Advocating terrorist acts and Australian censorship law

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This article examines how Australian law regulates material that advocates terrorist acts. Amendments made in 2007 to the Classification (Publications, Films and Computer Games) Act 1995 (Cth) direct Commonwealth classification authorities to ban publications which counsel, instruct in or praise terrorism. These amendments are expressed in vague, and potentially overbroad, language, creating a risk they will be construed to require authorities to ban an overly broad range of publications. These amendments are examined in the light of the existing Australian classification law, beginning with an overview of the Australian classification and censorship system. The text of the amendments is then examined, and how the amendments might be understood in the light of the existing jurisprudence. It is found that there is reason to think that the amendments will be read down so as not to overly restrict valuable speech.

INTRODUCTION

Debate about freedom of speech can feel rehearsed. One side says that a restriction is needed because free speech is only one important value amongst many, and must sometimes give way to those other values. The other side replies that free speech is different to all, or almost all, other values. It is said that because of its inherent and instrumental worth speech should be virtually inviolable and that, where there is doubt, government should err on the side of imposing no restrictions. Both sides do, however, agree on one thing: where the government chooses to restrict speech, the law should be clear and precisely tailored to the law's object. Laws failing these criteria will be of uncertain and overbroad application. They may deter speech merely because the speaker cannot predict the law's operation and may result in overzealous enforcement where the Executive takes full advantage of the vague scope of the law.

This article addresses a labyrinthine area of Australian law: the censorship and classification of terrorist speech. The area involves a complicated cacophony of Commonwealth, State and Territory Acts and other legislative instruments which determine what can be said, and how it can be said. Recent judicial decisions have clarified the way that Australian censorship law approaches dangerous speech. Recent legislative amendments have, on the other hand, changed and obfuscated this. In this article, these cases and amendments are examined so as to illuminate how Australia's censorship and classification law regulates speech that relates to terrorism and other forms of violence. The aim is not to add to the large body of writing on legal theory as it relates to freedom of speech and censorship, but to address these issues through close analysis of the Australian law. Hence, an overview of the legislative scheme is given first and then the article focuses on recent amendments to that scheme providing for the regulation of speech that advocates terrorism.

These amendments have been criticised for being both ambiguous and vague. It is suggested that they could have an overbroad application, and could chill valuable speech. These dangers can inhere in any new law that bears on public discourse. The analysis of the amendments, however, shows that there is reason to believe that, when viewed in the history and context of Australian censorship law, the courts will apply the law in a way which minimises their potential to restrict valuable speech.

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AUSTRALIA'S CENSORSHIP REGIME

The federal classification system

For the last 30 years, Australia's system of regulating publications has been one of classification. No longer does the government have a stark choice between censorship and permission. Instead, there are grades of permission, ranging from unrestricted up to being banned. The classification scheme is based on the principles that children should be protected, but adults in a free society should be allowed to view whatever they wish so long as this does not infringe the rights of others who want to avoid offensive material and be free from violence.[1]

The centrepiece of the system is the cooperative classification scheme established by the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (Classification Act) and corresponding State and Territory enforcement Acts.[2] The scheme results in largely uniform regulation of dangerous and obscene publications Australia-wide. At the broadest level of description, Commonwealth law determines what classification a publication is given, while largely uniform State laws determine the consequences of that classification.

The scheme applies to publications, films and computer games. These terms are defined broadly. They include all "written or pictorial matter".[3] There are small differences, of no present relevance, between the regulation of publications, films and computer games, and for the purposes of this article they are referred to jointly by the term "publications". Not all publications in Australia must be submitted for classification. Historically, the scheme operated by self-identification: there was no obligation to submit any particular publication. The Classification Act now defines some publications to be "submittable publications".[4] This matter will be returned to later. Briefly, submittable publications are those which should be submitted to classification because, upon classification, they would likely be restricted. The State and Territory enforcement Acts restrict the distribution of submittable publications.

Section 10 of the Classification Act provides that classification decisions are to be made by the Classification Board.[5] Decisions of the Classification Board are reviewable by the Classification Review Board.[6] The review is de novo and on the merits.[7] Decisions of the Board must comply with the Classification Act and a complex array of rules and principles which determine the limits of the classification power.

The Classification Act provides, subject to an exception relating to "advocating terrorism" which is discussed later, that publications are to be classified in accordance with "the Code" and "the

[1] See, eg Australian Law Reform Commission, *Censorship Procedure*, Report No 55 (1991) at [2.2].

[2] See *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (NSW); *Classification of Publications, Films and Computer Games Act* (NT); *Classification of Computer Games and Images Act 1995* (Qld); *Classification of Films Act 1991* (Qld); *Classification of Publications Act 1991* (Qld); *Classification (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).

[3] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 5.

[4] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 5.

[5] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 10.

[6] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 42.

[7] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 44(1). Where one of either the Classification Board or the Classification Review Board is referred to and there is no relevant difference between the two, the term "Board" is used.

Guidelines".[8] Thus, three documents regulate the Board's classification power: the Classification Act, the *National Classification Code 2005* (Cth) (the Code) and the *Guidelines for the Classification of Publications 2005* (Cth) (the Guidelines).[9]

Section 11 of the Classification Act is titled "Matters to be considered in classification". It provides:

> The matters to be taken into account [in making a classification] are:
> (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]; and
> (c) the general character of the [publication], including whether it is of medical, legal or scientific character; and
> (d) the persons or class of persons to or amongst whom it is published or intended or likely to be published.

These matters must be taken into account as part of the classification process. They are not, however, criteria according to which the decision must be made. They are considerations only, not binding parameters.[10] The Board is also guided by the Code and Guidelines, which are Commonwealth legislative instruments made under the Classification Act, though their content is determined by agreement between the Commonwealth, States and Territories. The Code expresses principles at a higher level of generality than the Guidelines. The legal effect on the scope of the boards' power does not, however, appear to differ as between the two instruments.

Clause 1 of the Code gives the broadest statement of the principles guiding classification decisions. It provides:

> 1. 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.

The Code then provides a table in accordance with which publications are to be classified. Most of the classification categories are in common currency: from "G" or "Unrestricted" ratings through to "X18+" or "category 2" restricted ratings. The highest rating is "RC" or "Refused Classification". The Code directs the Board to refuse classification to all publications which "promote, incite or instruct in matters of crime or violence".[11]

The Guidelines amplify the Code. They give more detailed descriptions of core concepts and provide the boards with a vocabulary to explain classification decisions. For example, they state that "[p]ublications will be classified RC … if they contain … detailed instruction in: (i) matters of crime or violence; (ii) the use of proscribed drugs".[12]

Jacobson J discussed the interaction between the Classification Act, the Code and the Guidelines in *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 (*Adultshop.com Ltd*). In that case, Adultshop.com Ltd sought judicial review of a decision classifying a film X18+. The film was called *Viva Erotica*. It contained real depictions of sexual activity between consenting adults. It contained no violence, sexual violence, coercion or sexual fetishes. One of the applicant's arguments was that the Guidelines were ultra vires the Classification Act. The Guidelines appeared to direct the Board to make a particular decision in certain circumstances: here, that films containing real, not simulated, sex should be classified X18+. The applicant argued that this direction

[8] *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 9.

[9] See also the *Guidelines for the Classification of Films and Computer Games* (Cth).

[10] *Adultshop.com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31 at [42]-[46] (Sundberg, Emmett and Siopis JJ).

[11] *National Classification Code 2005* (Cth), cl 2, item 1(c).

[12] *Guidelines for the Classification of Publications 2005* (Cth), p 14.

was inconsistent with the fact that the Act required the Board to exercise its judgment in each particular case. Jacobson J held the relevant parts of the Code and Guidelines to be lawful. He reached this result by reading the Code and Guidelines as laying down only *presumptive* rules as to how publications of certain kinds should be classified. Classifications "in any particular case" remain "a matter of judgment" for the relevant board.[13] Jacobson J emphasised the importance of the Board looking at each publication "on its own merits".[14] On appeal to the Full Court, the Bench noted that the Code was "prescriptive", but also noted that the Code only requires that decisions give effect to it "as far as possible".[15]

Discussed below is some of the Federal Court's commentary on how the Classification Act, Code and Guidelines are to be reconciled. It is sufficient to note that a key part of the Board's decision-making processes is to synthesise the various documents which guide its power.[16]

The Classification Act only outlines a scheme for giving publications a particular classification. With one exception, it does not determine the consequences of any particular classification.[17] That is left to State and Territory laws. With minor differences, these are uniform. Broadly, they prohibit selling and publicly exhibiting publications which have been refused classification.[18] They also prohibit possessing RC publications with the intention of selling them[19] and privately exhibiting the publication before a minor.[20] The mere *production* or *possession* of publications which are, or will be, refused classification is not prohibited. That is left to the ordinary criminal law, as discussed in the next section. Because of the restriction on sale and distribution, however, the effect of a publication being refused classification can be described as "censorship" within the ordinary understanding of that term.

Alternate means of censorship

The primary alternative means of censoring publications is provided by the general criminal law.[21] Where the sale, distribution or possession of material would in itself constitute a criminal offence, it can generally be restrained by injunction pursuant to ordinary principles for vindicating public rights.[22] Alternatively, in some circumstances, the government may have powers to seize and destroy publications involved in an offence.[23] In both cases, the practical effect is to ban that publication.

Several offences target publications which incite violence. There are a wide range of laws that vary between jurisdictions. Under Commonwealth law, eg it is unlawful to incite (or urge) a Commonwealth offence.[24] Victoria also has a specific statutory offence of incitement.[25] New South Wales has a general offence of incitement, punishable summarily and contained outside its general

[13] *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 at [104] (Jacobson J).

[14] *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 at [94] (Jacobson J).

[15] *Adultshop.com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31 at [43] (Sundberg, Emmett and Siopis JJ).

[16] See relevantly the comments of the Convenor of the Classification Board in evidence before a Senate Committee: Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Official Committee Hansard* (17 July 2007) p 29 (Ms Shelley).

[17] The exception is Pt 10 of the Act which regulates the dissemination of publications in "prescribed areas" in the Northern Territory.

[18] See, eg *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (NSW), s 6.

[19] See, eg *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (NSW), s 26.

[20] See, eg *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (NSW), s 12.

[21] For a useful summary of much of the law in this area, see Griffiths G, *Sedition, Incitement and Vilification: Issues in the Current Debate*, Briefing Paper No 1/2006 (2006) http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/57BA30F38D3C969CCA25710F0023442F viewed 2 February 2009.

[22] See, eg *Cooney v Ku-ring-gai Corp* (1963) 114 CLR 582.

[23] See, eg *Confiscation Act 1997* (Vic).

[24] *Criminal Code* (Cth), s 11.4(1).

[25] *Crimes Act 1958* (Vic), s 321G.

criminal legislation.[26] While the jurisdictions use different terminology, generally a person who counsels, procures or instigates an offence is an accessory to that offence.[27] To be guilty, the accused must both have a purpose of bringing about an offence and have engaged in conduct which rendered the offence more likely.[28] Unlike the Commonwealth offence of incitement, accessorial liability is derivative: it requires the commission of the principal offence. Some jurisdictions also have incitement provisions which apply only to specific offences.[29]

Commonwealth law also contains a set of "sedition" offences. Broadly, those offences apply where someone urges another to violence against an Australian government.[30] Most States and Territories retain an offence, either codified[31] or common law,[32] of sedition. Commonwealth law also contains a set of offences applying to activities preparatory or incidental to a terrorist act. These include: possessing things connected with terrorist acts[33] and possessing or making documents likely to facilitate terrorist acts.[34] Further, some publications which incite violence may constitute unlawful public racial[35] or religious[36] vilification. State and Territory laws covering offensive or threatening public behaviour could also extend to some publications which might reasonably incite an offence.[37]

These laws form part of the overall regulation of publications which incite violence. By and large, however, the primary means of regulating such publications is the cooperative classification scheme. This matter is now discussed below.

PUBLICATIONS WHICH ADVOCATE TERRORIST ACTS

The 2007 amendments

In 2006, there was apparent community concern over the availability of nine publications which were thought to incite terrorism, but had been classified "unrestricted" or "PG". Talk show host Ray Hadley questioned the then Attorney-General Phillip Ruddock about this during a live interview on 2GB Radio. Soon afterwards, the Attorney-General referred the nine publications to the Classification Review Board. The Board affirmed the original classification for seven of the publications, but classified two of the books "RC".[38] The two banned books were titled *Join the Caravan* and *In the Defence of the Muslim Lands*.[39] Both were passionate calls to arms to Muslims against the Soviet occupation of Afghanistan. Both discussed and explained the concept of jihad. In banning the books, the Board relied on the provisions of the Code and the Guidelines directing it to classify as RC

[26] *Crimes Prevention Act 1916* (NSW), ss 2-5.

[27] See, eg *Crimes Act 1958* (Vic), ss 323-324.

[28] See, eg *R v Russell* [1933] VLR 59 at 66-67 (Cussen ACJ).

[29] See, eg *Crimes Act 1900* (NSW), s 131C (incitement to commit suicide).

[30] See *Criminal Code* (Cth), s 80.2. See also Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006).

[31] See, eg *Criminal Code Act 1899* (Qld), ss 44-46.

[32] See Maher L, "The Use and Abuse of Sedition" (1992) 14 Syd LR 287.

[33] *Criminal Code* (Cth), s 101.4.

[34] *Criminal Code* (Cth), s 101.5.

[35] *Racial Discrimination Act 1975* (Cth), s 18C.

[36] See, eg *Racial and Religious Tolerance Act 2001* (Vic).

[37] See, eg *Summary Offences Act 2005* (Qld), s 6(2).

[38] See generally Australia, House of Representatives, *Parliamentary Debates* (15 August 2007) p 19 (the Hon Phillip Ruddock MP).

[39] See MacDonald E and Williams G, "Banned Books and Seditious Speech: Anti-Terrorism Laws and Other Threats to Academic Freedom" (2007) 12 ANZJLE 29 at 38-39.

material which incites or promotes crime. These were the first two books banned in Australia since 1973.[40] Since 2006, the Board has also banned a book by Phillip Nitschke called *The Peaceful Pill* which explores suicide options.[41]

The Board's decisions to ban *Join the Caravan* and *In the Defence of the Muslim Lands* were unsuccessfully challenged by the NSW Council for Civil Liberties in *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 (*NSWCCL*).[42] The action failed primarily because the NSW Council for Civil Liberties failed to show it was necessary for the Board to have regard to the likely effect of the books, as opposed to their objective purpose.

In 2007, while judgment in the *NSWCCL* was reserved, and citing doubts about the extent to which the law ensured that all material advocating terrorist acts is refused classification,[43] the then Howard Government enacted the *Classification (Publication, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth) (Classification Amendment Act). The government chose to amend the Classification Act, rather than the Code or Guidelines, because the States and Territories refused to agree to the amendments.[44]

The Classification Amendment Act inserted a new s 9A into the Classification Act. Section 9A(1) and (2) provides:

> **9A. Refused classification for [publications] that advocate terrorist acts**
>
> (1) A [publication] that advocates the doing of a terrorist act must be classified RC.
>
> (2) Subject to subsection (3), for the purposes of this section, a [publication] *advocates* the doing of a terrorist act if:
>
> (a) it directly or indirectly counsels or urges the doing of a terrorist act;
>
> (b) it directly or indirectly provides instructions on the doing of a terrorist act; or
>
> (c) it directly praises the doing of a terrorist act in circumstances where there is a risk that such a praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act.

Section 9A uses the same words to define "advocates" as are used in s 102.1(1A) of the *Criminal Code* (Cth).[45] Division 102 of the *Criminal Code*, of which s 102.1 is a part, is concerned with the proscription of terrorist organisations (relevantly, those which advocate terrorist acts). The section also links the definition of "mental impairment" to that used in the *Criminal Code*. Section 7.3 defines the term in the following way:

> **7.3.Mental impairment**
>
> …
>
> (8) In this section:
>
> ***mental impairment*** includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
>
> (9) The reference in subsection (8) to **mental illness** is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

[40] Moorhouse F, "The Writer in a Time of Terror" (2007) 68 IPF 10 at 20.

[41] Australian Broadcasting Corporation, *Classification Board Bans Nitschke Assisted Suicide Book* (27 February 2007) http://www.abc.net.au/news/stories/2007/02/25/1856282.htm viewed 2 February 2009.

[42] An appeal against the decision has been filed.

[43] See Attorney-General's Department, *Material that Advocates Terrorist Acts: Discussion Paper* (2007) pp 2-3.

[44] See generally Australia, n 38, p 19 (the Hon Phillip Ruddock MP). See also Ruddock P, *Labor States Fail to Agree on Material Advocating Terrorism*, Media Release (27 July 2007).

[45] "Terrorist act" is given the meaning it has in s 100.1 of the *Criminal Code* (Cth): *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 9A(4).

This is obviously a broad definition. When applied to s 9A, it seems to have the effect that there are few potential audience members excluded from the assessment of whether a publication creates a risk that someone might commit a terrorist act.

Section 9A(3) carves out some material from this otherwise broad provision. It provides:

> (3) A [publication] 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.

The general intent of the amendments is apparently to direct the Board to refuse classification where a publication advocates a terrorist act and s 9A(3) does not apply. Even where the publication is not considered to advocate a terrorist act, it may nevertheless be refused classification under the existing law because it promotes, incites or instructs in crime.

These provisions have the capacity to censor an incredibly broad range of publications. Predictably, when the Senate Legal and Constitutional Affairs Committee reviewed the amendments, many stakeholders vigorously opposed them on the grounds of vagueness and overbreadth. For example, the Law Council of Australia devoted three pages to criticising the amendments' use of "ambiguous and broad definitions".[46] Other submissions pointed out that the amendments may result in the banning of valuable critiques of Robert Mugabe, the Sudanese Government or the Burmese authorities.[47] The majority report of the committee, acknowledging many of these concerns, recommended only one change to the Bill, the omission of the phrase "regardless of his or her age or any mental impairment" in s 9A(2)(c). The committee commented that the phrase made the law difficult to apply, hard to predict and would result in the censorship of important speech.[48] The government did not adopt this recommendation.

If the relationship between the Classification Act, the Code and the Guidelines was complicated before the amendments, it is now labyrinthine. In evidence before the Senate Committee, the Convenor of the Classification Review Board, Maureen Shelley, described the new scheme as "unnecessarily intricate and legalistic".[49]

The Board's role under s 9A

The 2007 *Adultshop.com Ltd* and *NSWCCL* decisions, the appeal to the Full Court from *Adultshop.com Ltd*[50] and *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 (*Brown*),[51] shed some light on how the Classification Act, particularly the new s 9A, regulates the publication of materials which incite violence. Section 9A constitutes a statutory direction to the Board. It provides that the Board "must" classify publications which advocate terrorist acts "RC". As outlined above, Jacobson J assumed in *Adultshop.com Ltd* that the classification power should be exercised with close regard to the merits and context of each case. The effect of s 9A then is to provide that, where the Board finds that a publication advocates a terrorist act, the Board is foreclosed from considering broader context.

In relation to s 9A, the question for the Board becomes: "does this publication advocate a terrorist act?" This directs attention to the question: how is the Board to go about answering that question?

[46] Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 [Provisions]* (2007) pp 11-13.

[47] See Australian Lawyers for Human Rights, Sydney Centre for International and Global Law and Sydney PEN, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 [Provisions]* (2007) p 11.

[48] Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Report of the Inquiry into the Classification (Publications, Films and Computer Games) Bill 2007 [Provisions]* (2007) at [3.36]-[3.41].

[49] Australia, n 16, p 20 (Ms Shelley).

[50] *Adultshop.com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31 (Sundberg, Emmett and Siopis JJ).

[51] Special leave to appeal to the High Court was refused on the ground that there was insufficient reason to doubt the correctness of the Full Federal Court's decision: *Brown v Members of the Classification Review Board* (1998) 1 Leg Rep SL3a.

Like most administrative decisions, the Board will need to make findings on issues of law (eg what is the scope of "advocates" and "terrorist act"?) and issues of fact (eg what was the author's purpose?) and then determine how those facts relate to the law (eg does the author's purpose fall within the scope of the statutory term "advocates"?) Several issues arise from this.

The relationship between ss 9A and 11

First, how do ss 9A and 11 interrelate? The question the Board asks itself when applying s 9A is: "does this publication advocate terrorism"? Under s 11, the Board is required to take into account certain factors in making its decision. These are mandatory considerations.[52] The immediate concern is that some of the s 11 factors do not logically bear on the question of whether a publication advocates terrorism. Section 11 requires reference to a publication's redeeming merit and the standards of morality accepted by reasonable adults. It is difficult to conceive of how these could bear on whether a publication advocated terrorism.

The possibility that s 9A overrides s 11, such that when it applies s 9A the Board need not consider the s 11 factors, can probably be rejected out of hand. The Explanatory Memorandum to the Classification Amendment Act states that "[t]he amendment is not intended to exclude from the Boards' consideration the matters in section 11 of the Act".[53] The Attorney-General affirmed in Senate Committee evidence that this was his understanding of the effect of the amendments.[54] The Classification Review Board has also adopted this interpretation[55] and will presumably construe the law accordingly when making s 9A decisions.

If this is correct, s 11 principles must be capable of being germane to the Board's determination of whether a publication advocates a terrorist act. (Otherwise, some absurdity would result: the Board could be required to consider factors of no *possible* pertinence to the ultimate issue.) In other words, the fact that the s 11 considerations are mandatory may mean that s 9A should be construed so that topics like a publication's educational merit, its nature and its audience bear on the question of whether a publication advocates a terrorist act. This is similar to the position advanced by the applicant in *NSWCCL*. In *NSWCCL*, the Board, applying the Code, decided to refuse classification to the two books because they promoted or incited crime or violence. The applicant argued that, since the s 11 factors were mandatory considerations, the court should adopt a construction, "promote or incite crime or violence", that permitted each of those factors to bear on it. Edmonds J noted this position, without needing to decide on it. The Full Court, in *Adultshop.com Ltd*, rejected the proposition that classification decisions must *conform or accord with* each of the s 11 factors.[56] This makes sense: it is unclear what it would mean for a decision to conform or accord with a particular consideration. The Full Court did not, however, hold that the statutory scheme could be read so that it is possible that some of the s 11 factors are incapable of bearing on a particular decision. The consequences of reading down s 9A in accordance with s 11 are discussed below.

The relationship between s 9A, the Code and the Guidelines

Secondly, how does s 9A relate to the Code and the Guidelines? Section 9 provides that "[s]ubject to section 9A, [publications] are to be classified in accordance with the Code and the Guidelines". The phrase "subject to section 9A" was inserted by the Classification Amendment Act. Before that insertion, Jacobson J interpreted s 9 as imposing a "mandatory" requirement to classify in accordance with the Code and the Guidelines.[57] The insertion's effect seems to be that there is no need for a decision under s 9A to *accord with* the Code and Guidelines. This is supported by the text of the

[52] *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 at [87], [97] (Jacobson J).

[53] *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (Cth), Explanatory Memorandum, p 2.

[54] Australia, n 16, p 35 (Ms Davies).

[55] Australia, n 16, p 20 (Ms Shelley).

[56] *Adultshop.com Ltd v Members of the Classification Review Board* (2008) 169 FCR 31 at [45] (Sundberg, Emmett and Siopis JJ).

[57] *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 at [88].

insertion and the Attorney-General's evident purpose of bypassing the Code and Guidelines because they depend on State and Territory agreement. So construed, s 9 would have the practical effect that a publication may be classified RC even if the Code and Guidelines indicate that a different classification should apply.

Even if decisions under s 9A need not accord with the Code and Guidelines, are the Guidelines nevertheless permissible – perhaps even mandatory – considerations in the Board's determination of whether a publication advocates terrorism? Whether they are permissible or mandatory is ultimately a matter of statutory construction. It is also a matter of some significance. The Code contains the general principle that "adults should be able to read, hear and see what they want".[58] The Guidelines instruct the Board to examine each publication in its context according to a range of factors, including emphasis, tone, frequency and detail.[59] They also give particular meanings to the terms "description" and "depiction" both of which are used in s 9A(3).[60] Each of these, if permissible considerations for the Board, could greatly affect the Board's application of s 9A. Indeed, it seems likely that at least one of the boards will consider the Code and Guidelines in reaching decisions under s 9A. The skill-set, corporate culture and decision-making processes of the boards are directed to applying these instruments. The Convenor of the Classification Review Board has, for instance, said: "We are well-used to balancing different sections of the act, the code and the guidelines. That is what we are trained to do."[61]

The Explanatory Memorandum to the Classification Amendment Act is inconclusive. It indicates that the Board "need not refer to the National Classification Code or guidelines *if section 9A applies*" (emphasis added);[62] but it indicates nothing about whether the Board can refer to them in determining whether s 9A itself applies. Neither do the cases assist. In *Adultshop.com Ltd*, Jacobson J held that the s 11 factors were not an exclusive list of relevant factors.[63] This assists an argument that the Code and Guidelines are permissible considerations, but it is not determinative. The most that can be said is that this is an open question, and one likely to be determined by litigation.

The development of internal policies by the Board

Thirdly, the Classification Review Board has indicated that it may develop an internal policy to assist it in applying s 9A. In evidence to the Senate Committee Inquiry, the Board's Convenor pointed to the direction that the Board must classify as RC a publication which directly praises a terrorist act so as to create a risk that someone (regardless of age or mental impairment) might commit a terrorist act. The Convenor noted the vagueness and potential breadth here: particularly the breadth of the relevant audience and the term "risk". She said that:[64]

> the Classification Review Board … [has] discussed the [law] and, as far as we can see, if we made a determination that there was praise of a terrorist act then we would have to refuse the work classification. We cannot work out any other way that we could, on a consistent basis, without anomaly arising with different panels, apply any criteria which would lead to a consistent application of the Act, apart from simply saying that, if there is praise, it must be refused.

Presumably, the Convenor intended to exclude situations in which the exception in s 9A(3) applies. The issue which this raises is whether a policy of "if there is praise, then refuse classification, unless the exception applies" would be a lawful policy. The general rule is that internal policies are lawful so long as they are not inconsistent with the statutory criteria.[65] In addition, if applying a policy

[58] *National Classification Code 2005* (Cth), cl 1.

[59] *Guidelines for the Classification of Publications 2005* (Cth), p 4.

[60] *Guidelines for the Classification of Publications 2005* (Cth), p 16.

[61] Australia, n 16, p 29 (Ms Shelley).

[62] *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (Cth), Explanatory Memorandum, p 2.

[63] *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 at [97] (Jacobson J).

[64] Australia, n 16, p 21 (Ms Shelley).

[65] See generally *Green v Daniels* (1977) 51 ALJR 463 at 467 (Stephen J).

results in decisions diverging too far from those which would be made if there were no policy and the decision-maker considered the statutory test afresh on each occasion, the policy will generally be inconsistent with the statutory criteria.[66] Evidently, a blanket rule directing the Board to refuse classification to all publications which directly praise terrorist acts could run foul of this principle. The understandable thought is: if Parliament wanted all direct praise of terrorist acts to be refused classification, they could have said so. Instead, the policy would render meaningless the remainder of the provision following "it directly praises the doing of a terrorist act". Even if the policy were ultimately held to be lawful, the Board would need to show, in respect of each decision, that it had treated the policy only as a presumptive rule and had independently determined whether there was a risk. Failure to do so may render the decision ultra vires as it would result from the inflexible application of a rule or policy.[67]

In *Adultshop.com Ltd*, Jacobson J emphasised the importance of the Board exercising an independent judgment each time it exercised its classification power.[68] That case was concerned with the Board's general power under s 10, not the new constraint on its power in s 9A, but the central point applies equally to both sections. Whether the Board applies this policy will probably not be revealed until it gives reasons for its first decision under the new section.

Is "advocacy of terrorism" a fact to be determined by the court?

The new s 9A raises a broader point of administrative law. The general tenor of most submissions to the Senate inquiry which were critical of the proposed amendments was that the law's vagueness and overbreadth burdens free speech. This is true; but there is a countervailing point. Where the Board refuses classification under s 10, an aggrieved person seeking judicial review has a reasonably tough task. They must show that the Board's exercise of power was ultra vires. This is reasonably difficult to show since the Classification Act contains few express restrictions on the Board's classification power. The power to classify is conferred by s 10. Section 11 requires the Board to take into account certain matters. It seems that the Board has power to give each factor whatever weight it wishes, so long as it considers it.[69] Section 9 requires the classification to be "in accordance with" the Code and Guidelines. The Code and Guidelines are both drafted at high levels of generality. In practice, as long as the Board's statement of reasons indicates that it has considered the s 11 matters, and the decision generally accords with the vague statements of principle in the Code and Guidelines, the Board's decision is unlikely to be set aside upon review, at least where the asserted ground is that there has been a failure to take account of relevant considerations. This has been borne out in the three judicial review applications of s 10 decisions so far, with all being dismissed.[70] In contrast, s 9A confines power by reference to a clear criterion. If a publication advocates terrorism, the Board must refuse classification. Where power is confined, and that confinement depends upon the existence of a fact, courts often hold that the existence of that fact should be determined de novo upon review.[71] A construction of this kind may be even more likely where the statutory provision has the capacity to trench upon common law rights. If the factual precondition to the operation of s 9A is so construed, this may assist applicants seeking review. It may be easier for an applicant to show that the Board has failed lawfully to determine whether the publication advocates terrorism than it would be to show that the Board's relatively unconfined s 10 power has miscarried. One effect of this, combined with the

[66] See generally *Green v Daniels* (1977) 51 ALJR 463.

[67] See *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2)(f).

[68] *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 at [101]-[102] (Jacobson J).

[69] See *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752 at [87] (Jacobson J).

[70] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225; *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108; *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752.

[71] See, eg *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 82 ALJR 1465 at [43]-[47] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

vagueness of parts of s 9A, may be that the Board will prefer to apply its general s 10 power, not the special direction under s 9A. This may not be an entirely positive result for those aggrieved by the censoring of a publication.

The meaning of "advocates"

"Advocates" is the critical term in the new section. This term, as used in s 9A of the Classification Act and also in the *Criminal Code*, is notoriously ambiguous and vague. The context makes the situation even less clear. What work does "indirectly" have to do in the phrase "directly or indirectly counsels, urges or provides instruction in"? What is "praise"? When will it create a "risk" that someone will act on it? These, and many other questions, remain unanswered.

As an initial point, it is important to keep in mind that the fact that s 9A defines "advocates" in the same terms as s 100.2 of the *Criminal Code* does not necessarily mean that "advocates" has an identical meaning in the two statutes. Certainly, jurisprudence interpreting "advocates" in the *Criminal Code* will be relevant to its interpretation in the Classification Act; but it will not be determinative. The presumption that statutory terms are construed consistently is only one principle amongst many of statutory construction.[72] Ultimately, a statute must be interpreted according to its terms, given its structure and context. Indeed, there are good reasons why the s 9A meaning of "advocates" may depart from that in the *Criminal Code*. The *Criminal Code* directly creates offences and liabilities to punishment, and consequently may be construed more narrowly than the Classification Act.[73] (There is, in fact, a danger that judicial pronouncements on the meaning of "advocates" in the Classification Act might be unwarily applied to the same term in the *Criminal Code*, with the consequence that the *Criminal Code* will not be read as narrowly as it ought.)

Section 9A(4) links the definition of "terrorist act" in the Classification Act directly to that which the term has in s 100.1 of the *Criminal Code*: it states that the terms have the same meaning. Section 9A(2), which defines "advocates", has no similar provision binding the meaning to that in the *Criminal Code*. Further, it seems likely that the courts will construe s 9A in the light of the history of and existing learning on the censorship of violent speech. It is significant that the concept of language which "instructs in" a crime is one very familiar to the Australian law of censorship. Further, it may be that the understanding of the concepts of "counselling or urging" may be conditioned by the existing learning in censorship law on language which "promotes or incites".

The 2007 amendments to the Classification Act, in including specific reference to terrorism, are not without precedent. The phrase presently used in the Code to pick out dangerous publications is "promote, incite or instruct in matters of crime or violence". This phrase appears to derive from s 19(4) of the now repealed *Classification of Publications Ordinance 1983* (ACT) (the Ordinance). The Ordinance was formerly the centrepiece of a national cooperative classification scheme. The Classification Act, the Code and the Guidelines replaced that scheme in 1994. From 1983 to 1989, the Ordinance did not refer to matters of crime or violence. It instead applied to publications which "promote, incite or instruct in terrorism". The meaning of "terrorism" was linked to the definition of "terrorism" in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act). In 1986, the ASIO Act was amended and the definition of "terrorism" omitted.[74] From 1986 until 1989, s 19(4) of the Ordinance was linked in meaning to a provision no longer part of the Commonwealth law. In 1989, the government seems to have realised this. The Ordinance was amended so that it used the terms now used in the Code.[75] There is no indication that Parliament intended to modify the effect

[72] See, eg *Gale v Federal Commissioner of Taxation* (1960) 102 CLR 1.

[73] *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Evans v New South Wales* (2008) 168 FCR 576.

[74] *Australian Security Intelligence Organisation Amendment Act 1986* (Cth).

[75] *Classification of Publications (Amendment) Ordinance 1989* (ACT).

of the law. Despite that, the Full Federal Court has not read down "matters of crime or violence" so that it is confined entirely, or primarily, to terrorism.[76]

The Federal Court's approach to classification law

Two cases have construed the phrase "promote, incite or instruct in". They are the Full Federal Court decision in *Brown* and the Federal Court decision in *NSWCCL*. The holdings in these cases are discussed first, before turning to their relevance to the construction of s 9A. *Brown* concerned a university student article entitled "The Art of Shoplifting", which contained information on how to successfully shoplift. The article was published in *Rabelais*, the student newspaper of the La Trobe University Student Representative Council. The Classification Board and Classification Review Board classified the newspaper RC for the reason that the publication "instructed in" shoplifting. The editors sought judicial review of the Review Board's decision. Merkel J, at first instance, dismissed the application. An appeal from his decision to the Full Federal Court was dismissed.

The Full Federal Court's construction of "instructs in" is significant because s 9A(2)(b) of the Classification Act applies to publications which "directly or indirectly [provide] instructions on". One of the appellant's arguments was that "instructs in" incorporates two elements: a *purpose* of instructing in, and an effect or likely *effect* that someone will act on that instruction. The court, in three separate judgments, unanimously rejected the second suggested element. Each judge appeared to suggest that whether conduct constituted "instruction" depended upon the instructor's *objective purpose*. It is important that throughout the judges were careful to note that it was necessary to read the classification statutory instruments in the light of common law freedoms and the constitutional freedom of political communication.[77]

French J defined "to instruct" as "to furnish with knowledge or information; to teach or educate".[78] He rejected an argument that "instruct" should be read down so as not to have a meaning overlapping with "promote" or "incite".[79] Heerey J said that he agreed with French J's understanding of "instruct". He said the term connotes: "(i) the imparting or teaching of knowledge, skills and techniques as to how crime may be committed, and also (ii) some element of encouraging or exhorting the commission of crime."[80] Sundberg J adopted an apparently identical meaning.[81]

All three judges agreed that instruction required only a certain objective purpose on the instructor's part. French J said, rather obliquely: "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."[82] Heerey J said: "one is not concerned with the actual effect of the publication. Still less is the actual intent of the author or publisher relevant. The test is an objective one."[83] It seems that the requirement of objective purpose applies to whether the instructor encouraged crime, not whether the instructor imparted information. That is, the instructor's objective purpose must have been to encourage or exhort crime.

The judges indicated some features that might go to disproving such an objective purpose. French J suggested that the objective purpose directed attention to a contextual reading of the publication, not a literal reading.[84] Work which is satiric, ironic or is a parody may not have the

[76] See *Brown v Members of the Classification Review Board* (1998) 82 FCR 225, where the Ordinance was held to cover instruction in shoplifting.

[77] See, eg *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 239 (French J), 240 (Heerey J).

[78] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 239 (French J).

[79] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 239 (French J).

[80] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 242 (Heerey J).

[81] See *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 257 (Sundberg J).

[82] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 239 (French J).

[83] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 242 (Heerey J). See also at 257 (Sundberg J).

[84] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 240 (French J).

requisite purpose.[85] Heerey J commented that, in his view, "[s]uch a construction [ie a test of objective purpose] would clearly place beyond the reach of the statute newspaper reports of crime, crime fiction and criminology material as well".[86] Presumably, publications of that kind lack, on their face, the requisite objective purpose of encouraging. Sundberg J added that material which is satirical or tongue-in-cheek "will lack the educational quality that inheres in the word 'instruct', and readers will understand that it is not to be taken seriously".[87] To the extent that his reasoning depends on an analysis of the likely effect on the publication's audience, not the author's objective purpose, it seems that Sundberg J's analysis is not consistent with the remainder of his or the other judgments. It probably cannot ground an argument that the likely effect on the likely audience is an element of the test for "instructs". It should also be noted that the test adopted by each of the three judges already includes an element of effect: it requires an assessment of whether the publication in fact imparts information. It would be wrong to conclude that there is no element of effect in the test; it is simply not essential to show that the publication has the effect of making crime or violence more likely.

French J also advanced suggested meanings of "incite" and "promote".[88] "To promote", he said, "is to further the growth, development, progress or establishment of (anything); to further advance, encourage. To incite, is to urge or spur on; to stir up, instigate, stimulate."

In *NSWCCL*, Edmonds J picked up from where the Full Federal Court had left off in *Brown*. The Board had determined that the two books "promoted or incited" terrorism. In its application for review, the applicant submitted that the Board had incorrectly construed "promote or incite" so that the terms did not require any particular effect (such as a greater likelihood that the books' audience would commit an offence). Edmonds J, citing *Brown*, held that there was no need for a publication to have a particular effect for it to "promote or incite" crime.[89] Edmonds J did not say whether, if not effect, the relevant test was the publication's objective purpose. It seems likely he would have adopted a requirement of objective purpose. The Board made both decisions at issue in *NSWCCL* on the basis that objective purpose was at least part, if not the entirety of, the test for promotion or incitement.[90] Edmonds J did not criticise that approach. Further, he relied on *Brown* – the source of the objective purpose test – to reject a test of effect. Having rejected any particular effect as a part of the test for "promotion or incitement", Edmonds J rejected a further submission that the likely effect of the publication is a mandatory consideration for the Board.[91] He seemed to think that this further conclusion followed necessarily from the earlier finding. This can be doubted. The fact that "effect" is not an essential part of the legal test does not entail that it is not an essential consideration in determining another part of the legal test. Whether it is so is a matter of statutory construction. Indeed, one way of making sense of Sundberg J's reference to the effect on the audience, described above, is to see the likely effect on an audience as *one of the strongest indicators of* a publication's objective purpose. There may indeed be a good argument that likely effect is a mandatory consideration for decision-makers required to determine a publication's objective purpose. Following *Brown* and *NSWCCL*, it seems reasonable to state that, as the law now stands, "promote, incite or instruct in" directs attention to the author's objective purpose and not to the effects or likely effects of the publication on its audience. *NSWCCL* suggests that "effect" is not a mandatory consideration, though there is room for debate.

In *NSWCCL*, the Board's reasons indicated that it had considered the general question of whether the publication promoted or incited terrorist acts. The applicant submitted that the Board could not

[85] See *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 240 (French J), 242 (Heerey J), 257 (Sundberg J).

[86] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 242 (Heerey J).

[87] See *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 257 (Sundberg J).

[88] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 239 (French J).

[89] *NSW Council for Civil Liberties Inc v Classification Review Board* (No 2) (2007) 159 FCR 108 at [67]-[69] (Edmonds J).

[90] See *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [13], [19] (Edmonds J).

[91] *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [101] (Edmonds J).

consider this issue holistically; it needed to consider whether the publications promoted or incited *each element of* the offence. Edmonds J ultimately rejected the factual premise of the applicant's argument – that the Board had not considered each element of the offence separately.[92] In doing so, however, he made a comment that implied he did not accept the applicant's legal proposition either. That is, he did not accept that the Board needed to consider whether there was promotion of or incitement to each element.[93]

Construing s 9A in the light of the jurisprudence

How does this bear on the understanding of s 9A? It indicates the way that the courts may construe the phrase "instructs in" in s 9A. It would mean that a publication only instructs in the relevant sense if: (i) it imparts knowledge about how terrorist acts are to be committed; and (ii) it has the objective purpose of encouraging a terrorist act.

It also indicates that the courts may confine the terms "counsel or urge" – and perhaps even "praise" – so as to require that the publication's objective purpose be to encourage or exhort a terrorist act. Indeed, a requirement of exhortative objective purpose seems to suit the terms "counsel or urge" even more aptly than it does "instructs in".

It also indicates that there may not be any requirement that the publication have a particular effect or likely effect before it can be censored. This interpretation is certainly open with respect to s 9A(2)(a) and (b). It is, however, harder to sustain with respect to s 9A(2)(c) as it specifically refers to a likely effect: the risk that someone could act upon the praise. Relevantly, the Classification Review Board has indicated its view that s 9A(2)(a) and (b) does not require any assessment of the likelihood that someone might be led to engage in a terrorist act.[94]

This suggests that, consistently with Edmond J's comments in *NSWCCL*, the Board may lawfully censor a publication under s 9A(2)(a) and (b) even though it has not considered whether the publication advocates a terrorist act in the full, technical sense of "terrorist act". This may be significant since the Classification Review Board has indicated that it would find it very difficult to assess whether the audience is likely to form the requisite mental element for committing a terrorist act.[95]

There are three significant caveats to the above. The first is that both s 9A(2)(a) and (b) use the terms "directly or *indirectly*" to preface "counsel or urge" and "instruct". The courts may seek to find some work for the term "indirectly" to do. It may be that they will give it meaning by applying a modified objective purpose test in which a lower standard of purpose is required before the publication can be said to advocate terrorism. It may be that using "indirectly" means it is sufficient if the malign objective purpose is only one minor purpose amongst many apparent on the face of a publication.

The second caveat is that the courts may read the carve out, s 9A(3), as evincing a legislative intention that a benign objective purpose is not determinative of the concept of "advocates". Section 9A(3) is discussed in more detail below. It removes from the scope of "advocates" publications which "could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire". This reads much like a modified form of the objective purpose test, applied as a confined exception to the general rule, rather than as an essential part of the general rule itself. On this argument, a publication's objective purpose would not be an essential element of whether it advocates a terrorist act.

The third caveat is that there seems to be little way of reading s 9A(2)(c) such that it is not so overbroad as to restrict too much speech. As indicated earlier, the opinions of both the Senate

[92] *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [97] (Edmonds J).

[93] *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [96] (Edmonds J). He described it as "a matter not free from argument".

[94] Classification Review Board, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 [Provisions]* (2007) p 2.

[95] See Classification Review Board, n 94, p 2.

Committee and the Classification Review Board were that the provision went too far. It is easy to construe "counsel or urge" and "instruct in" as requiring an objective purpose of exhorting a particular outcome. It is more difficult to construe "praise" in the same way. The term "praise" seems to require, at most, an objective purpose to laud a terrorist act (with, perhaps, recklessness regarding the consequences of the praise). Many publications, including innocuous and valuable publications that concern past liberation struggles like that of Nelson Mandela against apartheid in South Africa,[96] could be considered to laud a terrorist act. If that objective purpose could be made out, what s 9A(2)(c) would then require is simply proof that the publication could *possibly* have a malign effect on *one* member of a *very large class* of people. And that class includes people (the mentally ill and the young) who are likely to be far more susceptible to such effects than the ordinary adult. This is the nub of the problem with the amendments. It will be difficult for the courts to construe s 9A(2)(c) so that it does not do too much.

Construing s 9A consistently with s 11

It was argued above that s 9A might be read down so that the s 11 factors bear on its application. This raises interesting possibilities with respect to the construction of "advocates". Section 9A(1)(c) presently deems the praise of a terrorist act which creates a risk that "a person" might commit a further terrorist act as "advocating". If s 11 bears on s 9A(1)(c), then "a person" might be read down to refer only to "a person in the likely or intended audience". Alternatively, the concept of "indirectly" urging might be read consistently with a proposition that some kinds of publication (eg academic publications) are less likely indirectly to urge terrorist acts.

If the s 11 factors do bear on whether a publication advocates terrorist acts, *NSWCCL* is instructive. The Board's reasons included that the two Islamic books had "no discernible educational merit". The Board presumably considered educational merit in fulfilment of its obligation to consider educational, scientific or literary merit under s 11(b). The applicant argued that it was insufficient for the Board to make this determination based only on its everyday understanding of what is educational. Instead, at least in specialist areas such as Islamic studies, the Board was obliged to undertake a special inquiry to determine the publication's merit. This may require approaching established educational institutions or appropriate scholars. It will be apparent that, if this submission were accepted, it would clarify how the Board should approach determining whether a publication advocates terrorism.

Edmonds J rejected the submission. He applied the test outlined by Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 (*Prasad*). Edmonds J said that:[97]

> there was no obligation on the Review Board to make some wider or roving enquiry as to the educational or literary merit of each book, other than perhaps to have regard to "material [that] is readily available … [and] centrally relevant to the decision to be made" where proceeding to a decision without attempting to obtain that information may properly be described as unreasonable in the *Wednesbury* sense: *Prasad* … That is not this case. There was no attack on the Review Board's finding that neither publication exhibited any discernible educational merit on the basis that such a finding was not reasonably open.

Edmonds J may have misunderstood the decision in *Prasad*. He also appears to have answered only part of the applicant's submission. These points are related, as will become apparent. Edmonds J has applied *Prasad* as if it stands for the proposition that a decision based on incomplete evidence can only be attacked if the decision was not reasonably open. If that were all *Prasad* stood for, the case would only constitute an uninformative restatement of the principles in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. *Prasad* is not, however, about whether the ultimate decision in itself was unreasonable in the sense of not being reasonably open; it is about whether the

[96] See Lynch A and Williams G, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006) p 17: "Nobel Peace Prize winner Nelson Mandela was called a terrorist by many people – including British Prime Minister Margaret Thatcher – during his fight against apartheid in South Africa. He would also be classified as a terrorist under Australian law, for the law applies to terrorism both in and outside of Australia and makes no allowances for someone who causes harm as part of a struggle for liberation."

[97] *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [147] (Edmonds J).

process leading up to that decision was unreasonable. Wilcox J adopted the view in *Prasad* that a decision-maker must consider those facts actually or constructively known to the decision-maker, together with "such additional facts as the decision-maker would have learned but for any unreasonable conduct by him".[98] As Wilcox J makes clear, the issue is the manner of exercise of the decision-making power, not the decision itself.[99] Edmonds J sought evidence that the Board's finding was not reasonably open; he should have sought evidence that the Board's *process* of reaching that finding was not reasonably open.

This is where Edmonds J's misunderstanding of *Prasad* means that he considered only part of the applicant's submission. In not directing attention to the decision-making process, Edmonds J failed to consider whether there was material readily available which was centrally relevant. It is the issue of "central relevance" which is significant. The applicant's submission, as recounted by Edmonds J,[100] appears to have had two aspects: the Board's decision was unreasonable and the Board, in reaching its decision, failed to take into account all relevant considerations. Both are recognised grounds of review. Edmonds J dealt with the first but not the second of these contentions.

Whether considerations are relevant proximately depends on the construction of the empowering statute: does the statute mandate consideration of that factor? Part of that construction process is to determine, in reaching a decision, what legal test ought the decision-maker to apply. For instance, if a legal standard ultimately requires determination of the *effect*, not the *purpose*, of an actor's conduct, it will be less likely that the decision-maker must consider the actor's purpose. Thus, determining the applicant's submission that the Board should have taken into account special evidence about whether the books had educational merit amongst a narrow community depends upon the construction of the phrase "educational merit" as used in the Code. It could mean "educational merit amongst the ordinary population". Alternatively, it could mean "either educational merit amongst the ordinary population *or amongst a subset of that population*". If it means the latter, or something similar, then it is likely that evidence bearing on whether the publication has merit amongst a subset of the population will be a mandatory consideration. Failure to consider any evidence (even if that necessitated an inquiry) would constitute failing to take into account a mandatory consideration. Seen this way, the applicant's submission was that the Board had misconstrued the meaning of "educational merit" by confining it to educational merit amongst ordinary people (and thereby made an error of law) and, in consequence of that misconstruction, had failed to take into account relevant considerations.

As well as "merit", s 11 requires the Board to consider the publication's actual, intended or likely audience. It may be that a consideration of audience may colour the construction of s 9A too. In *Brown*, French J indicated that the likely market for a publication, as assessed on the face of the publication, is relevant to determining the publication's objective purpose.[101] In *NSWCCL*, Edmonds J held that the Board need not go beyond its assessment, on the face of the publication, of the publication's likely audience.[102] It may be then that, if the courts import an objective purpose test into s 9A, they will include as part of that test a consideration of likely audience.

The High Court's discussion in *Coleman v Power* (2004) 220 CLR 1 may be significant here. In that case, the court construed s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). That section applied to "threatening, abusive or insulting words". Some members of the court construed that provision as applying to words either *intended to or reasonably likely to* provoke a physical response. None of the subsequent Federal Court decisions construing the Classification Act saw *Coleman v Power* as bearing on the construction of the Classification Act, but the similarity

[98] *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169 (Wilcox J).

[99] See *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 170 (Wilcox J).

[100] See *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [100]-[118] (Edmonds J).

[101] *Brown v Members of the Classification Review Board* (1998) 82 FCR 225 at 240 (French J). See also *Burrows v Commissioner of Police* [2001] NSWIRComm 333 (14 December 2001), in which Boland J held that it was relevant to the Board's classification that the actual audience of a publication did not find it offensive.

[102] *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [148].

between words likely to provoke a violent response and words which advocate terrorism is clear. In *Coleman v Power*, Gleeson CJ, as well as Gummow and Hayne JJ, held that the characteristics of the actual audience of the words was relevant to determining whether particular words were reasonably likely to provoke retaliation. Thus, the fact that the actual audience of the words was a police officer, who may be presumed to be capable of non-violently responding to harsh words, would make it less likely that the words would be held to be insulting.[103] This may give some indication of how actual or likely audience could be applied in determining whether a publication advocates terrorism.

A consideration of audience will be particularly significant for publications which on their face appear to condone terrorism but are in fact intended only for the academic or policy community. One issue which arose in the Senate review process for the Classification Amendment Act was whether the requirement in the Code's reference to "promote and incite" incorporated a notion of audience: in particular, whether it was necessary for the publication to promote or incite a reasonable adult. The Attorney-General, despite the contrary opinion of the Classification Review Board, expressed a firm view that the Code was not so confined.[104] If the Attorney-General is correct, and there is no reason to doubt this according to ordinary principles of statutory construction, then "the body of reasonable adults" could not be applied as a proxy for determining the "likely audience" of a publication of general distribution.

This will also be significant in the construction of s 9A(2)(c). That section applies to publications which praise terrorism and create a risk that "a person" could act on that praise and commit a terrorist act. The Explanatory Memorandum and second reading speech make it clear that the provision "is intended to capture material that has the capacity to lead the impressionable to engage in a terrorist act".[105] Construing s 9A(2)(c) consistently with s 11 may result in confining the term "a person" to "people in the actual, likely or intended audience". This would substantially narrow the scope and alleviate some of the potential overbreadth of that subsection.

The scope of the carve out

Section 9A(3) operates to exclude conduct meeting a certain description from the definition of "advocates". It excludes publications which "depict" or "describe" terrorist acts, but "could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire". It was discussed above how this exception might bear on the construction of s 9A(2).

The statutory formulation "could reasonably be considered to be done merely as part of" is a peculiar one. Read literally, it seems to apply to publications which have the relevant benign purpose: for discussion, debate, entertainment or satire. That the purpose is determined objectively is indicated by the phrase "could reasonably be considered". That the publication's objective purpose is to be assessed at the date of classification – and not at the date of production, or distribution – is indicated by the use of the present tense ("to be done") rather than the past tense ("to have been done"). The date of assessment is significant since external events may colour the objective purpose of the publication. Both books in issue in *NSWCCL* were written during the Soviet occupation of Afghanistan and were proximately directed towards insurgency against that occupation. It may be that 20 years ago the existence of such a book in Australia would have evinced a different objective purpose to what it evinces today. The use of the term "merely" seems to suggest that the benign purpose must be the sole purpose: any evident malign purpose, even if insignificant, may nullify the exclusion.

There are some difficulties with this "objective purpose" construction of s 9A(3). First, if the definition of "advocates" is construed consistently with the decided cases in classification law, then, as discussed above, a publication may only advocate terrorist acts if it has a malign purpose. On that view, the exception may lack utility: it would simply clarify what s 9A(2) already means.

[103] See *Coleman v Power* (2006) 220 CLR 1 at [16] (Gleeson CJ), [200] (Gummow and Hayne JJ).

[104] See Attorney-General, Letter to the Classification Review Board (26 July 2007) p 2.

[105] See *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (Cth), Explanatory Memorandum, p 2. See also Australia, n 38, p 20 (the Hon Phillip Ruddock MP).

Alternatively, if s 9A(2)(c) (direct praise with a risk of leading someone to a terrorist act) was read not to incorporate an objective purpose element, then the carve out could apply to alleviate the harshness of that subsection only. Consequently, direct praise with a risk of leading anyone to terrorism would not constitute advocating terrorism if the publication shows an objective purpose of being for public debate or entertainment. This kind of construction would be consistent with the terms of s 9A, whilst doing no violence to the established jurisprudence on classification law.

A second difficulty is that the Explanatory Memorandum seems to suggest that the carve out provision is concerned with the publication's effect, not its purpose. It says:[106]

> The sub-section clarifies that material, which does *no more than* contribute to public discussion or debate or provide entertainment or satirical comment, is *not* material which should be classified as RC under this provision. Examples could include investigative journalists' work, historical analyses, material which might appear to glorify war or battle … satirical pieces, and popular culture movies. On the other hand, material containing content which goes further and advocates the doing of terrorist acts, for example by directly praising terrorist acts in circumstances where there was a risk of leading a person to do similar, runs the risk of inspiring someone to commit a terrorist act. (emphasis in original)

This explanation directs attention to the publication's effect: "material, which does no more than contribute to." It also seems to suggest that the carve out provision cannot override the independent meaning of s 9A(2). Thus, it says that material which directly praises terrorist acts with a risk of inspiring another falls within the meaning of "advocate" – seemingly regardless of whether it could be viewed as being done for debate or entertainment. On this view of the provision, the carve out provision would apply to material which had a benign effect *and a benign effect only*. In practice, the Board would need to hear evidence on how the publication had been received. It is very difficult to acquire evidence on how a publication has affected the mind of its receiver. Presumably, the Board would need to draw an inference from the face of the publication as to its likely effect. This is a very difficult task. It may have been because of this difficulty that the Federal Court has preferred to focus on objective purpose, not effect, when it comes to construing classification law. Overall, it seems that the view of the provision adopted by the Explanatory Memorandum is inconsistent with the overall text and structure of s 9A, as well as the history and context of classification law in Australia.

Submittable publications

The Classification Amendment Act also amended the definition of "submittable publication" in s 4 of the Classification Act. The concept of "submittable publication" is central to the classification scheme. The State and Territory enforcement Acts prohibit the distribution of submittable publications.[107] Offenders are liable to 12 months' imprisonment.[108] Following the amendments, a submittable publication is relevantly (with the amendments emphasised):

> an unclassified publication that, having regard *to section 9A or* to the Code and the classification guidelines to the extent that they relate to publications, contain depictions or descriptions that:
>
> (a) are likely to cause the publication to be classified RC.

Thus, if a person distributes a publication and at that time the publication is likely to be classified RC, then the person commits an offence. This section has yet to be litigated. On its face, however, it seems to require a court to make findings as to the likely practice of the Classification Board and Classification Review Board. That is, it must find that the boards (or presumably one of them) would be likely to give the publication a certain classification. That is, to say the least, a difficult task for a court. Given the vagueness of s 9A, it is particularly difficult when the Board would only refuse classification to the publication by applying s 9A. It is apparent from its submission and evidence to the Senate Committee inquiry into the Bill that the Classification Review Board is uncertain about

[106] *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (Cth), Explanatory Memorandum, p 3.

[107] See, eg *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), s 19.

[108] See, eg *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), s 19.

how it will apply the law.[109] To comply with the law, individuals will need to assess a court's likely assessment of the Board's likely assessment of a publication. They will need to assess whether, even if s 9A does not direct the Board to classify the publication RC, the Board will nevertheless give such a classification by applying s 10, the Code and the Guidelines. Together, these are difficult tasks. Until courts or the boards give greater guidance about how they will apply s 9A, this has the capacity to greatly chill Australian public discourse.

CONCLUSION

Australia's censorship scheme has changed greatly over the last century. In the early 20th century, bushranger films were banned for 30 years because they romanticised the bushranger narrative.[110] Since 1973, the trend has been away from a scheme of censorship towards a scheme of classification. The fundamental principle has been that adults should be able to see, hear and read what they want. Some publications may nevertheless be, for all practical purposes, censored by being classified RC.

The recent amendments to the Classification Act have increased the range of publications which will be classified RC. The amendments have been criticised for being ambiguous, vague and potentially overbroad. Ambiguity and vagueness are problems in themselves: people should generally not need to rely on the decisions of courts to guide their actions, particularly in the sphere of speech. In this article, it has been argued, however, that situating the provisions within the history and jurisprudence of censorship law in Australia sheds light on how they will be construed. In particular, this suggests that the amendments might be interpreted to not be as overbroad as has been thought. Courts, historically, have carefully guarded common law rights and freedoms.[111] Weaving through the judgments in *Brown*, *NSWCCL* and *Adultshop.com Ltd* is a clear concern that statutes abrogating freedoms should be construed narrowly. The analysis suggests there is good reason to think that courts will construe most of s 9A so as to restrict its apparent overbreadth. It is more difficult to conceive of how courts will read s 9A(2)(c) so that it does not apply to restrict too much speech. Achieving that aim may be beyond the courts, and may be a task instead for the legislature.

[109] See, eg Classification Review Board, n 94, p 1: "It is difficult to envisage circumstances where the Review Board might objectively assess [how some of the provisions apply]."

[110] Australian Government, *Culture and Recreation Portal*, http://www.culture.gov.au/articles/film viewed 17 February 2009.

[111] See, eg *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).