

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Justice
Classification (Publications, Films and Computer Games) Act 1995
Classification (Publications, Films and Computer Games) (Modifications of Computer Games) Instrument 2015

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

Authority for making the instrument

Paragraph 20A(2)(e) and subsection 21(3) of the Act enable the Minister to make a legislative instrument prescribing modifications that would not require the modified item to be classified.

This legislative instrument is made in relation to modifications to computer games only.

Purpose of instrument

Currently, the Act in paragraphs 20A(2)(a) to (d) and 21(2)(a) to (d) provide the statutory exceptions to the modification rule for films and games.

Paragraph 20A(2)(e) and subsection 21(3) of the Act allow a legislative instrument to be made to cover additional exceptions to the modification rule.

The legislative instrument adds to the statutory exceptions for computer games. It provides for a greater range of modifications to computer games that do not require classification again. The instrument covers modifications of a computer game that are of a ‘minor and/ or technical nature’ as defined.

The exceptions in the instrument will only apply if the modification does not affect the computer game’s original classification. If the game’s classification is affected by the modification, the modified version is unclassified.

Issues giving rise to the need for the instrument

At the April 2013 meeting of the then Standing Council of Law and Justice (SCLJ), Classification Ministers agreed, among other things, that the Act should be amended to expand the exceptions to the modification rule.

The reform arose from a recommendation of the Australian Law Reform Commission’s (ALRC) 2012 Report on the National Classification Scheme, *Classification–Content Regulation and Convergent Media*. The ALRC considered that classified content should only become unclassified if it is modified in such a way that the modified content is likely to have a different classification from the original content. It stated that the Act also should not prescribe specific types of modifications that operate to declassify content (paragraph 8.28 and Recommendation 8–2 refer).

The *Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Act 2014* (Amending Act), which introduced these reforms, received Royal Assent on 11 September 2014. Schedule 4 of the Amending Act covering modification exceptions took effect on 11 March 2015.

Schedule 4 of the Amending Act introduced, among other provisions, paragraph 20A(2)(e) and subsection 21(3) to the Act to allow the Minister to make a legislative instrument to cover additional exceptions to the modification rule. The instrument-making power was considered necessary to respond to technological advances that facilitate rapid and multiple modifications to computer games (and films). It would enable the classification scheme to respond more quickly and to deal more effectively with the rapidly evolving content and content distribution environment.

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

Consultation

The Department consulted state and territory classification officials, the Classification Board and the following stakeholders.

Consumer group: The Australian Council on Children in the Media (ACCM).

Industry group: The Interactive Games & Entertainment Association (iGEA).

The iGEA (whose industry members will be primarily affected by this determination) and ACCM were consulted in relation to this instrument. The iGEA generally supported the making of this instrument.

The iGEA raised two issues about the illustrative examples in subsection 7(2) and 7(3) of the instrument. The main concern of the iGEA was in relation to the definition of ‘minor and/or technical’ modification in section 5 of the instrument. In response, appropriate changes were made to take account of the concerns raised.

The ACCM raised three concerns with the proposed instrument. The ACCM questioned whether it was appropriate for industry to determine whether a modification needs to be submitted for classification and whether such a decision should be subject to an external check. Currently, industry is already required to make similar considerations under other provisions of the Act, including determining whether a computer game is exempt from classification. Further, the Director of the Board has the power to call in any computer game for classification if the Director believes that a modification to a computer game should be classified. For these reasons, the Department considers the arrangements provided by this instrument are appropriate.

The ACCM also raised a concern in relation to subsection 7(2) of the instrument. That subsection lists several examples of modifications that may be covered by the modifications rule in section 6. The Department made appropriate changes to take into account the ACCM’s concern. The examples in subsection 7(2) are intended to help illustrate the operation of section 6. Subsection 7(1) clarifies that the applicability of the examples ‘will depend on the specific nature of the original game and the modification’.

The third concern also related to subsection 7(2) and section 6—specifically questioning the general usefulness of listing in a subsection (i.e. subsection 7(2)) examples of things that are likely covered by another section (section 6). As noted above, the Department considers that it is appropriate and beneficial to provide the examples at subsection 7(2). These examples do not limit or extend the operation of section 6, but will help industry to better determine when it applies.

Commencement

The instrument commences on the date it is registered. This instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA).

In accordance with subsections 44(1) and 54(1) of the LIA, the instrument is not subject to disallowance or sunseting because the Act facilitates the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more of the states, and authorises the instrument to be made by the Minister.

The Hon Michael Keenan MP
Minister for Justice

Details of the *Classification (Publications, Films and Computer Games) (Modifications of Computer Games) Instrument 2015*

Section 1 – Name

This section provides that the title of the instrument is the *(Publications, Films and Computer Games) (Modifications of Computer Games) Instrument 2015*.

Section 2 – Commencement

This section provides for the instrument to commence on the day it is registered.

Section 3 – Definitions

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

Section 4 – Prescribed computer games modifications

Modifications of unclassified games that are later classified

Subsection 4(1) specifies that modifications of a kind prescribed under section 6 are covered by subsection 20A(2) of the Act.

That is, if a computer game is modified in line with the requirements of section 6, and is classified in unmodified form at a later time, both the modified and unmodified forms of the game have the same classification from that later time.

Section 20A applies in relation to a computer game classified on or after 1 January 2013, regardless of when the game was modified. This is specified in subsection 6(1) Part 2 Schedule 4 of the Amending Act.

For example:

1. A computer game (the original game) is produced on 1 February 2013. The game is modified (the modified game) on 1 July 2013. On the day this instrument comes into effect, the original game is classified. The modified game receives the same classification and consumer advice as the original game on that day (contingent on the modified game satisfying the other requirements of this legislative instrument). This is because the original game was classified after 1 January 2013 and after the instrument came into effect.
2. A computer game is produced on 1 June 2012. The game is modified on 1 July 2012. The original game is classified on 1 August 2012. The modified game is unclassified because the original game was classified before 1 January 2013.

The Explanatory Memorandum to the Amending Act stated that the new section 20A is intended to address a legislative anomaly relating to modified content being treated differently under the Act depending on whether the modification is made before or after the content is classified. Section 21 of the Act states that a classified film or classified computer

game becomes unclassified when a modification is made to it, unless the modification is of a kind listed as an exception to this modification rule. A gap was identified because section 21 only dealt with modifications made to classified films and classified computer games, and not with modifications made **before** films or computer games are classified. The new section 20A addressed this legislative anomaly and expanded the modification rule.

Classified games that are later modified

Subsection 4(2) specifies that subsection 21(1) of the Act does not apply to modifications of a kind prescribed under section 6.

This means that if a classified computer game is modified in line with the requirements of section 6, the modified game receives the same classification as the original game.

Section 21 applies in relation to a computer game classified on or after 1 January 2013. This is specified in subsection 6(2) Part 2 Schedule 4 of the Amending Act.

For example:

1. A computer game is classified on 1 January 2013. On the day this instrument comes into effect, the game is modified. The modified game receives the same classification and consumer advice on that day (contingent on the modified game satisfying the requirements of this legislative instrument).
2. A computer game is classified in 1 December 2012. On 1 January 2013 the game is modified. The modified game is unclassified because the original game was classified before 1 January 2013.

Section 5 – Meaning of *minor and/or technical modification*

Section 5 defines a ‘minor and/or technical’ modification to a computer game:

A ***minor and/or technical modification*** means a modification to a computer game that:

- (1) does not cause the game, as modified, to be materially different to the original game; and
- (2) is not a work.

‘Materially different’ means not different in a substantial or major way when compared to the original game.

In assessing whether the new elements or new levels in a game, as modified, are materially different to the original game, it is the overall effect of the new elements or new levels which is relevant rather than the quantitative number of new elements or levels.

A modification that amounts to a standalone or discrete computer game that could be played without reference to the original game would be a ‘work’ as defined in section 5 of the Act and therefore excluded. An example of a modification that is likely to constitute a separate ‘work’ is a spin-off game. Another example of a ‘work’ is an episode that can be played without reference to the original game. On the other hand, the mere removal of either a

single player experience or a multi-player experience from a classified game would constitute a modification but it would not generally be a ‘work’.

Section 6 – Rule for modifications of computer games

The rule for modifications of computer games in section 6 has primacy over the examples in section 7.

A modified computer game receives the same classification and consumer advice as the original game if the modification complies with the rule in section 6.

Section 6 states that if a modification to a computer game meets the following criteria the game as modified receives the same classification as the original game. That is, if the modification:

- (a) is a minor and/or technical modification; and
- (b) does not have a material effect on the gameplay of the original game; and
- (c) does not change the title of the original game; and
- (d) is not likely to cause a game, as modified, to be given a different classification to the original game.

‘Material effect’ means a substantial or major effect on gameplay.

‘Gameplay’ is intended to capture the general nature of the computer game and the interaction of players with the game and/or other players. Modifications such as changes to settings in which the action takes place and changes to the tools, weapons or costumes used by the player-controlled character are generally covered. Modifications of these kinds would generally not have a material effect on the gameplay of the original computer game and would be covered by the rule provided that: (a) the game’s title is unchanged; and (b) the modification is not likely to cause the game to be given a different classification. Costumes worn by characters that are, for example, shredded or destroyed in the course of the game revealing the character’s partial nudity is not the same as a costume change and might not be covered by the rule.

A modification to a karaoke computer game that enables a player to select a song from a new musical genre, for example, would probably not affect the general manner in which the player interacts with the game. In this case, the game remains a karaoke game. Similarly, a modification to a racing car computer game that enables a player to select a new background location for the racing track or a new model of vehicle or a vehicle from a new range of colours seems unlikely to affect the general nature of the player’s involvement in the game because the game remains a car racing game.

A modification that has a material effect on the gameplay of the original computer game, such as the introduction of shooting in a karaoke game, would not be covered by the rule. This is because it would seem to affect the general manner in which the player interacts with the game because of the nature of the decisions, input and involvement required of the player would have changed.

Section 7 – Examples of operation of rule

Subsection 7(1) states that the applicability of a particular example of a permitted computer game modification in subsections 7(2) and 7(3) will depend on the specific nature of the original game and the modification. This recognises that these examples are for general guidance purposes only and they may not apply in every case.

Subsection 7(2) lists examples of the types of modifications which are intended to be covered by the rule in section 6. The list is non-exhaustive and does not limit or extend the operation of section 6. The rule may cover:

- (a) patches or updates that fix security vulnerabilities, compatibility problems or bugs;
- (b) graphic enhancements;
- (c) format changes;
(Format changes such as a modification to play the game on a smaller or larger screen is likely to be covered);
- (d) additions of songs, characters, weapons, costumes, skins or vehicles;
- (e) additions of environments, levels, missions, storylines or modes, even if these affect the overall difficulty or setting of the game.

Subsection 7(3) list some examples of modifications which are not intended to fall within the operation of section 6. The list is non-exhaustive and does not limit or extend the operation of section 6. They include:

- (a) patches or updates that make accessible previously inaccessible content that is likely to change the computer game's overall classification;
- (b) a remake of a simple game with vastly improved graphics that causes the game, as modified, to become unrecognisable from the original game;
- (c) the addition of items or environments that completely alter the general manner in which a player interacts with a game;
- (d) a computer game involving the same or similar characters, settings and plot as the original game but that can be played without the original game.

An example in subsections 7(2) or 7(3) is not intended, either expressly or impliedly, to extend the operation of the modification rule in section 6.¹

Section 8 – Rule does not prevent classification of modified computer games

Section 8 recognises that the modification rules do not prevent an application being submitted to the Board to classify a modified computer game or the use of an approved classification tool to classify a modified computer game. A decision by an approved classification tool is deemed by the operation of subsection 22CF(1) of the Act to be a decision of the Board.

¹ Section 15AD of the *Acts Interpretation Act 1901* states in part that 'if an Act includes an example of the operation of a provision...the example may extend the operation of the Act'.