

# E – BRIEF



## NSW Parliamentary Library Research Service

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### Censorship law - questions and answers

by Gareth Griffith

#### 1 What are the guiding principles of censorship law?

Historically, censorship law in Australia was founded on the common law and statutory schemes governing obscenity and indecency. In NSW the relevant legislation was the *Obscene and Indecent Publications Act 1901-1968*, and its successor the *Indecent Articles and Classified Publications Act 1975*. Obviously variations apply and the details of new statutory provisions must be attended to. Nonetheless, many of the guiding principles established under the common law and the former statutory regimes remain largely in place today.

The leading case is *Crowe v Graham*,<sup>1</sup> notably the judgment of Windeyer J. Arising from that case, censorship law in Australia is based on the concept of 'offensiveness', which is to be understood contextually and judged in terms of the likely degree of offence to the reasonable adult. This is the community standards test.

The key principles of the case were set out by Bray CJ in *Romeyko v Samuels*.<sup>2</sup> These can be summarised as follows:

- That the test of indecency is whether the matter in question is offensive to the contemporary standards of decency 'currently accepted by the Australian community'.

- Bray CJ added that it is necessary that the matter should offend to a 'substantial degree'.
- That in applying that test it is the contemporary standard which must be applied.
- That the matter complained of must be looked at in the context of the publication as a whole.

Moreover, what is acceptable in any particular case will depend on the 'setting and circumstances' in which the material was published. As Windeyer J observed:

To publish or exhibit a particular picture or print might amount to a publication of indecent matter in one set of circumstances although in other circumstances this would not be so.<sup>3</sup>

Among other things, the tribunal of fact was directed to have:

regard to the persons, classes of persons and age groups to whom or amongst whom the matter was published.<sup>4</sup>

Bray CJ noted in this respect:

a book which would offend community standards of decency if displayed in the bookshop might escape if it were kept under the counter and sold only to a genuine adult enquirer.<sup>5</sup>

In *Romeyko v Samuels* he stated:

something might be offensive to contemporary standards of decency in one context, but not in another.<sup>6</sup>

Likewise, in *Dalton v Bartlett* Bray CJ said, on the topic of whether or not something is indecent, that it is:

a question of fact to be decided by the application of an evaluatory standard after due consideration of the circumstances and the context.<sup>7</sup>

## 2 What are the social purposes of censorship laws?

In *Hutchins v The State of Western Australia* Wheeler JA commented:

The *broad social purposes* of censorship are, as I understand them, to ensure that ordinary members of the community are not affronted by the display of material to which a *majority of reasonable adults* would object, to maintain a level of public decency, and to avoid the undesirable social effects which may flow from the "normalisation", by its use in entertainment or other dissemination, of undesirable material. (emphasis added)<sup>8</sup>

## 3 Are community standards to be decided by a majoritarian test?

For Windeyer J, 'Contemporary standards are those which ordinary decent-minded people accept'.<sup>9</sup> Applying the statutory test under s 60 of the *Censorship Act 1996* (WA), Wheeler JA's reference above is to 'a majority of reasonable adults'. Are community standards to be decided therefore by some form of majoritarian test?

Commenting on Wheeler JA's observations, in [Adultshop.Com Ltd v](#)

[Members of the Classification Review Board](#) Jacobson JA said that those:

observations were not authority for the proposition that the words 'likely to cause offence to a reasonable adult' imports a test of whether a majority of Australians would be likely to be offended.<sup>10</sup>

For Jacobson J, offensiveness is not:

determined by a mechanistic majoritarian approach. It calls for a judgment about the reaction of a reasonable adult in a diverse Australian society.

Jacobson J continued:

171 The "reasonable adult" test must accommodate the community standards of Toorak and Newtown as well as those of Kunnarrurra and Broken Hill. It must also accommodate the standards of various subgroups within a multi-racial, secular society which nonetheless includes persons of different ages, political, religious and social views.

172 Even if the question of what would be likely to cause offence to a reasonable adult calls for a judgment as to "what most people think," it is a value judgment which is not susceptible to a bright line test.<sup>11</sup>

In brief, censorship decisions 'involve a value judgment about the views of the reasonable adult in the diverse Australian community'.<sup>12</sup>

## 4 Is expert evidence admissible?

From the decision in *Crowe v Graham*, Bray CJ extracted the principle:

That only within very narrow limits is evidence beyond the publication itself necessary or admissible.<sup>13</sup>

Extraneous matters are to be treated with caution by the tribunal of fact, including decisions made in other countries and the opinion of experts 'about the tendency of the matter in question or about the nature of contemporary standards'<sup>14</sup>

This approach was upheld in [Vokalek v Commonwealth of Australia](#),<sup>15</sup> a case concerning the importation of DVDs under the Commonwealth customs legislation. There it was noted that Windeyer J observed in *Crowe v Graham* that whether the goods transgress community standards:

... is a question of fact to be decided by the tribunal of fact. It is to be answered by reading the publication. Common sense and a sense of decency must supply the answer. Only within very narrow limits is evidence beyond the publication itself necessary or admissible. Evidence of what has been published in other books or writing is not admissible. ... Nor is it to be had by calling witnesses – whether writers, publishers or psychologists – and asking them to give their opinion on the matter.<sup>16</sup>

In [Vokalek v Commonwealth of Australia](#), Gray J said 'This approach has been frequently applied throughout Australia'.<sup>17</sup> He continued:

A fact finder is capable of viewing the DVD, seeing the images and applying the standard without the assistance of an expert. The law leaves the assessment of the relevant publications and whether the publications breach contemporary standards to the finder of fact, in this case the Magistrate. This was the ultimate question for the Magistrate in this case. It was not a topic on which expert evidence was admissible.<sup>18</sup>

Also cited with approval by Gray J was the view of Dixon CJ, Kitto and Taylor JJ in *Transport Publishing Co Pty Ltd v Literature Board*:

[It] may be said at once that ordinary human nature, that of people at large, is not subject of proof by evidence, whether supposedly expert or not.<sup>19</sup>

But note that statutory variations do apply. For example, under the NSW [Crimes Act 1900](#), s 578C(6) makes it clear that expert evidence is admissible:

In any proceedings for an offence under this section in which indecency is in issue, the opinion of an expert as to whether or not an article has any merit in the field of literature, art, medicine or science (and if so, the nature and extent of that merit) is admissible as evidence.

Under the [Commonwealth Classification \(Publications, Films and Computer Games\) Act 1995](#), which is discussed below, Members of the Classification Board and Classification Review Boards are not barred from receiving expert evidence in respect to classification decisions, but nor is the receipt of such evidence mandated by the Act. The issue was discussed at length by the Full Court of the Federal Court in [Adultshop.Com Ltd v Members of the Classification Review Board](#), specifically in relation to s 11(a) of the Classification Act – 'the standards of morality, decency and propriety generally accepted by reasonable adults'. The Court stated:

The appellant contends that s 11(a) raises a question of fact that must be determined by the Board on the basis of expert evidence and not simply by reference to the members' own perceptions of community

standards. We doubt that taking into account the s 11(a) matters involves an enquiry based on evidence, especially expert evidence, culminating in formal findings of fact. We think it more likely that the legislature intended to entrust that matter to the members, who are to be appointed having regard to the desirability of ensuring that membership is 'broadly representative of the Australian community'.<sup>20</sup>

## 5 Is there a national censorship scheme in place in Australia?

A cooperative scheme is in place but this is not uniform in nature. As Gray J observed in [Vokalek v Commonwealth of Australia](#):

there is a 'national' scheme for classification of publications, films and computer games within Australia to the extent that a Commonwealth Classifications Board exists to classify publications, films and computer games in accordance with a nationally agreed Classifications Code and classification guidelines. However, the Northern Territory, South Australia and Queensland retain the legislative ability to classify publications, films and computer games independently of the Commonwealth Classifications Board. Further, the permitted use within Australia of classified or unclassified publications, films and computer games varies across the States and Territories.<sup>21</sup>

As to these variations, Gray J explained:

For example, it is an offence in NSW, Vic, ACT, NT, SA and Qld to possess an RC film with the intention of selling or exhibiting the film; it is an offence in WA to possess an RC film per se and it is not an offence to possess such a

film in Tasmania at all regardless of intention. Also, it is an offence in NSW, WA, Vic, SA and Qld to possess an X18+ film with the intention of selling or exhibiting the film but not in Tas or the ACT.<sup>22</sup>

## 6 What is the basis of the cooperative censorship scheme?

The cornerstone of the scheme is the Commonwealth [Classification \(Publications, Films and Computer Games\) Act 1995](#). The Commonwealth Classification Act establishes the Classification Board and the Classification Review Board.

## 7 What role does State and Territory law play?

Under the cooperative arrangements in place in Australia, the State and Territory statutes operate as enforcement Acts, setting out such matters as the conditions for the public exhibition or demonstration, sale or advertising of films, publications or computer games. In NSW the relevant legislation is the [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#), which also provides for penalties for relevant offences.<sup>23</sup>

## 8 Is classification compulsory?

Provision is made under s 5B of the Commonwealth Classification Act for exempt films and computer games, including certain educational, hobbyist and sporting material. Otherwise, classification is compulsory.

For publications, the voluntary scheme that operated before 1995 has been replaced by a partially compulsory scheme based on 'submittable publications' (those containing material that would fall within the restricted categories).<sup>24</sup>

**9 What are the relevant classifications?**

By s 7 of the Commonwealth Classification Act, the classifications applied by the Classification Board and the Classification Review Board are as follows:

Publications	Films	Computer Games
<b>Unrestricted</b>	<b>G</b> General	<b>G</b> General
<b>Category 1 restricted</b>	<b>PG</b> Parental Guidance	<b>PG</b> Parental Guidance
<b>Category 2 restricted</b>	<b>M</b> Mature	<b>M</b> Mature
<b>RC</b> Refused Classification	<b>MA15+</b> Mature Accompanied	<b>MA15+</b> Mature Accompanied
	<b>R18+</b> Restricted	<b>RC</b> Refused Classification
	<b>X18+</b> Restricted	
	<b>RC</b> Refused Classification	

**10 How are classifications determined?**

By s 9 of the Commonwealth Classification Act, classifications are to be made in accordance with the [National Classification Code](#) and the Classification Guidelines for [Films and Computer Games](#) and [Publications](#). These Guidelines set out in more detail what may be permitted under each of the classification categories.

**11 What ‘matters’ are to be taken into account?**

By s 11 of the Commonwealth Classification Act classifiers are directed to take certain ‘matters’ into account, as follows:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
- (c) the general character of the publication, film or computer game,

including whether it is of a medical, legal or scientific character; and  
 (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

**12 Which principles must be given effect by classifiers?**

Under the National Code, classification decisions are to give effect, as far as possible, to the following principles:

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about: (i) depictions that condone or incite violence, particularly sexual violence; and (ii) the portrayal of persons in a demeaning manner.

As the Classification Review Board has observed, it is required to give effect to these principles only ‘as far as possible...they are not absolute binding rules but merely statements of principle’.<sup>25</sup> The Full Court of the Federal Court explained further:

Although the Code’s tables are prefaced by a list of principles to which classification decisions are to give effect ‘as far as possible’, the tables are prescriptive: ‘Films are to be classified in accordance with the following Table. Thus, for example, a film that promotes violence must be classified RC, and one that is unsuitable for minors must be classified R.’<sup>26</sup>

### 13 What is the relationship between s 11 of the Act, the Code principles and the Guidelines?

This issue was considered in [Adultshop.Com Ltd v Members of the Classification Review Board](#). It was claimed by the appellant that the 'classifier must start the classification process with the mandatory classification requirements in s 11'. The Full Bench of the Federal Court disagreed. Basically, it concluded that the s 11 requirements are not mandatory and that, unlike the Code and the Guidelines, they are not 'classification criteria'. Sundberg, Emmett and Siopis JJ explained:

It is true that s 11 of the Act requires the Board to take into account various matters, including the standards of morality, decency and propriety generally accepted by reasonable adults: par (a). However those matters do not govern classification decisions. Contrary to the appellant's submissions, the s 11 matters are not classification "criteria" or "standards". As s 9 makes clear, films are to be classified in accordance with the Code and the Guidelines. They work together... In contrast to the Code's prescriptive character, s 11 merely requires the matters it lists and any relevant unlisted matter to be "taken into account".<sup>27</sup>

### 14 What must be refused classification?

#### 14.1 Offensive material

Under the [National Classification Code](#), films, publications and computer games<sup>28</sup> are to be Refused Classification if they:

(a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or

revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or

The test is one of '**offence**' against the standards '**generally accepted by reasonable adults**'. The offence must be '**to the extent**' that the material in question should not be classified. It is a test based on community standards and it is one of degree. The material must offend sufficiently against community standards to warrant refusal of classification.

That the question of offensiveness under the Code is one of degree is clearer in relation to publications where the relevant contrast is with the tests for awarding a Category 1 or 2 restricted classifications – '*likely to cause offence to a reasonable adult*'. The inference is that, a publication that offends against community standards can be awarded a Category 1 or 2 restricted classification, whereas to be refused classification a publication must offend to a higher degree. The same test applied to films originally, whereas under the current Code the sole test for R18+ films reads '*Films (except RC films and X18+ films) that are unsuitable for a minor to see*'.

Offensiveness is a question of fact to be decided by the Classification Board and the Classification Review Board, having regard to the 'matters' set out in the Commonwealth Classification Act and, more particularly, the 'principles' in the National Classification Code and the relevant Guidelines. In appointing both the Board and the Review Board:

regard is to be had to the desirability of ensuring that the membership...is broadly representative of the Australian community.<sup>29</sup>

## 14.2 Child pornography material

Films, publications and computer games are also to be Refused Classification if they:

(b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or

The test is not expressed as one of degree here but, rather, in terms of whether the material **'is likely to cause offence to a reasonable adult'**. If so, the material is to be prohibited, again having regard to the Classification Code and Guidelines.

Para (b) makes reference to 'a person who is or appears to be' a child. A similar formulation is found in the definition of child pornography under s 91H of the NSW [Crimes Act 1900](#) and the definition of 'child pornography material' in the [Criminal Code Act](#) (Cth), s 473.1 (2). In respect to these statutory definitions, in [McEwen v Simmons](#)<sup>30</sup> it was found that depictions of sexual acts among the child characters of the American cartoon *The Simpsons* constitutes child pornography. Whether a cartoon character actually depicts a person was said to be a 'question of fact and degree'.<sup>31</sup> For Adams J, the mere fact that a cartoon character departs from a realistic depiction in some respects does not mean that the cartoon character cannot be a person.<sup>32</sup>

## 14.3 Material promoting crime or violence

Films, publications and computer games are also to be Refused Classification if they:

(c) promote, incite or instruct in matters of crime or violence.

Here the focus is not on either the degree or likelihood of offence against community standards. In *Brown v Classification Review Board*,<sup>33</sup> Sundberg J said that, unlike (a) and (b) above, the prohibition in (c) does not 'look to the effect or likely effect of the publication on the reader'.<sup>34</sup> In [NSW Council for Civil Liberties Inc v Classification Review Board \(No 2\)](#), Edmonds J agreed with this approach to the interpretation of para (c), stating:

It was submitted that the definitions of the words ['promote' and incite] themselves contain a requirement to look to the effect or likely effect of the action, in this case publications of the books. I reject this submission. There is nothing in the definition of either word which requires one to look to the effect or likely effect of the relevant action.<sup>35</sup>

In *Brown*, Sundberg J added in respect to para (c), nor does one 'look into the mind of the author...The test is an objective one'.<sup>36</sup>

In the same case French and Heerey JJ proposed a purposive construction to the paragraph, in particular to the interpretation of the word 'instruct'. They explained that the material, in this case an article in a student newspaper on 'The Art of Shoplifting', 'must be read as a whole and in context'.<sup>37</sup> According to Heerey J, such a construction, would

clearly place beyond the reach of the statute newspaper reports of crime, crime fiction and criminology as well as publications which are satirical or ironic.<sup>38</sup>

For the article to be Refused Classification it had to go 'beyond the mere provision of information about crime'. French J wrote:

Reflecting the theme of promotion or incitement the provision of information on matters of crime will constitute instruction if it appears from the content and context of the article, objectively assessed, as purposive, the relevant purpose being to encourage and equip people with the information to commit crimes.<sup>39</sup>

The approach was said to be:

consistent with the principle that free speech, while not an absolute, should be restricted only to the minimum extent necessary to protect other important values in a civilized society – in the present case the security of personal property.<sup>40</sup>

### 15 Does a special prohibition apply to terrorist material?

As amended in 2007, s 9 the Commonwealth Classification Act reads: 'Subject to section 9A, publications, films and computer games are to be classified in accordance with the Code and the classification guidelines.' The effect is that even before material is assessed according to the requirements of the Classification Code and Guidelines, it must be refused classification under s 9A of the Act if it 'advocates the doing of a terrorist act'.<sup>41</sup>

Three tests are provided for the word 'advocates', namely, whether the material:

- 'directly' or 'indirectly' counsels or urges the doing of a terrorist act;
- 'directly' or 'indirectly' provides instruction on the doing of a terrorist act; or
- 'directly' praises such an act 'in circumstances where there is a

risk that such praise might have the effect of leading a person...to engage in a terrorist act'.

The proviso in s 9A(3) is that:

A publication, film or computer game does not advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.

### 16 Are the decisions of the Classification Review Board subject to judicial review?

The position is that one independent specialist tribunal of fact, the Classification Review Board, reviews the decisions of another independent specialist tribunal of fact, the Classification Board, on the merits and without reference to the Administrative Appeals Tribunal.<sup>42</sup>

However, on an application from an aggrieved person, review by the Federal Court is available under s 5 of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth). In general an error of law or a failure to exercise the jurisdiction or power conferred on the Classification Review Board in accordance with the law must be determined. Nonetheless, as shown by such recent cases as [NSW Council for Civil Liberties Inc v Classification Review Board \(No 2\)](#) and [Adultshop.Com Ltd v Members of the Classification Review Board](#), judicial review can be wide ranging in nature.

### 17 Which other Commonwealth laws operate in this area?

Other Commonwealth laws relevant to censorship include:



(i) The [Customs \(Prohibited Imports\) Regulations 1956](#), regulation 4A of which bans the 'importation of objectionable goods'. *Prima facie*, the same tests apply as under the National Classification Code, as does the prohibition found in s 9A of the Commonwealth Classification Act against advocating 'the doing of a terrorist act'.<sup>43</sup>

However, following the decision in [Vokalek v Commonwealth of Australia](#), it is important to recognize that here these tests operate in a different statutory setting. That case concerned the importation, without prior permission from the federal Attorney General, of DVDs entitled 'Fetish World' and 'Doll House'. The test of offensiveness against community standards was applied, but in such a way that it was asked whether the goods were suitable for 'the unrestricted importation of goods into Australia'. As the Commonwealth submitted in the case:

The question to be answered in a particular case was whether the particular publication offends against the standards of morality, decency and propriety generally accepted by reasonable adults to permit the unrestricted importation of the publication.<sup>44</sup>

The question of the 'extent' or 'degree' of offence does not apply therefore, with Gray J rejecting the submission:

that the use of the word 'extent' in the regulation is a reference to the degree to which standards of morality, decency and propriety must be transgressed.<sup>45</sup>

Gray J added:

Had the defendant sought permission in the present case to

import the DVDs, and had the Attorney-General considered it appropriate to allow importation, he could do so, imposing conditions that would ensure that the goods were not used for any unauthorised purpose.<sup>46</sup>

At first instance, the Magistrate had concluded that the test of offensiveness had to be read down where the DVDs in question were purportedly for private adult viewing only. The conclusion was reached having regard to the views expressed by Bray CJ about context and the intended audience, with the Magistrate accepting:

that the size of the prospective audience or the degree to which the material might be generally available is a relevant consideration.<sup>47</sup>

Gray J disagreed, arguing that the statutory test in question did not permit this construction and noting that:

Once imported, the DVD would be available in Australia for unrestricted use without classification, and available for dissemination.<sup>48</sup>

But note that in this statutory context the Commonwealth Attorney General:

could have given consideration to the allowing of the importation, subject to conditions. That process may have led to the legal availability of the DVD for private adult viewing only.<sup>49</sup>

The upshot seems to be that DVDs that would receive a restricted classification, in particular X18+, cannot be imported without prior permission. The test in this context is 'the unrestricted importation of goods into Australia'.

The fact that the DVD 'Doll House' could have been produced and classified in Australia is not to the point. Such a DVD, so classified, would not, I presume, be available on an unrestricted basis within Australia. The Commonwealth Government are entitled to regulate in the way they have, and applying the test of federal regulation, the importation by the defendant of the DVD 'Doll House' involved a breach of regulation 4A.

(ii) The [Customs Act 1901](#), s 233BAB of which contains specific offences for the importation and exportation of 'child pornography' and 'child abuse material' in hard copy. Detailed definitions of such material are provided. The test is whether the material in question depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age 'in a way that reasonable persons would regard as being, in all the circumstances, offensive'.<sup>50</sup>

(iii) The same definitions and tests apply under ss 473.1 of the Commonwealth [Criminal Code Act](#) in respect to Internet (telecommunication) offences involving 'child pornography' and 'child abuse material'.

## 18 Which other NSW laws operate in this area?

Several provisions of the [Crimes Act 1900](#) (NSW) relate to censorship law. These include the 'Child Pornography' offences under Division 15A of the Act.<sup>51</sup> By s 91H(4)(b) it is a defence:

that the material concerned was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification (RC).

Further, by s 578C it is an offence to publish 'indecent articles'. The meaning of 'indecent' is left to the common law. Among the exemptions from the reach of the provision are publications, films and computer games classified under the Commonwealth Classification Act. However, the exemption does not apply to articles classified RC (or X18+ in the case of films).<sup>52</sup>

## 19 What is 'prohibited content' on the Internet?

Federally in Australia, Internet content is regulated by Schedules 5 and 7 of the [Broadcasting Services Act 1992](#) (Cth). This is a complaints based system administered by the Australian Communications and Media Authority (ACMA) on a co-regulatory basis with the Internet industry

In summary, as amended in 2007, Schedule 5 provides for the regulation of Australian Internet Service Providers (ISPs) in respect to overseas-hosted content. Where the ACMA is satisfied that such content is 'prohibited content' or 'potential prohibited content', it may either refer the matter to the police (as in the case of child pornography material for example), or require the ISP to deal with the content in accordance with procedures set out in the [Industry Code of Practice](#).<sup>53</sup>

Content hosts are now regulated under Schedule 7, which provides for the regulation of the new convergent technologies, such as broadband services to mobile handsets (such as a 3G handset). Specifically, Schedule 7 regulates internet content which has an 'Australian connection'. If the content is hosted in or provided from Australia and is prohibited, or is likely to be prohibited, [ACMA](#) will direct the

content service provider to remove or prevent access to the content on their service.

The definition of 'prohibited content'<sup>54</sup> is the same for both Schedules 5 and 7 and is based on the classifications applied by the Classification Board under the [National Classification Code](#). The following categories of online content are prohibited:<sup>55</sup>

- (a) the content has been classified RC or X 18+ by the Classification Board; or
- (b) the content has been classified R 18+ by the Classification Board and access to the content is not subject to a restricted access system; or
- (c) the content has been classified MA 15+ by the Classification Board, access to the content is not subject to a restricted access system, the content does not consist of text and/or one or more still visual images, and the content is provided by a commercial service (other than a news service or a current affairs service); or
- (d) the content has been classified MA 15+ by the Classification Board, access to the content is not subject to a restricted access system, and the content is provided by a mobile premium service.

## 20 Is censorship law consistent with the implied constitutional freedom of political communication?

The question can only be answered on a case by case basis. To date, the laws have successfully withstood legal challenge. As formulated in *Coleman v Power*,<sup>56</sup> the test is:

- (1) Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

- (2) If so, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of government prescribed by the Constitution?

In effect, the conclusion in both *Brown v Classification Review Board*,<sup>57</sup> which concerned an article in a student newspaper on 'The Art of Shoplifting', and in [NSW Council for Civil Liberties Inc v Classification Review Board \(No 2\)](#) was that the publications at issue did not concern 'government or political matters'. The challenges fell therefore at the first hurdle.

In [NSW Council for Civil Liberties Inc v Classification Review Board \(No 2\)](#) the Classification Review Board had refused classification and therefore effectively banned two publications on the basis that they 'promoted and incited in matters of crime or violence'. This was on an application from the Commonwealth Attorney General after the Classification Board had classified both publications 'Unrestricted'. Subsequently, an application by the NSW Council for Civil Liberties to the Federal Court for judicial review of the Review Board's decision was unsuccessful. Edmonds J endorsed the submission of the Commonwealth Attorney General:

that no burden is placed on the freedom of communications about government or political matters. The classification scheme affects publications that promote, incite or instruct in matters of violence or crime. Communications of this nature do not fall within the constitutional freedom.<sup>58</sup>

Edmonds J wrote:

it is important not to lose sight of what that political process is – the effective operation of the

constitutional system of representative and responsible government. Communications that promote, incite (or instruct) in matters of violence or crime do not fall within its architecture or framework; they therefore cannot burden or impair it.<sup>59</sup>

## 21 End note

Censorship law in Australia is obviously complex and constantly evolving as technology shifts the boundaries of access to potentially problematic material. One ongoing issue is that different thresholds apply across technologies, notably between films on one side and computer games on the other. The highest available classification for computer games is MA15+. The introduction of an R18+ classification for computer games is the subject of current debate. Another issue relates to the Commonwealth Government's Internet filtering proposal.<sup>60</sup>

<sup>1</sup> (1968) 121 CLR 375.

<sup>2</sup> (1972) 2 SASR 529 at 560-1; (1972) 19 FLR 322 at 354-5. Cited with approval in: *Phillips v Police* [1994] 75 A Crim R 480 at 487-8; *Vokalek v Commonwealth of Australia* [2008] SASC 256 at para 43.

<sup>3</sup> (1968) 121 CLR 375 at 396.

<sup>4</sup> (1968) 121 CLR 375 at 396.

<sup>5</sup> JJ Bray, 'The juristic basis of the law relating to offences against public morality and decency' (1972) 46 *Australian Law Journal* 100 at 107.

<sup>6</sup> (1972) 2 SASR 529 at 560-1; (1972) 19 FLR 322 at 354-5.

<sup>7</sup> (1972) 3 SASR 549 at 555.

<sup>8</sup> [2006] WASCA 258 at para 4.

<sup>9</sup> (1968) 121 CLR 375 at 399.

<sup>10</sup> (2008) 243 ALR 752; [2007] FCA 1871 at para 129.

<sup>11</sup> (2008) 243 ALR 752; [2007] FCA 1871 at paras 170-172.

<sup>12</sup> (2008) 243 ALR 752; [2007] FCA 1871 at para 141.

<sup>13</sup> (1972) 2 SASR 529 at 560-1; (1972) 19 FLR 322 at 354-5.

<sup>14</sup> (1972) 2 SASR 529 at 560-1; (1972) 19 FLR 322 at 354-5.

<sup>15</sup> [2008] SASC 256 at paras 49-50. The case concerned the importation of DVDs under the [Customs \(Prohibited Imports\) Regulations 1956](#), regulation 4A.

<sup>16</sup> (1968) 121 CLR 375 at 395-6.

<sup>17</sup> [2008] SASC 256 at para 50.

<sup>18</sup> [2008] SASC 256 at para 54.

<sup>19</sup> (1956) 99 CLR 111 at 119.

<sup>20</sup> [2008] FCAFC 79 at para 49. The Court concluded: 'Whether or not the Board was obliged to deal with the expert evidence in the manner for which the appellant contends, it did so'. (para 60) Note that under s 5 of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) the grounds on which a decision can be reviewed include 'that there was no evidence or other material to justify the making of the decision' (s 5(1)(h), which is to be read with s 5(3)).

<sup>21</sup> [2008] SASC 256 at para 26.

<sup>22</sup> [2008] SASC 256 at Fn 34.

<sup>23</sup> [Classification of Computer Games and Images Act 1995](#), [Classification of Films Act 1991](#), [Classification of Publications Act 1991](#) (Qld); [Classification of Publications, Films and Computer Games Act 1995](#) (SA); [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#) (Tas); [Classification \(Publications, Films and Computer Games\) \(Enforcement\) Act 1995](#) (Vic); [Classification \(Publications, Films and Computer Games\) Enforcement Act 1996](#) (WA); [Classification \(Publications, Films and Computer Games\) \(Enforcement\) Act 1995](#) (ACT); [Classification of Publications, Films and Computer Games Act](#) (NT).

<sup>24</sup> [Classification \(Publications, Films and Computer Games\) Act 1995](#) (Cth), ss 5 and 23.

<sup>25</sup> Quoted with approval in [Adultshop.Com Ltd v Members of the Classification Review Board](#) [2007] FCA 1871 at para 92.

<sup>26</sup> [2008] FCAFC 79 at para 43.

<sup>27</sup> [Adultshop.Com Ltd v Members of the Classification Review Board](#) [2008] FCAFC 79 at paras 42 and 44.

<sup>28</sup> Computer games that 'are unsuitable for a minor to see or play' are also to be Refused Classification. A lower threshold applies to computer games, in relation to which there is no R18+ classification.

<sup>29</sup> [Classification \(Publications, Films and Computer Games\) Act 1995](#) (Cth), ss 48(2) and 74(2).

<sup>30</sup> [2008] NSWSC 1292.

<sup>31</sup> [2008] NSWSC 1292 at para 40.

<sup>32</sup> The case law on child pornography is discussed in G Griffith and K Simon, [Child Pornography Law](#), NSW Parliamentary Library Briefing Paper No 9/2008, pp 21-27.

<sup>33</sup> (1998) 154 ALR 67.

<sup>34</sup> (1998) 154 ALR 67 at 97-8.

<sup>35</sup> [2007] FCA 896 at para 67.

<sup>36</sup> (1998) 154 ALR 67 at 97-8.

<sup>37</sup> (1998) 154 ALR 67 at 82.

<sup>38</sup> (1998) 154 ALR 67 at 83.

<sup>39</sup> (1998) 154 ALR 67 at 81.

<sup>40</sup> (1998) 154 ALR 67 at 83.

<sup>41</sup> The history and background to this amendment is discussed in MA Neilsen, [Classification \(Publications, Films and Computer Games\) Amendment \(Terrorist Material\) Bill 2007](#), Bills Digest No 22, 2007-08, Commonwealth Parliamentary Library.

<sup>42</sup> Limited appeal to the AAT is available in respect to decisions made about 'additional content': [Classification \(Publications, Films and Computer Games\) Act 1995](#) (Cth), ss 22G and 22J.

<sup>43</sup> An additional ban applies to goods that 'promote or incite the misuse of a drug specified in Schedule 4' to the Prohibited Imports Regulations.

<sup>44</sup> [2008] SASC 256 at para 33.

<sup>45</sup> [2008] SASC 256 at para 38.

<sup>46</sup> [2008] SASC 256 at para 40.

<sup>47</sup> [2008] SASC 256 at para 64.

<sup>48</sup> [2008] SASC 256 at para 66.

<sup>49</sup> [2008] SASC 256 at para 68.

<sup>50</sup> For a detailed analysis of the Commonwealth Customs and Criminal Code provisions see G Griffith and K Simon, n 32, pp 21-27.

<sup>51</sup> For a detailed analysis of these provisions see G Griffith and K Simon, n 32, pp 28-31.

<sup>52</sup> [Crimes Act 1900](#) (NSW), s 578C(1)(e)-(g).

<sup>53</sup> The ACMA may also issue a 'standard-access prevention notice': [Broadcasting Services Act 1992](#) (Cth), Sch 5, cl 40(1)(c).

<sup>54</sup> 'Prohibited content' is defined by clause 20 of Schedule 7; a further category of 'potential prohibited content' is defined by clause 21.

<sup>55</sup> Note that a separate scheme operates for 'eligible electronic publications'. As defined by clause 11 of Schedule 7 these are the online equivalent of those books and magazines available in print in Australia. In this case, the prohibited content regime mirrors that for publications under the National Classification Scheme and refers to: RC; Category 1 Restricted; and Category 2 Restricted.

<sup>56</sup> (2004) 220 CLR 1.

<sup>57</sup> (1998) 154 ALR 67.

<sup>58</sup> [2007] FCA 896 at para 180 read with para 205.

<sup>59</sup> [2007] FCA 896 at para 205.

<sup>60</sup> G Griffith and T Edwards, [Internet Censorship and Mandatory Filtering](#), NSW Parliamentary Library E-Brief No 5/08; A Maurushat and R Watt, 'Australia's Internet filtering proposal in the international context' (2009) 12(2) *Internet Law Bulletin* 18.

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