previous Board decisions, in the same way that I suggested the ABC could above. This might be where there is no Board report, or where a deviation from the Board Report is justified because the Board Report only considered the highest classifiable elements or because the Board Report assessed the cumulative impact of a storyline across a number of programs, in the case of a television series.

- 24.5. Many of the Content Classification Officers in the ACMA have worked in the Classification Board before and indeed the Manager of the Content Classification Section of the ACMA, Mr Fenton, used to work as a member of the Board from 2003 to 2010, including a period of four years as a senior classifier.
- 24.6. Such a change would not result in any additional expenditure by the government, as the current funding of the Content Classification Section of the ACMA would be transferred to a new section of the Board. In the financial year 2009/10, the ACMA conducted 189 investigations into broadcasting complaints. If the resources of the Content Classification Section were re-directed to the Board, it would be possible for the Board to continue this role of investigating classification complaints.
- 24.7. Members of the Classification Board are independent statutory officers responsible for classifying content in accordance with the standards of Australians. It would be appropriate that the Board also have the responsibility of classifying television content which becomes the subject of a complaint (after internal complaints procedures within a TV station have been exhausted).

THE ABC'S AVOIDANCE OF PUBLIC SCRUTINY

25. Introduction

- 25.1. In the final part of my submission I would like to make some observations about the manner in which the ABC has avoided public scrutiny over its classification processes and recently its complaints procedures.
- 25.2. The ABC's avoidance of public scrutiny, despite it receiving millions of dollars of tax payer funding each year and in light of its severe poor record in classifying content, is most unfortunate. The ABC has left many questions unanswered and ought to provide a further written submission which is of some use to the Committee.
- 25.3. In this section I will also suggest proposals for reform related to ABC public accountability in respect of classification matters, mainly concerning the ABC's code of practice, which was recently amended to reduce public accountability.

26. The ABC's reluctance to release information about its classification policies

- 26.1. The first way the ABC has avoided public scrutiny is its failure to make public its classification policies and documents, and in particular its policies concerning the relevance of Classification Board decisions when classifying ABC content.
- 26.2. History of my two freedom of information requests to the ABC
- 26.2.1. On **5 October 2010**, I lodged a freedom of information request with the ABC, seeking documents and policies relating to the classification of television programs, after I had received numerous responses from the ABC stating that it refused to consider the decision or reasons of the Classification Board when assessing my complaints.
- 26.2.2. I cancelled and re-lodged this request in identical format on **1 November 2010**, in order to avail myself of the new right to appeal to the Information Commissioner which came into operation of that date.³⁴
- 26.2.3. On **17 November 2010**, the ABC's FOI coordinator refused my request on the basis that the requested documents purportedly fell within the ABC's exemption from the FOI Act. The ABC is exempted from the operation of

³⁴ The right to appeal to the Information Commissioner only applies to FOI requests originally made on or after 1 November 2010.

the Act in relation to its "program material".

- 26.2.4. Notwithstanding the refusal, the ABC indicated that it was able to exercise its discretion to make some material available to me outside of the formal FOI process. Such indication proved to be fruitless, when on 7 January 2011, the ABC's FOI coordinator emailed me an extract from a document entitled *Program Makers Guide to Program Delivery and Presentation* which I was informed included "some information about the presentation of classification information". Such document appeared to be an attempt to honour the ABC's previous undertaking to provide some material out of the formal FOI process. However, it was completely irrelevant to my original request.
- 26.2.5. On **14 April 2011**, I made another FOI request to the ABC, in substantially the same terms as my request of 1 November 2010. This time, I outlined why the ABC's classification policies were *not* "program material". I also sought to explain that the ABC's view that documents which are merely *related* (either directly or indirectly) to program material are also exempt, was incorrect. This view of the ABC relied upon a decision of Justice Bennett of the Federal Court in 2006, part of which decision was disapproved by the Full Court of the Federal Court two years later in 2008.
- 26.2.6. The ABC again refused my request on **27 May 2011**, and outlined why it disagreed with my submissions regarding its program material exemption. I maintain the view that the ABC's interpretation of its exemption is incorrect and contrary to the Full Court's decision in 2008.
- 26.2.7. I referred the ABC's decision of 27 May 2011 to the Information Commissioner for review on 1 June 2011 (see Q319).

26.3. Significance of the ABC's refusal to provide access to its classification policies

- 26.3.1. The significance of the ABC's two refusals to my FOI requests is that it demonstrates the ABC's reluctance to be accountable to the public about its classification policies, in light of its poor standards, which are inconsistent with those of the Classification Board.
- 26.3.2. One can infer that the ABC is reluctant to release such documents for fear of public embarrassment in light of its poor classification record, as shown in this submission and attachments. Such an inference is strengthened when one refers to the ABC's FOI coordinator's first email to me of 21 September 2010 which responded to my initial informal inquiries about the ABC's classification policies. The coordinator at that time stated:

...depending on what is sought...**we would grant access to internal policies** which relate generally (but not specifically) to program material.

(Emphasis added)
- 26.3.3. Regardless of the correctness of the proviso that documents which relate *specifically* to program material are exempt (with which I disagree), it is clear that in September 2010, the ABC was prepared to at least grant access to classification policies which were general in nature.
- 26.3.4. However, by November 2010, that preliminary view had certainly changed, most probably because of the increasing allegations of classification breaches.

27. New ABC Code of Practice 2011 and Complaints Handling Procedures

27.1. The second way the ABC has avoided public scrutiny is through a series of changes introduced in the new *ABC Code of Practice 2011 and Complaints Handling Procedures*, which came into operation on 11 April 2011, conveniently just after the date of Mr Brealey's appearance before the Committee on 7 April 2011.

27.2. These two documents made a series of changes to the content about which viewers can complaint to the ABC and the way in which they can complain. Such changes were made by the ABC Board without any public consultation, and in one case, was actually contrary to a recommendation made in a 2009 review into the ABC's self-regulation framework.

27.3. Summary of changes made in the new ABC Code of Practice 2011

27.3.1. The changes that were made in the new *ABC Code of Practice 2011* included:

- 27.3.1.1. Requiring complaints under the Code to be made within 6 weeks, rather than 6 months, which is contrary to a recommendation of a 2009 review into the ABC's self-regulation framework;
- 27.3.1.2. Specifically excluding the ABC's online content (including iView) from regulation under the Code;
- 27.3.1.3. Deleting the obligation on the ABC to respond to a complaint within 60 days;
- 27.3.1.4. The introduction of new section outlining the scope of the application of the code, unduly restricting the operation of the code and mandating a restrictive interpretation of a complainant's right to refer a complaint to the ACMA, which is inconsistent with the *Broadcasting Services Act*;
- 27.3.1.5. Excising the "complaints handling procedures" from the code;
- 27.3.1.6. Re-branding the classification provisions of the code as the "Associated Standard on Television Classification" and making this "binding";
- 27.3.1.7. Minor changes to the MA15+ classification guidelines despite no public consultation on these changes having been undertaken or any reasons given for these changes.

27.4. Summary of changes introduced in the new Complaints Handling Procedures

27.4.1. The changes that were introduced in the new *Complaints Handling Procedures* were:

- 27.4.1.1. Including a new provision which grants the ABC extraordinary power to refuse to investigate a complaint on the subjective basis that it has not been able to satisfy a complainant;
- 27.4.1.2. Requiring complaints under the Code to be made within 6 weeks, rather than 6 months (a requirement which is also contained within the code itself, as referred to above).

27.5. I will now address each of these changes in turn.

27.6. Requiring complaints under the Code to be made within 6 weeks, rather than 6 months

27.6.1. One can only infer that the requirement that a complaint be made within six weeks of the broadcast date (contained in both the *ABC Code of Practice 2011* and the new *Complaints Handling Procedures*) was

introduced in order to make it harder for complainants to make complaints to the ABC. It may also be fair to infer that this provision was a direct result of my justified serious allegations of poor classification standards throughout late-2010 and early-2011. These inferences are strengthened when one bears in mind the fact that this new restrictive time limit requirement directly contradicted a recommendation of a 2009 review into the ABC's self-regulation.

- 27.6.2. The new *Complaints Handling Procedures* document specifically states in the "Principles" section, that the procedures and standards contained therein, are to be interpreted having regard to, inter alia, the findings of the 2009 review of the ABC's self-regulating framework.³⁵ However, such 2009 review specifically recommended that complainants have six *months* in order to lodge a complaint – it recommended six *weeks* only in cases where a copy of the broadcast content is not available for review.³⁶ So while the new procedures are to be interpreted having regard to the 2009 review, the new procedures actually completely contradict one of 2009 review's recommendations!
- 27.6.3. With this new stricter time limit requirement coming into operation on 11 April 2011, the ABC was quick to apply it only a month later on 13 May 2011 when it attempted to refuse to investigate my complaint of 6 May 2011 regarding the classification of five episodes of *Republic of Doyle* (*Series 1*), broadcast in late-2010 and early-2011.
- 27.6.4. I replied to the ABC on 20 May 2011 indicating that the ABC was obliged to investigate my complaint as it came under the old *ABC Code of Practice 2007 (as amended in 2008)*, which provided for a six month time limit period in which to make a complaint.
- 27.6.5. However, I also pointed out the above inconsistency between the 2009 review and the new code in respect of the new time limit provision. This change was not only made by the ABC Board without public consultation and without reasons explaining its introduction, but was actually in direct contradiction with a report on which at least some little public consultation had been conducted.

27.7. Specifically excluding the ABC's online content (including iView) from regulation under the Code

- 27.7.1. The *ABC Code of Practice 2007 (as amended in 2008)* specifically states in the introduction that it "applies to ABC Radio and Television, Online and other emerging media services".
- 27.7.2. However, the new *ABC Code of Practice 2011* specifically states that it applies only to television and to radio programming. There is now no way of complaining about content appearing on the ABC's iView website under the code, despite still being able to complain about the same under the ABC's Editorial Policies.
- 27.7.3. Under the 2007 code it was possible to make a complaint about the lack of classification information for a program (and arguably also about the classification itself) under clause 2.3 of the 2007 code which provided:

2.3 Warnings. From time to time the ABC presents content that it recognises may disturb or offend some of the audience. Where appropriate, the

³⁵ *Review of the ABC's Self-Regulation Framework* (September 2009): available at http://www.abc.net.au/corp/pubs/documents/review_of_the_abc_self_regulation_framework_1009.pdf See at p 3.

³⁶ Which is not the case here, as mentioned above.

audience will be given advance notice about such content.

- 27.7.4. That this was so is confirmed by the upheld complaint concerning the third and fourth episodes of *The Tudors (Series 1)* shown on iView in January 2011. A person complained that the episodes did not have any consumer advice on iView. The complaint was assessed under clause 11.2 of the *ABC Editorial Policies (revised 1 March 2009)*, which is in substantially the same terms as clause 2.3 of the 2007 code (despite having more detail).

27.8. Deleting the obligation on the ABC to respond to a complaint within 60 days

- 27.8.1. Another new change introduced in the 2011 code was the deletion of the requirement to respond to a complaint within 60 days, which was contained in the 2007 code.
- 27.8.2. The new *Complaints Handling Procedures* document does include a "principle" that the ABC intends to respond within 30 days, but that some complaints may take longer to finalise.
- 27.8.3. However, these complaints procedures are not part of the code. This means that a failure to respond to a complaint within 60 days will no longer be a breach of the code. It is queried whether this clause was deliberately deleted from the code, as the ABC was found by the ACMA to have breached the 60 day response time frame requirement in its investigation into *Criminal Justice (Series 1)*.

27.9. Introduction of new restrictive scope provision

- 27.9.1. The ABC also introduced a new "scope" provision in its 2011 code which pre-determines the scope of the ACMA's jurisdiction to investigate a complaint under the code and dictates an interpretation of ss 150 and 151 of the *Broadcasting Services Act* which is not appropriate.
- 27.9.2. The new scope provision provides that the code does not apply to a complaint where:
- 27.9.2.1. the complaint concerns content which become the subject of legal proceedings;
 - 27.9.2.2. the complaint was frivolous, vexatious or not made in good faith;
 - 27.9.2.3. the complaint was lodged more than six weeks after the broadcast of the complained content;
 - 27.9.2.4. the complainant does not have sufficient interest in the subject matter.
- 27.9.3. Besides the introduction of the new six week time limit and the new "sufficient interest" test, the above conditions are not new. The 2007 contained these provisions.
- 27.9.4. However, what is extraordinary, is the next section of the "scope" section which reads:

To avoid any doubt, the ABC intends that any complaint falling within the terms of any one of the above categories is not relevant to the ABC Code of Practice, for the purposes of section 151(2)(b) of the BSA [*Broadcasting Services Act*]. In effect, **this means that only complaints which the ABC has accepted for investigation in accordance with the above criteria are eligible under this Code to be reviewed and investigated by the ACMA.**

(Emphasis added)

- 27.9.5. It is not appropriate for the ABC to outline the way in which the ACMA should interpret ss 150 and 151 of the *Broadcasting Services Act*. That is a task of statutory interpretation for the ACMA itself to conduct. Sections 150 and 151 of the Act provide:

150. Complaints relating to national broadcasting services or datacasting services provided by the ABC or SBS

If:

- (a) a person has made a complaint to the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation on the ground that the Corporation has, in providing a national broadcasting service or a datacasting service, acted contrary to a code of practice developed by the Corporation and notified to the ACMA; and
- (b) either:
 - (i) the person has not received a response within 60 days after making the complaint; or
 - (ii) the person has received a response within that period but considers that response to be inadequate;

the person may make a complaint to the ACMA about the matter.

151. Investigation of complaints relating to the ABC or SBS by the ACMA

- (1) Subject to subsection (2), the ACMA must investigate the complaint.
- (2) The ACMA need not investigate the complaint if it is satisfied that:
 - (a) the complaint is frivolous or vexatious or was not made in good faith; or
 - (b) the complaint is not relevant to a code of practice developed by the Corporation.

- 27.9.6. The ACMA has an obligation to investigate a complaint regarding an alleged breach of an ABC code where "a person has made a complaint to the ABC on the ground that the Corporation has ... *acted contrary to a code of practice developed by the Corporation*." It has an obligation to investigate such complaint unless it is "frivolous or vexatious or was not made in good faith" or is "not relevant to a code".

- 27.9.7. It is for the ACMA to determine whether a complaint meets these provisions. It is not for the ABC to attempt to change the law by reading down ss 150 and 151 of the Act to cover only certain complaints that it would like it to cover.

- 27.9.8. The obligation to investigate a complaint which alleges that the ABC has "acted contrary to a code" is very broad. It would encompass any complaint that alleged a breach of a provision found in an ABC code.

- 27.9.9. One of the qualifications to the ACMA's obligation to investigate – that the ACMA need not investigate if the complaint is "not relevant to a code" – is to be determined by the ACMA on a case-by-case basis. It is not for the ABC to make a quasi-legislative pronouncement that a complaint made after six weeks of broadcast material is "not relevant to a code" – the relevance of a complaint to the ABC's code is not removed simply because of the time in which it was made. This is confirmed by the ACMA itself. In

Investigation Report No 2371 into *A Current Affair*, finalised by the ACMA on 23 August 2010, the ACMA held that just because a complaint was late, that did not mean that it was not a complaint “in accordance with the code” per s 148 of the *Broadcasting Services Act*. The delay in that case was four years after the broadcast in question. The ACMA held:

Section 148 of the *Broadcasting Services Act 1992* permits a complaint to be made to the ACMA if, along with other things, the complaint to the licensee ‘was made in accordance with’ the relevant code of practice. **A late complaint is not, by reason of its lateness alone, precluded from being a complaint made in accordance with the code.** Under section 149 of the *Broadcasting Services Act*, the ACMA ‘must’ investigate the complaint, but need not do so if it is satisfied that the complaint is frivolous or vexatious or was not made in good faith.

(Emphasis added)

- 27.9.10. Despite the above case being a commercial station case, it demonstrates that a time limit provision in a code (30 days in the commercial television code) does not restrict the ACMA’s jurisdiction which is outlined in the Act. This would seem to apply even more so in the case of the ABC, where there is no requirement that a complainant have made a complaint “in accordance with” a code, but merely a requirement that a complainant make an allegation that the ABC has “acted contrary to a code of practice.”
- 27.9.11. So long as a complainant has made a complaint *alleging* a code breach and that allegation is *relevant* to that code, the ACMA will have jurisdiction to investigate and indeed will be obliged to investigate such complaint. There is no requirement in the *Broadcasting Services Act* that requires complaints to be made within the timeframe provided in the ABC code in order for the ACMA to investigate the complaint. Therefore, it is inappropriate for the ABC to dictate to the ACMA its preferred (and incorrect) interpretation of ss 150 and 151 of the *Broadcasting Services Act*.

27.10. Excising the “complaints handling procedures” from the code

- 27.10.1. In its new 2011 code, the ABC has effectively excised the complaints handling procedures of the ABC from its code. At the end of the “How to make a complaint” section at the end of the code, these words appear:
- Note:* ABC complaints procedures do not form part of the ABC Code of Practice.
- 27.10.2. There are certain problems with this provision, besides the removal of the obligation to respond with 60 days, as referred to above.
- 27.10.3. First, there is no good reason why the way in which the ABC responds to complaints should not form part of its code of practice. The way in which the ABC deals with its complainants is sometimes just as important as its *actual response* itself to the complaint. All commercial licensees are required under the *Commercial Television Industry Code of Practice 2010* to follow certain procedural requirements for complaints. One such requirement is that complainants receive a response from a licensee within 30 business days (i.e. six weeks). The ABC should also be required to comply with minimum standards in its complaint handling procedures, failures of which should result in a breach of its code. It is important to recognise that from 2001 to 2011, the ACMA has found that the ABC has breached its complaints handling procedures as contained with its code on **five** occasions. On two occasions it held that the ABC had failed to make a reasonable effort to resolve a complaint. On the three other occasions, the ACMA found a breach of the code due to a failure to provide a response to

a complaint within 60 days. Under the new *ABC Code of Practice 2011*, the ABC will now not be subject to such accountability and the ACMA will no longer be able to record breaches of the ABC's complaints handling procedures.

- 27.10.4. Second, complaints made to the ABC that can be reviewed by the ACMA are those made under the ABC's code of practice, not complaints made under the ABC's editorial policies. Therefore, it should be the complaints procedures contained within the code that should govern code complaints. It is entirely inappropriate for the ABC, for example, to refer to its *Complaints Handling Procedures* in deciding not to investigate a complaint made under a code. However, that is exactly what the ABC has recently done in its letter of 13 May 2011, responding to my complaint regarding certain episodes of *Republic of Doyle (Series 1)* (see K249). In its letter, the ABC stated:

Audience & Consumer Affairs has not accepted your complaint about several episodes of *Republic of Doyle* broadcast on ABC2 in November and December 2010 and January 2011 for investigation.

...

... I note that the complaint was lodged more than three months – and in some cases almost six months – after the episodes were broadcast. **In accordance with the ABC's complaint handling procedures, Audience & Consumer Affairs may decide not to accept complaints for investigation if they are lodged more than six weeks after the date of broadcast** or publication of the content to which they relate.

(Emphasis added)

- 27.10.5. One can see from this above quotation that the ABC purported to refuse to investigate my complaint "In accordance with the ABC's complaint handling procedures". Notwithstanding that it is the 2007 code not the 2011 code that regulates this particular complaint, the ABC should not have referred to its complaint handling procedures in refusing to investigate my code complaint – it should have referred to the provisions of the code, which regulate my complaint.
- 27.10.6. Thirdly, the fact that the ABC's complaints procedures do not form part of its code is a fiction and it is unfair on complainants. Despite the procedures not forming part of the code, in practice the procedures are in reality a de facto part of the code, in that complaints under the code will be governed by the procedures. That is the fiction. This is unfair on complainants as it allows the ABC to refer to its *Complaints Handling Procedures* when it suits it to do so, but then claim that those very same procedures are not part of its code, so that it can not be found to have breached its code for the way in which it deals with a complainant. In another example, the ABC might terminate correspondence with a complainant on the extremely subjective basis that the ABC considers that it has "been unable to satisfy a complainant in relation to a particular matter", a provision contained in the *Complaints Handling Procedures* but not in the code. I address this extremely subjective power of the ABC in more detail below.

27.11. The "binding" new *Associated Standard on Television Classification*

- 27.11.1. Included within the changes to its code in 2011, the ABC re-branded what were simply previously known as the "Television program classifications" as the "Associated Standard: Television Program Classification".
- 27.11.2. The introduction to the new Standard states: "This Associated Standard is approved by the ABC Board and is *binding*" (emphasis added). It might be

inferred that the ABC was concerned about the serious and justified allegations that its classification standards were inconsistent with those of the Board, that is sought to make the Standard "binding". This may be a measure designed to justify an ABC policy that apparently refuses to have regard to Classification Board decisions and reasons for such decisions.

- 27.11.3. It may also be inferred that it has sought to re-brand the classification provisions as an "Associated Standard" to create the impression that the ABC has a unique set of classification provisions. This is misleading for the reasons already discussed above concerning the history of the ABC's classification provisions.

27.12. Minor changes to the MA15+ classification guidelines

- 27.12.1. The last change to the new 2011 code was the introduction of a few minor changes to the MA15+ classification guidelines. No reason has been given for these changes nor was there any public consultation on the need for such changes.
- 27.12.2. The first change was that now the treatment of themes at an MA15+ level, rather than being "discreet", must now "not be gratuitous". There is a significant difference between these two requirements. One wonders whether this change was a deliberate change to make it easier to include content at the MA15+ classification?
- 27.12.3. The second change was that the requirement under the violence section in the MA15+ classification that "Realistic treatments may contain detailed depictions, but *these should not be prolonged*" was deleted.
- 27.12.4. These two changes might not change the ABC classification guidelines substantially, but one wonders why they were made without public consultation and why no reasons were given for the changes.

27.13. Refusing to investigate a complaint where the ABC cannot "satisfy a complainant"

- 27.13.1. The last change I wish to mention is the introduction in the new *Complaints Handling Procedures* document of a provision which allows the ABC to terminate correspondence with a complainant on the very subjective basis that the ABC considers that it has "been unable to satisfy a complainant in relation to a particular matter". Clause 6.2 of such document provides:

6.2 Unable to satisfy complainant after reasonable efforts

- 6.2.1** The ABC will also consider terminating correspondence with a complainant in cases where **the ABC has clearly been unable to satisfy a complainant in relation to a particular matter, despite reasonable efforts having been made.** In such cases, the correspondent should be advised that the ABC will not continue to engage in correspondence in relation to the matter.
- 6.2.2** In cases where correspondence is terminated in relation to particular complaint, rather than with a complainant who is vexatious or not acting in good faith, correspondence about any new issues should be considered and a response provided where appropriate.

(Emphasis added)

- 27.13.2. This new section is extremely concerning for a number of reasons.

- 27.13.3. First, the section is extremely subjective. It is unclear what “unable to satisfy a complainant” means. It will be not uncommon for a complainant to be unsatisfied with the ABC’s response to a complaint. Indeed, that is the whole purpose behind s 150 of the *Broadcasting Services Act*, which allows a complainant to complain to the ACMA where he believes the ABC’s response to be “inadequate”. In such a situation, the ABC will not have been able to satisfy a complainant. However, according to clause 6.2 of the ABC’s new *Complaints Handling Procedures*, the ABC will be entitled to refuse to continue to correspond with such complainant. It is also unclear what it means when reference is made to “particular matter” in clause 6.2.1. Does this mean a single complaint, or does this mean a series of complaints that have a common element – for example, poor classification standards which are inconsistent with those of the Classification Board?
- 27.13.4. Secondly, “where a complainant is not satisfied” is not one of the reasons for not investigating a complaint under the *Broadcasting Services Act*. Under that Act, the ACMA may refuse to investigate a complaint if it is frivolous, vexatious or not made in good faith, or where a complaint does not relate to the ABC’s code of practice. Although the Act does not mandate that the ABC apply these same criteria, it is to be noted that these are standard conditions across all television stations. The codes of the commercial television stations, the SBS and pay-TV stations only allow for such stations to refuse to investigate complaints on those bases. There is no good reason for allowing the ABC to include a further extremely subjective ground – that of not being able to *satisfy* a complainant.
- 27.13.5. Thirdly, the whole point of complaining is because of dissatisfaction. It is not up to the ABC to refuse to correspond with a complainant on the basis that it believes that it has tried to satisfy the complainant. The question of whether the ABC’s response should be satisfactory is up to the independent arbiter, the ACMA.

27.14. Comments about these changes discussed above

- 27.14.1. There are several disappointing aspects about the changes introduced to the *ABC Code of Practice 2011* and the ABC’s new *Complaints Handling Procedures*. There was a lack of public consultation and explanation of the changes, in one case a fundamental change was contrary to a recommendation in a 2009 review, and the changes were conveniently made after the ABC’s appearance at the Committee’s hearing of 7 April 2011.
- 27.14.2. First, the lack of public consultation and explanation of these significant changes to the ABC code is significant. The changes unreasonably restrict the way in which complaints can be made to the ABC – they have a real impact of the way Australians interact with the national broadcaster.
- 27.14.3. There is no requirement for the ABC Board to consult the public when changing its code of practice. This is in distinction to the commercial television industry where the ACMA must be satisfied that the public have been consulted on a proposed code before registering it.³⁷ The *ABC Act* and the *Broadcasting Services Act* provide no requirements as to the basic elements that should be included in the ABC’s code of practice. This is in distinction to the licence conditions that apply to commercial television stations and the minimum content that is required to be included in commercial industry codes per s 123 of the *Broadcasting Services Act*.

³⁷ *Broadcasting Services Act*, s 130M(1)(e).

- 27.14.4. The fact that the ABC is independent from government does not justify a lack of accountability when it comes to the regulation of the ABC. In fact, the fact that the ABC receives enormous taxpayer funds to fund a wide platform of television, radio and internet services requires a high level of public accountability. The ABC should be required to include minimum standards in its code of practice.
- 27.14.5. Secondly, it is unacceptable that the ABC has amended its code to require complaints to be made within six weeks of broadcast. This amendment is completely inconsistent with the ABC's own review into its self-regulation in 2009, only two years ago!
- 27.14.6. Thirdly, it is interesting to observe that the new *ABC Code of Practice 2011* was conveniently introduced only days after Mr Brealey's appearance at the Committee's hearing on 7 April 2011. One wonders whether the introduction date of 11 April 2011 had anything to do with this?
- 27.14.7. One should also question why no reference was made to the Committee about the changes to the ABC's code in either the ABC's written or oral submissions to the Committee. A new code does not appear overnight – Mr Brealey made no reference to the fact of this new code being released only days later. And when the new code was referred to in the ABC's answers to questions taken on notice, the ABC merely cited the code on its website, with no explanations at all.

SUMMARY OF RECOMMENDATIONS FOR REFORM OR ACTION BY THE ABC

28. Introduction

- 28.1. In summary, the recommendations for reform or action by the ABC, contained in both the "Proposed Reforms: Achieving Greater Consistency" and "The ABC's Avoidance of Public Scrutiny" sections, are:

29. Reform proposals: consistency between the Classification Board and the ABC

- 29.1. The ABC should apply the *Guidelines for the Classification of Films and Computer Games* made under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and should not have its own separate guidelines.
- 29.2. In light of the Commonwealth Attorney-General's proposal on 25 May 2011 to have separate guidelines for the classification of *computer games* (due to their increased impact), the new separate guidelines for the classification of *films* should be amended to include more detail at each classification level, as they contained pre-2003.
- 29.3. The ABC and the ACMA should consider the reasons for a particular classification given in Classification Board Decision Reports, where these are available. The ABC and the ACMA should not depart from the decisions of the Board, unless good reason for doing so is shown, including but not limited to, because:
- 29.3.1. of reduced viewing impact due to individual episode presentation;
 - 29.3.2. the episode has been modified prior to broadcast; and
 - 29.3.3. the Board's findings as to particular scenes that caused a particular classification did not relate to the episode in question.
- 29.4. The Classification Board should adjudicate complaints about the classification of broadcast content, in order to maintain consistency of standards across different media. A complainant should still be required to complain to the TV station in the first instance. The Board should have the flexibility to depart from its previous

decisions where there is good reason to (see above).

- 29.5. The program classifiers in the ABC Television department should be re-trained to ensure that ABC classification decisions are broadly in line with the standards of the Classification Board.

30. Reform proposals: the ABC code of practice and complaints procedures

- 30.1. The ABC should be required to include minimum standards in its code of practice, including:
 - 30.1.1. the ABC should be required to comply with a requirement that complainants receive a response within 60 days; and
 - 30.1.2. the ABC should incorporate its complaints handling procedures within its code.
- 30.2. The ABC code of practice should not pre-determine the ACMA's jurisdiction to investigate a complaint regarding an alleged breach of the ABC code.
- 30.3. The ABC code of practice should extend to its online services, including its iView catch-up program.
- 30.4. The ABC should be required to consult with the public when introducing a new code of practice. The ACMA should register such code, but should only register the new code if it is satisfied that such public consultation has been sufficient.
- 30.5. The ABC should not have the power to refuse to investigate a complaint on the extremely subjective basis that it cannot satisfy a complainant.

31. Reform proposals: iView

- 31.1. The ABC's iView program should be subject to the regulation scheme under Schedule 7 of the *Broadcasting Services Act*.
- 31.2. The ACMA should be given jurisdiction to investigate complaints concerning content made available on iView.

32. ABC action proposal: classification policies and documents of the ABC

- 32.1. The ABC should release its classification policies and documents in the interests of public accountability, which are not exempt from release under the *FOI Act*.