

CHAPTER 2

History of censorship and classification in Australia

2.1 This chapter provides a brief overview of the historical development of censorship and classification in Australia.

Historical background

2.2 Censorship and classification has a long history in Australia, beginning with publications and extending to new media, including films for public exhibition in the early 20th century, and more recent additions such as videos and computer games.

2.3 The Commonwealth has no direct power of censorship, but has used other constitutional heads of power to this end, including:

- the trade and commerce power (section 51(i) of the Constitution), to restrict and prohibit the importation of books, films and videotapes;
- the telecommunications power (section 51(v) of the Constitution), to regulate radio, television and the internet; and
- the territories power (section 122 of the Constitution), in setting up national classification and censorship schemes.

Era of censorship

2.4 From 1901, the trade and commerce power enabled the Commonwealth to prohibit the import of 'blasphemous, indecent or obscene works or articles',¹ a function that was carried out by the Department of Trade and Customs. Australian-produced publications continued to be regulated by state legislation, such as various Police Offences Acts or Obscene and Indecent Publications Acts.²

2.5 The censorship of films in Australia began in 1917, with customs regulations prohibiting the import of films that were not first approved by the new Commonwealth Board of Censors.³ The Board of Censors was authorised to ban any film that:

- was blasphemous, indecent or obscene;
- was likely to be injurious to morality, or to encourage or incite to crime;
- was likely to be offensive to any ally of Great Britain; or

1 *Customs Act 1901*, para. 52(c).

2 For example, the *Obscene and Indecent Publications Act 1901* (NSW), and the *Police Offences Act 1890* (Vic).

3 Customs (Cinematograph Films) Regulations, No. 40 of 1917.

- depicted any matter the exhibition of which, in the opinion of the Board, was undesirable in the public interest.⁴

2.6 The Board of Censors was replaced in 1919 by a similar system involving a Chief Censor and Deputy Censor,⁵ and in 1929 by the Commonwealth Film Censorship Board.⁶

2.7 This strict censorship regime, with the Commonwealth regulating imported books and films, and the states regulating Australian material, remained in place until the late 1960s.

2.8 During the 1960s, however, some steps were being taken to establish a uniform censorship regime. In 1961, after the unsuccessful prosecution of Penguin Books in England for publishing a paperback edition of *Lady Chatterley's Lover*, it was agreed that the states would not take legal proceedings against publications approved by Customs authorities, without prior consultation.⁷ In 1965, negotiations commenced between the Commonwealth and the states on a uniform censorship regime, leading to an intergovernmental agreement signed on 15 November 1967.

2.9 The intergovernmental agreement established the National Literature Board of Review, which had the task of classifying books⁸ as unsuitable for distribution in Australia if they:

- were blasphemous, indecent or obscene;
- unduly emphasised matters of sex, horror, violence or crime; or
- were likely to encourage depravity.⁹

4 Customs (Cinematograph Films) Regulations 1917, Statutory Rule No. 40.

5 Customs (Cinematograph Films) Regulations 1919, Statutory Rule No. 137.

6 Customs (Cinematograph Films) Regulations 1928, Statutory Rule No. 132; the Commonwealth Film Censorship Board became part of the newly formed Office of Film and Literature Classification in 1988.

7 Harry Whitmore, 'Obscenity in Literature: Crime or Free Speech', *Sydney Law Review*, vol. 4, no. 2, 1963, p 179.

8 That is, works of prima facie literary, artistic or scientific merit, but not publications in general. See: Australian Parliament, *Agreement between the governments of the Commonwealth and of the states of Australia in relation to the administration of laws relating to blasphemous, indecent or obscene literature*, Parl. Paper 157, Canberra, 1968.

9 Australian Parliament, *Agreement between the governments of the Commonwealth and of the states of Australia in relation to the administration of laws relating to blasphemous, indecent or obscene literature*, Parl. Paper 157, Canberra, 1968.

2.10 The expectation was that books permitted by the National Literature Board of Review would be permitted by the state ministers, but enforcement decisions were ultimately matters for each state government.¹⁰

From censorship to classification: 1968–84

2.11 From the 1960s, the censorship regime was significantly liberalised, moving from a model of censorship to a model of classification which enabled adults to make well-informed choices about what they saw and read.

2.12 One of the first major developments occurred in March 1968. In the landmark case of *Crowe v Graham*, the High Court of Australia replaced the common-law test of obscenity—the 'tendency to deprave and corrupt', dating from 1868—with a community-standards test: whether material offends against contemporary community standards, or the 'modesty of the average man'.¹¹ This was a significant shift in the underlying principle behind censorship.

2.13 A second major development occurred in June 1970. The then Minister for Customs and Excise, the Hon. Don Chipp MP, commenced a new debate on censorship in a major parliamentary statement. Mr Chipp called for as little censorship as possible (within the limits set by community standards), greater public scrutiny, and community responsibility (in particular parental responsibility).¹²

2.14 The same year, the Film Censorship Board began to publish reasons for film-censorship decisions;¹³ and, in 1971, an R classification was introduced for films, as well as a Film Board of Review, which provided an enhanced appeal mechanism for decisions of the Film Censorship Board.¹⁴

2.15 The policy of the Whitlam Government, elected in November 1972, was as follows:

- adult persons should be free to read, view and hear what they wish;
- persons and those in their care should be protected from exposure to unsolicited material offensive to them; and

10 Australian Parliament, *Agreement between the governments of the Commonwealth and of the states of Australia in relation to the administration of laws relating to blasphemous, indecent or obscene literature*, Parl. Paper 157, Canberra, 1968.

11 *Crowe v Graham* (1968) 121 CLR 375 at 379.

12 The Hon. Don Chipp MP, Minister for Customs and Excise, *House of Representatives Hansard*, 11 June 1970, pp 3372–6.

13 Such reasons were published in the Film Censorship Board's *Film censorship bulletin* from May 1970 to January 1973.

14 Gareth Griffith, *Censorship in Australia: Regulating the Internet and other recent developments*, Briefing Paper, No. 4/02, NSW Parliamentary Library Research Service, March 2002, p. 6.

- the reasons for censorship decisions should be published.¹⁵

2.16 At a ministerial meeting in January 1974, the Commonwealth and all states except Queensland agreed that publications should be classified by the Commonwealth, although the states indicated that these decisions would be advisory only. Publications were to be classified in three categories, in keeping with the 1968 decision in *Crowe v Graham*:

- restricted, and not for sale to those under 18: material that was sexually explicit, or depicted extreme violence, horror or cruelty;
- for direct sale only, by mail order: 'hard core' pornography; and
- prohibited: publications which advocated or incited to crime, violence or the use of illegal drugs.¹⁶

2.17 A new round of general classification reform took place in 1983–4, prompted by the wide availability of films on videotape. The existing system focused on the importation of films for public 'exhibition' and did not include the display and sale of videos, especially sexually explicit videos. There was also no requirement for separate areas for displaying videos, no requirement for under-the-counter sale and no effective limitations on the sale of videos to minors.¹⁷

2.18 After an intergovernmental meeting in July 1983, the Commonwealth established a model law to apply in the Australian Capital Territory (ACT), based on the existing South Australian legislation. The *Classification of Publications Ordinance 1983* (ACT) commenced on 1 February 1984, along with associated changes to customs legislation.

2.19 The main features of the 1983–4 changes were as follows:

- a movement of the focus away from the customs barrier to the point of sale, so that the only material to be stopped at the customs barrier would now be child pornography, material which 'promotes, incites or encourages' terrorism,¹⁸ or material gratuitously depicting extreme violence or cruelty, particularly in circumstances involving a sexual element;
- the continuation of compulsory classification of films for public screening;
- the establishment of a nationally uniform classification system, with the Commonwealth running the classification of publications, subject to some

15 'Ministerial meeting on censorship, 24 January 1974', *Australian Government Digest*, vol. 2, no. 1, 1974, pp 38–9.

16 'Ministerial meeting on censorship, 24 January 1974', *Australian Government Digest*, vol. 2, no. 1, 1974, pp 38–9.

17 Senator the Hon. Gareth Evans, Attorney-General, *Senate Hansard*, 4 April 1984, pp 1179–86.

18 *Classification of Publications Ordinance 1983* (ACT), para. 25(4)(b).

regional or state variations, and the Film Censorship Board classifying films and videos;

- the introduction of legislation by each state to establish appropriate point-of-sale controls for each category of material;
- the introduction of an X rating for sexually explicit videos, which could not be publicly screened; and
- the voluntary classification of all publications and other works, except films for public screening, though a person selling material later found to be Refused Classification would be liable to prosecution. This voluntary approach was adopted because it was not considered necessary for every video or every piece of literature to be classified, particularly material at the general-exhibition end of the scale.¹⁹

2.20 From June 1984, the classification of videotapes and videodiscs for sale was made compulsory. This change was made by an amendment to the 1983 ordinance by the *Classification of Publications (Amendment) Ordinance 1984* (ACT). The purpose of the amendments was to provide better guidance to purchasers of videos and, in particular, to parents wishing to distinguish between movies rated G (general), PG (parental guidance) and M (mature).²⁰

Towards the 1996 scheme

2.21 Although the reforms introduced in the period 1983-84 were meant to herald greater coherence between the states and territories, there remained significant differences between approaches to classification in each jurisdiction.²¹

2.22 The difficulties in administering the classification laws prompted the Attorney-General to refer the matter to the Australian Law Reform Commission (ALRC) in May 1990. The ALRC reported in 1991, presenting model classification laws for both federal and state jurisdictions. The ALRC outlined the main problems with the existing scheme:

Despite the recognition, at Ministerial level, among federal, State and Territory officers with responsibility for censorship matters and in the film and print distribution industries, that uniformity of policy and procedure is desirable, there is still a marked lack of uniformity in classification and censorship laws. While every State and the Northern Territory has legislation which, to some degree, imitates the Australian Capital Territory model, there are still significant differences.

19 Senator the Hon. Gareth Evans, Attorney-General, *Senate Hansard*, 4 April 1984, pp 1179–86.

20 Senator the Hon. Gareth Evans, Attorney-General, *Senate Hansard*, 4 April 1984, pp 1179–86.

21 See Gareth Griffith, *Censorship in Australia: Regulating the Internet and other recent developments*, Briefing Paper, No. 4/02, NSW Parliamentary Library Research Service, March 2002, p. 10.

Determined markings and consumer advice. The markings to be displayed on films and videos are not uniform throughout all jurisdictions. Most jurisdictions have not amended their legislation to require the display of consumer advice, despite an agreement made between Ministers in 1989.

Reclassification. Australian Capital Territory, Tasmanian and Victorian laws provide that films and publications can be reclassified at the Board's own motion after two years. This is not the case in other jurisdictions.

Standing to have decisions reviewed. Standing differs among jurisdictions. In New South Wales, for example, only the Minister or applicant for a classification can apply to have a classification decision reviewed. In Queensland, 'the exhibitor or distributor' can also apply. Under the Customs (Cinematograph Films) Regulations and under Victorian law, 'persons aggrieved' may also apply.

Classification of publications. The classification of publications under the *Classification of Publications Ordinance 1983* (ACT) is not adopted or effective throughout Australia. Western Australia, Tasmania and Queensland operate their own schemes.

This situation is exacerbated when agreement is reached on changes to the scheme, as some jurisdictions' legislation is updated more quickly than others. What has resulted is a set of State, Territory and federal legislation that is neither uniform nor comprehensive. Australia does not have a single, uniform classification procedure for the entire country.²²

2.23 In a speech made in 1997, the then Attorney-General, the Hon. Daryl Williams AM QC MP, described the practical effects of the lack of uniformity under the pre-1996 scheme:

In the case of films, each decision of the Classification Board was, in fact, made under up to 12 separate pieces of legislation. The problems...were compounded by the numerous differences between each set of legislation including the criteria under which decisions were made, the matters to be taken into account in making a decision and procedures for classification. For publications, it was not unusual for a classification officer to be required to make different decisions for different jurisdictions in light of the criteria to be applied.²³

22 Australian Law Reform Commission, *Report No. 55: Censorship Procedure*, September 1991, para. 1.11, pp 5–6.

23 The Hon. Daryl Williams AM QC MP, 'From Censorship to Classification: An Address by the Attorney-General the Hon Daryl Williams AM QC', *Murdoch University Electronic Journal of Law*, vol. 4, no. 4, December 1997, para. 17.

2.24 The Attorney-General concluded that 'the so called "national scheme"...was complex and lacked real uniformity. It was a mess'.²⁴

24 The Hon. Daryl Williams AM QC MP, 'From Censorship to Classification: An Address by the Attorney-General the Hon Daryl Williams AM QC', *Murdoch University Electronic Journal of Law*, vol. 4, no. 4, December 1997, para. 16.

