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**Censorship Law : Issues &
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by

Gareth Griffith

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Gareth Griffith

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EXECUTIVE SUMMARY

This paper presents an analysis of recent developments in the field of censorship law, notably in relation to two cases, one Australian, the other American.

The Rabelais case: The Australian case concerns the decision to refuse classification to an article on shoplifting in a La Trobe student newspaper called *Rabelais*. Among other things, this case serves as a good framework upon which to build an explanation of the administration of censorship in Australia, in particular the way the review process works in this field, an issue which has come to the fore again of late with the controversy surrounding the recent decision of the Classification Board to grant an 'R' classification to the film, *Lolita*. In that process the courts play only a limited role. Indeed, the arrangements in this area are perhaps unique in terms of Australian administrative law. The situation in regard to censorship is that one independent tribunal, the Classification Review Board, reviews the decisions of another independent specialist tribunal, the Classification Board, on their merits and without reference to the AAT (page 2).

The outcome in the *Rabelais* case was that the article in question was found by the full Federal Court to **'instruct in matters of crime' and was therefore prohibited under the National Classification Code**. On the other hand, **it was not a communication concerning a political or government matter and was not, therefore, protected by the constitutional implied freedom of political communication**. But even if the article had been found to deal in a political or government matter, it was held that the *Classification (Publications, Film and Computer Games) Act 1995* (Cth) 'satisfies the legitimate end of protecting the community from conduct likely to be harmful' (pages 7-15).

However, **the Court's analysis of this issue points to the continuing uncertainties concerning the scope of the constitutional freedom of political communication**. The question is, does the more recent emphasis on the text and structure of the Constitution suggest a far narrower conception of 'political speech' than was envisaged in the earlier cases, notably *Theophanous*? The judgments of Justice Sundberg and Heerey would suggest that that is the case, **an outcome which may have important implications for political dissent in this country**. What is not in doubt is that **the implied freedom of political communication is altogether different to the kind of constitutional right found under the US Constitution's guarantee of freedom of expression**. Justice French summed this up in these terms: 'The freedom of communication in relation to public affairs and political discussion protected by constitutional implication does not confer private rights. It confines legislative power' (pages 15-17).

On 11 December 1998 special leave to appeal to the High Court was refused. The constitutional question was considered, with members of the Court suggesting that the time to raise the constitutional guarantee might be when the charges in the Victorian courts are heard (page 15).

ACLU V Reno (No 2): The main United States case discussed in the paper is *ACLU v Reno (No 2)*, **the issue in which is the regulation of the Internet for the particular purpose of shielding children from harmful on-line material**. This was in the form of the *Child On-Line Protection Act* (COPA), passed by the US Congress on 7 October 1998 and signed into law by President Clinton on 21 October 1998. According to one commentator,

COPA 'has tried to get around the difficulties of the *Communications Decency Act 1996* case by creating a definition of harmful material which is remarkable for its specificity'. Judgment in the *ACLU v Reno (No 2)* case was handed down on 1 February 1999, in which Justice Reed found for the plaintiffs, the American Civil Liberties Union, and entered a preliminary injunction against enforcement of COPA.

In a preface to his decision, **Justice Reed noted that the case raised: 'Two diametric interests - the constitutional right of freedom of speech and the interest of Congress, and indeed society, in protecting children from harmful materials - are in tension in this lawsuit'**. It was observed that, by typing the word 'dollhouse' or 'toys' into a typical World Wide Web search engine, a child may be able to access sexual images and content. Noted, too, was expert evidence to the effect that 60% of all Internet content originates in the United States, a point which underlines the significance of US decisions in this field for Internet regulation in other jurisdictions, Australia included. His conclusion was that, **for the purposes of entering a preliminary injunction, there was sufficient evidence to suggest that COPA may violate the First Amendment rights of adults** (pages 18-20).

The interest of this case, as well as the *Loudon County Library* case, is that they highlight the contrasting approaches to the protection of freedom of speech in Australia and the US, **in particular the different considerations that arise where the protection of minors is concerned**. That such protection is a valid interest of the state is recognised in both countries, as well it might be, but the scope and rationale for legitimate state intervention appears to be drawn very differently, with any suggestion of state paternalism being treated with the utmost suspicion in the US. **In Australia, on the other hand, the state's role in protecting minors 'from material likely to harm or disturb them' (to use the terminology of the 1995 Classification Act) seems to be accepted more or less as a matter of course**. A further contrast to note is the US concern with laws which abridge the First Amendment because they are vague, over inclusive, rely too much on the discretion of administrators and are generally not sufficiently narrowly tailored to achieve their purpose. In Australia, on the other hand, the substantive parts of the censorship laws, as set out earlier in this paper, would appear to exemplify by US standards most, if not all, these characteristics (pages 20-22).

Regulating Internet content in Australia: Legislation for the purpose of banning objectionable material on the Internet and restricting access to material unsuitable for minors has been introduced in three Australian jurisdictions, Victoria, Western Australia and the Northern Territory. **In New South Wales, on the other hand, something of a wait and see policy appears to have been adopted**. Following the recommendations of the Wood Royal Commission into the NSW Police Force, the one area where legislative developments have occurred is that relating to child pornography. Among other things, **a new offence of publishing child pornography which can be dealt with on indictment has been created** (pages 22-25).

At this stage, **the proposal to develop a national regulatory framework for Internet content, based largely on a self-regulatory framework for on-line service providers (ISPs), has not been acted upon**. It seems that under this plan the ABA would only regulate content generated within Australia. The one definite development which has taken place has originated from the Internet industry itself, with the formulation of an Industry Code of Practice (pages 27-31).

1. INTRODUCTION

This paper presents an analysis of recent developments in the field of censorship law, notably in relation to two cases, one Australian, the other American. The Australian case concerns the decision to refuse classification to an article on shoplifting in a La Trobe student newspaper called *Rabelais*. This is not the first time that a publication of this sort has been banned in recent times. The 1992 Orientation Handbook of the University of Technology (Sydney) was refused classification on the ground that it dealt in matters of drug misuse in such a manner as to offend the reasonable adult person.¹ The difference is that, unlike the *Rabelais* article, that publication was not the basis of court proceedings requiring detailed analysis of the operation of censorship laws in this country. That the sort of issues raised in the case has wider implications is suggested by the fact that the New South Wales Minister for Police is reported to have asked the Federal Attorney General to look to the tightening of laws concerning books on self defence. The *Rabelais case* also serves as a good framework upon which to build an explanation of the administration of censorship in Australia, in particular the way the review process works in this field, an issue which has come to the fore again of late with the controversy surrounding the recent decision of the Classification Board to grant an 'R' classification to the film, *Lolita*.²

The main United States case discussed in the paper is *ACLU v Reno (No 2)*, the issue in which is the regulation of the Internet for the particular purpose of shielding children from harmful on-line material. This part of the paper serves as an update to NSW Parliamentary Library Briefing Paper No 19/1996, *Regulating the Internet: American Civil Liberties Union v Reno and other recent developments*.

The paper ends with a comment on proposals to regulate Internet content in Australia. It should be noted in this regard that the focus of the second part paper is on Internet censorship. The paper does not deal with other matters relevant to the debate about the regulation of the Internet, including privacy, defamation and copyright issues.

2. THE RABELAIS CASE

2.1 A limited role for the courts

Cases involving substantive issues of censorship in Australia in recent times are few and far between. There is the landmark *Crowe v Graham*³ case, after which censorship decisions have rarely been considered by the courts; nor has the Administrative Appeals Tribunal (AAT) been involved in censorship law. Indeed, the arrangements in this area are perhaps

¹ Office of Film and Literature Classification and Film and Literature Board of Review, *Reports on Activities 1991-92*, p 64.

² L Martin, 'Censor's Lolita ruling outrages MPs', *The Sydney Morning Herald*, 10 March 1999.

³ (1969) 121 CLR 375. In this case Justice Windeyer formulated the 'community standards' test, further to which the question to ask is whether a publication transgresses the contemporary bounds of decency, not whether it has a tendency to 'corrupt and deprave'.

unique in terms of Australian administrative law. The situation in regard to censorship is that one independent tribunal, the Classification Review Board, reviews the decisions of another independent specialist tribunal, the Classification Board, on their merits and without reference to the AAT.⁴ Review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is available, but in general an error of law or a failure to exercise the jurisdiction or power conferred on the Classification Review Board in accordance with the law must be demonstrated. If these arrangements do not encourage judicial review, perhaps a more decisive factor yet in limiting the role of the courts in censorship matters is the lack of an entrenched right to freedom of expression in this country.

Whatever the cause, the result is that the jurisprudence relating to censorship law in Australia is very thin. This is against a background of the introduction in the 1980s and 1990s of complex new laws in this field, the first wave of reform being designed largely in response to the introduction of videos in that period, the second in order to create a national uniform system of censorship law. The extent to which these laws have remained untested and have escaped legal analysis generally would surely surprise commentators from comparable jurisdictions, including those from Canada, New Zealand, the United States and even the United Kingdom. This is not to deny that censorship issues have generated considerable public debate in Australia recent times, both in respect of the general trends in censorship decision making, as well as in relation to particular decisions such as the 'R' classification awarded to the film *Salo* in January 1993 and, subsequently, the RC classification (Refused Classification) awarded to the same film in February 1998. Moreover, Australia has participated in the debate on the problems for classification and regulation raised by the new technologies associated with computer games and the Internet. At the same time, however, the role played by the courts has been marginal at best, confined for

⁴

It is an arrangement which has been endorsed by the Administrative Review Council which reported in 1986 that this is an instance where 'an existing specialist tribunal is seen to work efficiently and economically in a field that presents special features'; this area was said to require the 'making of sensitive judgments based on current community standards and on issues, for example, of the literary, artistic, or educational merits which such works may possess' and 'was seen to be an exception to the rule that 'a review jurisdiction in an area of Commonwealth administration should be conferred upon (or transferred to) the AAT rather than being conferred upon or retained by a specialist tribunal': Administrative Review Council, *Review of Customs and Excise Decisions: Stage Four, Censorship - Report No 24*, 1986, p 13. The Council's conclusion at that time was that 'the Board of Review's powers and procedures are well adapted to its existing functions, and that the process of making censorship decisions in the light of community standards is not one for which the AAT's procedures are appropriate'(in 1986 the reference was to the Film Board of Review). Under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 86, review by the AAT is limited to decisions concerning fees.

the most part to deciding issues of standing,⁵ or else to matters of a procedural kind.⁶ Very rarely have the courts strayed into the substantive quagmires of censorship decisions, and only then in those cases which stand outside the mainstream of censorship law.⁷

What has developed in Australia is a legal and administrative framework which has the Office of Film and Literature Classification (the OFLC) at its centre, within which extensive powers are exercised over many areas of modern cultural life, from films and videos to publications, computer games and Telecom services.⁸ Indeed, the OFLC sphere of activity cuts deep into areas of personal rights and freedoms, to the extent that it is perhaps the nearest thing Australia has had to a de facto ministry of cultural standards. Those members of the two boards administered by the OFLC, the Classification Board and the Review Board, are statutory officers whose duty it is to apply the law, as this is formulated under the Commonwealth Classification Act 1995 which incorporates the National Classification Code, the Classification Guidelines, as well as the various enforcement Acts operating in the States and Territories. However, it appears that these statutory officers, together with those public servants delegated to act on behalf of the Classification Board, apply a legal schema which, for the most part, has not been expounded or explained judicially to any significant extent.

The argument that is made here is that this is an issue of some importance, for the scheme itself embodies conceptually difficult notions, along with the snags and uncertainties which always attend statutory interpretation. In this context, the recent *Rabelais case* represents an important judicial excursion into a neglected area of the law.

2.2 Legislative provisions

The *Classification (Publications, Film and Computer Games) Act 1995* (Cth) (the 1995 Classification Act) governs the classification of films and the review of classification decisions. The Act provides that publications, films and computer games be classified in accordance with the National Classification Code and the classification guidelines.

⁵ *Ogle v Strickland* [1987] 13 FCR 306 where the Federal Court held that ministers of religion were 'persons aggrieved' in relation to the film *Hail Mary* and entitled therefore to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1975* (Cth). Further, a member of the general public it was held could ask the federal Attorney General, or a State or Territory Attorney General, to intervene on his or her behalf.

⁶ *Queer Screen Limited v the Chief Censor* [1994] 56 FCR 15.

⁷ *Phillips v Police* [1994] 75 A Crim R 480. The appellant was convicted of being in possession of child pornography contrary to the *Summary Offences Act 1953* (SA), s 33. Allowing the appeal, the court held inter alia that, viewed as a whole, the films concerned may have been classified as indecent, but that they were not 'child pornography' within the Act. It is probably fair to say that cases relating to child pornography are the most frequent censorship cases to come before the courts, but that very few of these develop into substantive inquiries into the construction of the censorship laws.

⁸ The Classification Board, by contractual arrangement, advises the Telephone Information Services Standards Council (TISSC) on censorship type complaints.

Relevantly, section 11 of the Act requires that the matters to be taken into account in making a classification decision include:

- the standards of morality, decency and propriety generally accepted by reasonable adults; and
- the literary, artistic or educational merit (if any) of the publication; and
- the general character of the publication including whether it is of a medical, legal or scientific character; and
- the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

The National Classification Code (the Code) requires that classification decisions are to give effect, as far as possible, to the following principles:

- adults should be able to read, hear and see what they want;
- minors should be protected from material likely to harm or disturb them;
- everyone should be protected from exposure to unsolicited material that they find offensive;
- 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.

Paragraph 1 of the Table under the heading ‘Publications’ in the Code provides that publications that:

- (a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime or cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
- (b) describe or depict in a way that is likely to cause offence to a reasonable adult a minor who is or who appears to be, under 16 (whether engaged or not in sexual activity); or
- (c) promote, incite or instruct in matters of crime or violence

are to be classified Refused Classification.

2.3 The Rabelais case - facts and findings

The Chief Censor: Briefly, the case involved the July 1995 edition of *Rabelais*, a monthly student journal published by the La Trobe University Students Representative Council, which contained a four page article entitled ‘The Art of Shoplifting’. Further to an application by the Retail Traders Association of Victoria under the Classification of Publications Ordinance 1983 (ACT) which was in force at the time, the Chief Censor refused classification for the publication on the ground that the article ‘instructs in methods

of shoplifting and associated fraud'. Under section 19(4) of the Ordinance, as amended in 1989, any publication which 'promotes, incites or instructs in matters of crime or violence' was to be refused classification. The decision to refuse classification to the article was made under the cooperative scheme which operated at that time; this included the Victorian *Classification of Films and Publications Act 1990*, section 3 of which defined publications which were or 'would be' refused classification as 'objectionable publications'.

The Classification Review Board: The editors of *Rabelais* applied out of time on 1 May 1996 to the Review Board for a review of the Chief Censor's decision, by which time the new governing legislation was the 1995 Classification Act. As noted, as part of the National Classification Code, which is a Schedule to the 1995 Classification Act, publications are to be refused classification if, inter alia, they 'promote, incite or instruct in matters of crime or violence'. In the event, a majority of the Review Board agreed with the Chief Censor that the article provided instruction in the crimes of theft (shoplifting) and fraud. Among the considerations the Review Board took into the account were those matters outlined in s 11 of the 1995 Classification Act. It found, among other things, that 'the general community would not condone the publication of material with the clear intent to provide instruction in theft' (s 11 (a)), and that 'instructing university students in the crime of theft is no different from instructing the general population' (s 11 (d)).⁹ Its conclusion was that the article intended to and, in fact, does provide practical instruction in techniques of shoplifting and that, while it was not without humour, it lacked indicators that it was intended to be satirical, with the tone at times bordering on malicious and was seen to lack literary and artistic merit. Responding in part to the submission that the article was protected under the constitutional implied right of freedom of political communication, the Review Board acknowledged that the article was 'political in flavour', but said that the major part of it was a 'step by step guide to shoplifting'.¹⁰

Note that a minority of the Board agreed with the characterisation of the article as instructing in crime, but concluded that 'the context of the publication and the nature of the crime were such that the publication ought not to be refused classification'.¹¹

Justice Merkel: The editors then applied to the Federal Court to review the Review Board's decision under the federal *Administrative Decisions (Judicial Review) Act*, subsequent to which, on 6 June 1997, Justice Merkel found in favour of the Review Board.¹² In summary, his Honour found that it had been reasonably open to the Review Board to reach the conclusions it had on the material before it, and that there was no basis for concluding that it had erred in law in its construction of the National Classification Code (the Code) or in

⁹ Classification Board and Classification Review Board, *Annual Report 1996-1997*, p 125.

¹⁰ Ibid, pp 124-126. In fact the Review Board declined to comment on the merits of this aspect of the applicant's submission.

¹¹ Ibid, p 124.

¹² *Brown and others v Members of the Classification Review Board of the Office of Film and Literature Classification* (1997) 145 ALR 464.

its application of the Code to the article. He also rejected the claim that the Review Board had taken into account irrelevant considerations and that the decision was unreasonable. In terms of the construction of the relevant part of the Code, Justice Merkel was of the opinion that:

- ‘instruct’ should be given its ordinary meaning, as defined in *The Macquarie Dictionary* of ‘to furnish with knowledge, especially by a systematic method: teach; train; educate’;
- for an instruction to fall within the context of the words ‘instruct in matters of crime or violence’ used in the Code, it must do more than state the obvious or inform or convey knowledge of matter in such a general way that, in a real and practical sense, no instruction has really been given;
- it is unlikely that an article that is truly satirical would, in a real and practical sense, be characterised as instructional;
- the phrase ‘matters of crime’ means the ‘commission of crime’;
- to be a crime the conduct in question must fall within the category of conduct stipulated by the law as constituting a crime;
- the conduct in question must be generally recognised as a crime under the law of each State and Territory; and
- ‘matters of crime’ are not limited to violent or serious crime.

Justice Merkel also expounded important guiding principles for the construction and application of the Code: first, that the Code should be given a sensible meaning which gives effect to its evident purpose; secondly, that the presumption against statutory interference with fundamental rights or principles, which include the freedom of speech and expression recognised by the common law, is rarely displaced by general words; and, thirdly, as the 1995 Classification Act was passed as an integral part of a uniform national scheme for censorship, its construction should have proper regard to its role and function as part of that scheme.

Importantly, it was said that in construing the Code regard must be had to the implied right to freedom of political communication and discussion, as well as to Article 19 of the International Covenant on Civil and Political Rights which provides for the right to freedom of expression. However, finding against the applicant, Justice Merkel held that the Review Board did have regard to the ‘substance of the freedoms in both construing the Code and characterising the publication for the purposes of the Code’.¹³ It did not, therefore, err in law. Further, his Honour rejected the submission that the article should be protected by the implied right to freedom of political communication; he had already noted, by reference to several Australian and overseas authorities, that the common law right to freedom of speech and expression cannot be absolute in nature and, *inter alia*, he applied the same argument to the implied constitutional right, noting that it ‘gives way to laws giving effect to legitimate countervailing interests’.¹⁴ It is open, he concluded, to Australian legislatures ‘to

¹³ *Ibid* at 479.

¹⁴ *Ibid* at 475.

conclude that incitement to, promotion of or instruction in the commission of crime constitute such conduct'.¹⁵

The Full Federal Court: Dismissing the appeal, in separate judgments Justices French, Heerey and Sundberg agreed with the decision of Justice Merkel at first instance. The grounds of appeal were described as 'lengthy and elaborate'.¹⁶ For the present purpose two main grounds may be considered, namely: that, as a matter of statutory construction, Justice Merkel misconstrued the Code and in particular the term 'instruct'; and that, as a constitutional point, the construction of the Code and the characterisation of the article should have had regard to the implied freedom of political communication.

The Federal Court's response to these overlapping 'construction' and 'constitutional' grounds of appeal can be considered separately.

2.4 The construction issue - to instruct in matters of crime

As noted, the phrase 'promotes, incites or instructs in matters of crime or violence' was inserted into the ACT Ordinance in 1989. It replaced a more specific prohibition against material which 'promotes, incites or encourages terrorism'. It has been pointed out that, the original amendment was made without any parliamentary debate or public discussion, thus leaving any questions about the prohibition's scope and reach unanswered.¹⁷ As an example of the application of the provision, in 1992 the book, *Final Exit*, was refused classification by the Chief Censor on the ground that it 'instructs in a matter of crime', notably the crime of assisting suicide.¹⁸ That decision was subsequently reversed by the Film and Literature Board of Review primarily on the basis that, while the book is 'capable of giving practical assistance' to persons who might wish to assist others to take their lives, it is 'not directed to them'. This observation derived from the legal advice obtained by the Chief Censor from the Federal Attorney General's Department, a fact which caused the Film and Literature Board of Review to observe: 'it seemed to us that on the legal advice in this matter there was a degree of uncertainty sufficient to justify consideration of whether a different conclusion from that reached by the Chief Censor was open in the circumstances'. For the present, the general point to make is that the *Final Exit* decision suggested the uncertainties surrounding the interpretation of the relevant provision. Indeed, underlining this uncertainty, the Review Board went on to say that it had difficulty accepting that the provision was intended to prohibit a book such as *Final Exit*; yet, as the same time, it also accepted that 'on a literal, and indeed on a reasonable, construction of the Ordinance it was possible to

¹⁵ Ibid.

¹⁶ *Brown and Others v Members of the Classification Review Board of the OFLC* (1998) 154 ALR 67 at 75 (per French J). (Henceforth, *Brown*).

¹⁷ G Griffith, *Censorship: Law and Administration*, NSW Parliamentary Background Paper 1993, p 19.

¹⁸ Under the legislative arrangements then in place the 'instruct in matters of crime' test did not apply in either New South Wales or the Northern Territory, where the book was classified Restricted Category 1, thus limiting its distribution to those over 18.

conclude that the book should be refused classification'.¹⁹ In the event the Review Board classified the book Restricted (Category 1), thus restricting its sale to persons 18 years and over.

Decisions by the Review Board based on the provision prohibiting materials that 'promote, incite or instruct in matters of crime or violence' are few and far between, a fact which can be taken to suggest the restraint of the censorship authorities in this country. However, it should be added that the same provision is also found in the Commonwealth Customs (Prohibited Imports) Regulations,²⁰ under which the Classification Board assesses material referred to it by the Police and Customs services. In 1997-1998 this included 803 films and 1024 publications. There is a reasonable likelihood that the more problematic material will tend to be found amongst these Police and Customs referrals. The difficulty with making any assessment of this kind is that no details of the relevant decisions are available in the recent annual reports of the OFLC. On the other hand, the 1991-1992 Annual Report (the only one to deal, albeit briefly, with Police and Customs referrals in a substantive sense) did contain the observation: 'some referrals involved detailed advice on lock picking techniques and the art of unarmed combat, with emphasis on causing serious injury and death. They were considered to be "prohibited imports" because they "promote, incite or instruct in a matter of crime or violence'.²¹ In other words, the 'instruct in matters of crime' provision has a relevance beyond its operation in the 1995 Classification Act. In relation to that Act, on the evidence of the Second Reading Speech and the Explanatory Memorandum there does not appear to have been any substantive debate or analysis as to the meaning of the relevant provision.

Before the *Rabelais case*, therefore, the operation of the provision remained uncertain. The comment was made that:

a literal reading of the provision could result in the prohibition of a wide range of books and films. Admittedly, the banning of Agatha Christie on the grounds that her work instructs in matters of crime or violence is an unlikely prospect. It may not be so unlikely in the case of more marginal material.²²

In the *Rabelais case*, the appellants submitted that for a publication to 'instruct in matters of crime' and therefore to be refused classification 'the evident intent and the likely effect of the publication' must be to bring about the commission of crime.²³ In other words, this aspect of the appeal centred on the issue of the relevance of the subjective intent of the

¹⁹ OFLC and Film and Literature Board of Review, *Reports on Activities 1991-92*, pp 67-68.

²⁰ Section 4A (1A) (d).

²¹ OFLC and Film and Literature Board of Review, *Reports on Activities 1991-92*, p 33.

²² G Griffith, *Censorship: Law and Administration*, NSW Parliamentary Background Paper 1993, p 20.

²³ *Brown* (1998) 154 ALJR 67 at 82-83 (per Heerey J).

publishers, as well as on the question of the tendency of the publication to cause a 'likely' effect. For the appellants, the latter proposition was supported by the contention that the word 'instruct' is found in the composite phrase 'promote, incite or instruct' and that, consistent with both legislative history and the evident policy of the legislation, each word carries 'with it the element of intention and tendency to bring about the commission of crime'.²⁴ As Justice Heerey observed, these arguments were not put to the Classification Review Board, or to Justice Merkel: 'Indeed, it was argued before his Honour that the intent of the article was an irrelevant consideration and the board had erred in law by taking it into account'.²⁵

In the event, the key arguments of the appellants were rejected by the full Federal Court. There was general agreement that any publication must be read as a whole and in its proper context and that exceptions should be made for material which was clearly satirical in nature. This followed from the 'purposive construction' of the provision adopted by all members of the Court who agreed that in its statutory context 'instructs' has two elements. For Justices French and Heerey these were: (a) the imparting of teaching of knowledge, skills and techniques as to how crime may be committed; and (b) some element of encouraging or exhorting the commission of crime.²⁶ Justice Sundberg's formulation was in similar terms, with the phrase 'instructs in matters of crime' being said to involve: 'first, furnishing readers with information as to how crime can be committed, and secondly, encouraging them to use that information to commit crime'.²⁷

In other words, based on the overall purpose of the 1995 Classification Act, it was accepted that there must be a stricter test than the more 'literal' one propounded by Justice Merkel, for whom 'instructs' was to be given its ordinary meaning of 'to furnish with knowledge', albeit in ways which go beyond merely stating the obvious. Justice French remarked that, in conformity with the principle of freedom of expression, an element of encouragement to commit a crime must also be found for a publication to be refused classification. Justice Heerey wrote in similar terms, stating 'The purposive construction of "instructs in matters of crime" is consistent with the principle that free speech, while not absolute, should be restricted only to the minimum extent necessary to protect other important values in a civilised society - in the present case the security of personal property'.²⁸ Justice Sundberg explained it in these terms: 'The mere furnishing of information about how to commit crime is not sufficient. If it were, a newspaper report about how a bank was broken into and robbed might instruct in matters of crime. That could not have been parliament's intention'.²⁹

²⁴ Appellants' Submissions, para B7, <http://rene.efa.org.au/censor/rabsubm2.htm>.

²⁵ *Brown* (1998) 154 ALJR 67 at 83.

²⁶ *Ibid* (Heerey J agreeing with French J).

²⁷ *Ibid* at 97.

²⁸ *Ibid* at 83.

²⁹ *Ibid* at 97-98.

To this extent the Court agreed with the appellants. Where they differed was in the Court's insistence that the test must be applied objectively, without regard to either the actual or likely effect of the publication or the actual intent of the author or publisher.³⁰ In the case of a publication, the purpose is to be ascertained from the words used (plus any pictorial material), understood in context and having regard to such factors as tone and content, as well as to 'the nature of the publication and the market to which, on the face of it, it is directed...'.³¹ As Justice French observed: 'In student publications in particular it may be open to treat outrageous or offensive or shocking statements whose purpose is to do little more than outrage, offend or shock even if presented in a form susceptible of a literal characterisation as instructional'.³² Nonetheless, neither the author's intention, nor the publication's tendency to cause either actual harm or a wrongdoing are at issue.

For its part, the Review Board was judged to have considered such matters as the publication's content, theme and tone and, in coming to its conclusion that the article was 'instructional and hortatory', its approach, 'in substance if not in strict form, lay well within the application of an objectively assessed purposive construction of the word "instruct"'.³³

To this point Justices French, Heerey and Sundberg were of one mind. Where they differed was on the question of whether or not the phrase 'promote, incite or instruct in matters of crime or violence' was to be read as a 'collocation of overlapping meanings'.³⁴ This was proposed by the appellants and adopted by Justice French who maintained that, consistent with the maxim *noscitur a sociis*, the meaning of the word 'instruct' is affected by its companions 'promote' and 'incite'. In support of this approach, Justice French explained:

The word 'instruct' does not have to be construed in a way which excludes all elements of promotion or incitement. To do so would lead to a broad construction satisfied by the mere fact that a publication furnishes the reader with knowledge on 'matters of crime'.³⁵

Justice Heerey was ambivalent on the point, stating only that in the present statutory context 'instructs' has a meaning consistent with its *Macquarie Dictionary* definition as 'To direct or command; furnish with orders or directions'.³⁶ Justice Sundberg, on the other hand, expressly disagreed with the approach adopted by Justice French, arguing that it was only permissible where a word was 'ambiguous or unclear', which was not the case in this

³⁰ Ibid at 83.

³¹ Ibid at 82 (per French J).

³² Ibid.

³³ Ibid.

³⁴ Ibid at 81.

³⁵ Ibid.

³⁶ Ibid at 83.

instance. As noted, his view was that, in the present statutory context, ‘instructs’ had to include an element of encouragement to use the information to commit crime, because any other interpretation could not have been ‘intended’ by Parliament.

Another aspect of Justice Sundberg’s judgment can be considered. In refuting the argument that a publication cannot be said to ‘instruct’ in matters of crime unless the evident intent and the likely effect of the publication is to bring about the commission of crime, his Honour observed that certain other grounds in the Code for refusing classification to a publication (as well as to films and computer games) are defined ‘in terms that look to the effect or likely effect of the publication on the reader’³⁷. For example, paragraph (a) of the Code deals with publications which, among other things, describe or depict matters of drug misuse ‘in such a way that they offend...’; and paragraph (b) deals with publications which describe or depict a minor in a way that is ‘likely to cause offence’ to a reasonable adult. Whereas paragraph (c) (the ‘instruction’ provision) ‘does not require that the publication have any effect or likely effect on the reader’. These considerations led Justice Sundberg to the conclusion that: ‘The absence of such a requirement, when it has been included in paras (a) and (b), is a clear indication that it is not to apply to publications falling within para (c)’.³⁸

These comments, in turn, lead to the following observations. First, an analysis of the legislative history of this part of the 1995 Classification Act would suggest that these grounds for refusing classification were only an amalgamation of what had existed under the previous legislative scheme and, further to this, that the evidence for any concerted analysis of the inter-relationship between these grounds of prohibition, either in relation to the 1995 Act, the ACT Ordinance or the Customs (Prohibited Imports) Regulations, is very thin indeed. It should be noted in this regard that the 1995 Act was introduced into the Commonwealth Parliament as being ‘essentially procedural in nature’ and discussed mainly on that basis.³⁹ Note, too, that the Law Reform Commission Report upon which the Act was based dealt with ‘censorship procedure’;⁴⁰ as such, it did not debate the substantive grounds for arriving at various classification decisions. Secondly, if Justice Sundberg’s analysis is followed does this mean that in order to prohibit material under paragraphs (a) or (b) evidence of the likelihood of a publication, film or computer game to cause offence must be forthcoming. What exactly would be required of the Review Board in this regard? In order

³⁷ Note that the Code outlines the grounds for refusing classification to publications, films and computer games separately, but that, minor variations notwithstanding, they are substantively the same. The difference is that the Code for publications refers to ‘describe’ as well as ‘depict’ in paragraphs (a) and (b), whereas the Code for film and Computer games make no reference to ‘describe’. Paragraph (c), the ‘instruct’ provision, is the same in all three.

³⁸ Ibid at 97.

³⁹ *Commonwealth Parliamentary Debates (HR)*, 22 September 1994, p 1380. Mention was made of the new requirement in the Code for classifiers to take account of community concerns about the portrayal of persons in a demeaning manner.

⁴⁰ ALRC, *Report No 55 - Censorship Procedure*, 1991; ALRC, *Discussion Paper 47 - Censorship Procedure*, 1991, p 6 - ‘The Commission’s Terms of Reference exclude a review of censorship and classification policy’.

to ban a film such as *Salo*, for example, would it need to go beyond the kind of considerations set out in its decision of February 1998 where the offensiveness of certain depictions of violence and cruelty are asserted without recourse to empirical evidence?⁴¹ Alternatively, would it be sufficient for the Review Board, as the tribunal of fact in this scheme, to merely have regard to the ‘likelihood’ question, arriving at a decision based on its own judgment of the question of the degree of offence?⁴² This last approach would certainly follow from Justice Windeyer’s comment in *Crowe v Graham* that questions of obscenity and indecency are ones of fact to be decided upon by the relevant tribunal on the evidence of the publication itself.: ‘Evidence is neither needed nor permitted’.⁴³

Note that in relation to appointments to both the Classification Board and the Review Board regard ‘is to be had to the desirability of ensuring that the membership of the Board is broadly representative of the Australian community’.⁴⁴ What is meant by this, presumably, is that members of the two Boards should be representative of something like a cross-section of the community in a ‘social’ sense; that is, as suggested in submissions to the ALRC, the Boards should include women, parents and people with ‘direct experience and

⁴¹ Note Justice French’s comment that ‘It is difficult to see how a rule requiring assessment of the likely effect of a publication in bringing about the commission of a crime would work in practice’ (at 81). It may be that the difficulties would be even more formidable where a normative judgment of community standards of the kind envisaged under para (a) is at issue. Presumably, the point in para (a) would be to show some ‘likely effect’ on moral sensibilities; whereas under para (c) there would be a need to show that a publication was ‘likely to bring about a crime’. Note, too, that under the Code the classifiers are to give effect to the principle that ‘minors should be protected from material *likely to harm or disturb them*’, which again raises the question of how this kind of moral imperilment is to be judged.

⁴² Justice Sundberg does not mention that paragraph (a) of the Code (for publications, films and computer games alike) makes reference to the depiction of ‘crime’ and ‘violence’ in such a way that ‘they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified’. Thus, publications dealing with crime or violence can be prohibited on two separate grounds which, bearing in mind the lack of parliamentary discussion of the relationship between these, raises the question of how or why they are meant to co-exist. It is hard to see, for example, how materials that ‘promote, incite or instruct in matters of crime or violence’ would not at the same time offend against a reasonable adult’s standards of propriety. The answer, presumably is that the two paragraphs address different kinds of material. Thus, para (a) deals with what might be called ‘representations’ of crime and violence, as for example in a fictional description or filmic depiction; whereas para (c) is more concerned with such things as pamphlets or tracts in which matters relevant to crime or violence are discussed but not ‘represented’. Of course, the distinction is not absolute. Conceivably, a film could well represent shoplifting in a way that would ‘instruct in matters of crime’. The question then would be whether to refuse classification under para (a) or (c), or both. The more general point to make is that the prohibition against material dealing in crime or violence is not restricted to para (c).

⁴³ (1969) 121 CLR 375 at 399. For a critical comment on this approach see - RG Fox, ‘Obscenity and indecency’ (1969) 3 *Adelaide Law Review* 392. Fox states that the Windeyer approach ‘assumes that there is a common set of contemporary community standards and that the courts have judicial notice of them’ (at 401).

⁴⁴ Sections 48(2) and 74 (2) of the 1995 Classification Act.

knowledge of children and adolescents'.⁴⁵ Beyond that, however, as the ALRC acknowledged, the Boards should also represent community values⁴⁶ and therefore need to represent the 'opinions' of the community.⁴⁷ In other words, the Boards should be representative of the community in a normative as well as a descriptive sense. Moreover, following Justice Windeyer's comments, while the Boards may find assistance in assessing contemporary community standards from other sources, including empirical research and such things as community assessment panels, under the Australian censorship scheme the Boards themselves are the ultimate arbiters of contemporary community values.⁴⁸

2.5 The constitutional issue - the implied freedom of political communication

The 'constitutional' argument of the appellants was that the word 'instruct' when used in the Code cannot have the meaning adopted by Justice Merkel as merely 'to furnish with knowledge' (other than stating the obvious), for the reason that it would infringe the implied constitutional guarantee of freedom of political communication by preventing the publication of political material which is neither intended nor likely to cause harm. By reference to the *Rabelais* article's introductory remarks concerning the evils of capitalism, it was argued that its true character 'is that of a challenging and confronting political statement' along the lines that 'all property is theft' and the like. Again, the submission was unanimously rejected.

Most straightforward in his rejection was Justice Sundberg who, having regard to the recent cases of *Lange*⁴⁹ and *Levy*,⁵⁰ noted: (a) that the freedom would not invalidate a law enacted to satisfy some legitimate end if that law is compatible with the maintenance of representative and responsible government under the Constitution and is reasonably appropriate and adapted to achieving the legitimate end: and (b) that the freedom refers to

⁴⁵ ALRC, *Report No 55 - Censorship Procedure*, 1991, 33. Submissions suggested the inclusion of such people on the Boards to ensure their representativeness, but the ALRC stated that appointment of members 'from particular groups in the community, would not necessarily achieve this goal. Legislation should specifically direct the Government's attention to this objective in making appointments to the [Classification] Board. Beyond this, however, it would be undesirable to prescribe qualifications for membership of the Board'.

⁴⁶ *Ibid*, p 24.

⁴⁷ For an analytical overview of the term 'representation' see - R Whip, 'Representing women: Australian female parliamentarians on the horns of a dilemma' (1991) 11 *Women and Politics* 1. Whip notes the distinction between 'social representation' and 'opinion representation' and explains that, for example, women may be represented in parliament by other women (who may be said to 'stand for' the class of persons they represent), or else by individuals with opinions and concerns similar to theirs but who need not necessarily be women (these persons can be said to 'act for' women).

⁴⁸ The community assessment panels scheme was established in 1998 is to be extended - Federal Attorney General, 'Community classifying films and videos', *Media Release*, 20 January 1999.

⁴⁹ (1997) 189 CLR 520.

⁵⁰ (1997) 189 CLR 579.

‘communication between people concerning political or government matters which enables the people to exercise a free and informed choice as electors’.⁵¹ From this, Justice Sundberg stated that the *Rabelais* article did not come within the ambit of the freedom, as it is not a communication concerning a political or government matter; but that even if it did come within that ambit, the 1995 Classification Act as interpreted ‘satisfies the legitimate end of protecting the community from conduct likely to be harmful’.⁵²

Both Justices French and Heerey agreed with this last aspect of Justice Sundberg’s analysis. Where the consensus failed was on the question of whether the article could be characterised as ‘political speech’. Justice Heerey was certain it could not, at least for the purposes of the constitutional freedom at issue which assumes - ‘indeed exists to support, foster and protect - representative democracy and the rule of law. The advocacy of law breaking falls outside this protection and is antithetical to it’.⁵³ In this constitutional context, therefore, the contested word ‘political’ is to be construed in narrow terms, excluding anarchic or other utterances which may be deemed inconsistent with or contrary to representative democracy and the rule of law. Presumably, on this basis political speech advocating abstention at an election would fall outside the ambit of the constitutional freedom, as would calls for draft resistence of the kind which occurred in the Vietnam War days. Justice French, on the other hand was more inclined to include the article within the scope of political discussion for the purposes of the constitutional freedom, noting that in *Kruger*⁵⁴ Justice Toohey restated the adoption by members of the High Court of the observations made by Barendt⁵⁵ to the effect that “‘political speech” refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about’.⁵⁶ This, in turn, led Justice French to the conclusion that ‘The adoption of the observation taken from Barendt would support a view that the category of [political] discussion is open’. To this he added:

There is much to be said for the conclusion that ‘The Art of Shoplifting’ falls outside the scope of political discussion. But, inelegant, awkward and unconvincing as is its attempt to justify its practical message about shoplifting by reference to the evils of capitalism, it is arguable that in some respects it would fall within a broad understanding of political discussion.⁵⁷

This did not rescue the article, for the law in question was still said to be appropriate and

⁵¹ *Lange* (1997) 189 CLR 520 at 106-07.

⁵² *Brown* (1998) 154 ALJR 67 at 98-99.

⁵³ *Ibid* at 87-88.

⁵⁴ (1997) 146 ALR 126.

⁵⁵ *Freedom of Speech*, 1985, p 152.

⁵⁶ (1997) 146 ALR 126 at 177; *Theophanous* (1994) 182 CLR 104 at 124 (Mason CJ, Toohey and Gaudron JJ).

⁵⁷ *Brown* (1998) 154 ALR 67 at 80.

adapted to achieving the legitimate end of protecting the ‘rule of law which is of the essence of democratic society with representative and responsible government.’⁵⁸ All the same, the comment does point to the continuing uncertainties concerning the scope of the constitutional freedom of political discussion. The question is, does the more recent emphasis on the text and structure of the Constitution suggest a far narrower conception of ‘political speech’ than was envisaged in the earlier cases, notably *Theophanous*? The judgments of Justice Sundberg and Heerey would suggest that that is the case, an outcome which may have important implications for political dissent in this country. What is not in doubt is that the implied freedom of political communication is altogether different to the kind of constitutional right found under the US Constitution’s guarantee of freedom of expression. Justice French summed this up in these terms: ‘The freedom of communication in relation to public affairs and political discussion protected by constitutional implication does not confer private rights. It confines legislative power’.⁵⁹

2.6 The High Court refuses special leave to appeal

On 11 December 1998 special leave to appeal to the High Court was refused. Again, the appellants questioned the construction of ‘instructs in matters of crime’, arguing that the publication must have, in addition to that purpose, ‘a likelihood or tendency to achieve that purpose’. The constitutional question was also considered, with members of the Court suggesting that the time to raise the constitutional guarantee might be when the charges in the Victorian courts are heard. Gleeson CJ said:

The Court is of the view that having regard to the way in which the issues were presented for decision in the litigation in the Federal Court, there is insufficient reason to doubt the correctness of the actual decision of the Full Court of the Federal Court to warrant a grant of special leave and the application is refused.⁶⁰

2.7 Comments

If nothing else, the *Rabelais case* underlines the complexities involved in the interpretation of censorship laws and the need for their careful scrutiny for the benefit of the community at large, but also to assist those who must administer the scheme. Whether it suggests the need for a greater involvement by the courts generally in this field, such as would flow from the entrenchment of a right to freedom of expression is another matter. No doubt, the prospect of the courts becoming embroiled in the minutiae of censorship decisions, with judges deciding on questions of contemporary community standards as in the notorious 1965 *Oz Trial*,⁶¹ is one of the factors to be weighed in the case for and against the

⁵⁸ Ibid at 80-81.

⁵⁹ Ibid at 79.

⁶⁰ ‘Shoplifting article’ (1999) 1 *Legal Reporter* SL 3.

⁶¹ *Neville v Lewis* [1965] NSW 1571.

entrenchment of a Bill of Rights in the Australian Constitution. The immediate consequence of the present involvement by the courts is that four former student editors may now face prosecution.⁶²

These considerations also raise the question of the extent, if any, to which members of the Classification and Review Boards do or should receive some guidance in the interpretation of censorship law. This may be especially pertinent to members of the Classification Board itself who, after all, make the vast majority of the thousands of classification decisions which are handed down each year. A feature of the Review Board's decisions in recent years is that they appear to be written with the aid of specialised input from legal officers in the OFLC and, further to this, it can be said that the Review Board's work holds up well to judicial scrutiny. Its reasons for deciding to ban the *Rabelais* article were set out in full in the 1996-1997 Annual Report; indeed, all its decisions are set out in this way. On the other hand, the Chief Censor's reasons for refusing classification to the *Rabelais* article are not found in the annual report. Is there a case for requiring the Classification Board to report its own reasons for decisions in detail, at least on those applications which have gone to review? At present the Classification Board's substantive discussion of censorship decisions in the annual report is limited to a selective survey of 'classification trends and issues'.

The fact that Justice Heerey decided to append the text of the prohibited article to his judgment is one of the oddities of the *Rabelais* case. Adding to its peculiarities, the Australian Government Solicitor's Office then wrote to Justice Heerey questioning the appropriateness, if not the actual legality, of the article's inclusion. This, in turn, has led to the question whether the censorship laws apply to court judgments and the reports of court, as well as to suggestion that the current legislation may need amending to clarify this issue.⁶³

Whether a narrower interpretation of the freedom of political communication, as contemplated by Justice Heerey, has any implications for political dissent in this country remains to be seen. What is not in doubt is that the implied freedom of political communication in the Australian Constitution is altogether different to the kind of constitutional right found under the US Constitution's guarantee of freedom of expression: the US guarantee constitutes a conferral of a private right to individual citizens against the power of the state, whereas Australia's implied freedom operates only to confine legislative power.

3. REGULATING THE INTERNET IN THE UNITED STATES

⁶² P Gregory, 'Student editors vow to fight on', *The Age*, 12 December 1998. It seems their solicitor has asked the Victorian DPP not to continue with the prosecutions.

⁶³ J Hogan, 'Censoring the bench', *Communications Update*, Issue 143, May 1998, pp 18-19. In order to test the legislation, on 23 April 1998 Electronic Frontiers Australia sent a copy of the *Rabelais* judgment to the Classification Board for classification. It seems the Classification Board declined to act on the application - <http://www.efa.org.au/Issues/Censor/oflcappl.htm>

3.1 The first *ACLU v Reno* case⁶⁴

In August 1996 the Research Service published a paper on Internet regulation which took as its focus the then recent decision of the United States District Court in *American Civil Liberties Union v Reno*. That case concerned the constitutional validity of the Federal Communications Decency Act 1996 (CDA), which sought to regulate access by minors to ‘indecent’ and ‘patently offensive’ material on the Internet. In the event, all three justices of the District Court decided that the Act limited forms of speech which were constitutionally protected. It was noted in the Research Service paper that the decision focused attention on several issues of general interest for the debate concerning the censorship of cyberspace.⁶⁵ In particular, the case:

- served as a good basis for the discussion concerning the technical complexities involved in regulating the Internet;
- highlighted the unfairness of vague laws and their potential ‘chilling’ effect on free speech;
- re-asserted the importance of free speech as a fundamental value which is only to be limited, if at all, for the very best reasons and then only by laws which are ‘narrowly tailored’ to achieve their well-defined purpose;
- suggested the difficulties involved in establishing meaningful community standards in any complex society and particularly where the medium at issue reaches across sub-communities, of locality or of taste, so that the standards at issue cannot be ‘controlled’ for regulatory purposes by reference to ‘intended’ or ‘likely’ audiences;
- indicated the problems of scope and reach, as well as of definition, which arise when the criminal law seeks to regulate material which is not sufficiently extreme or problematic to be categorised as ‘obscene’ (to use the US term) or ‘objectionable’ (to use the Australian term). To put it another way, the further down the censorship scheme the criminal law travels the more likely it is to run into problems of unwieldiness, enforcement and fairness;
- established the uniqueness of the Internet and suggested that the law must grapple with the practical, legal and ethical implications which operate in relation to this particular medium of communication, thus accepting the challenge posed by its novelty; and
- in Judge Dalzell’s judgment, in particular, there was a recognition that new forms of communication are to be taken seriously in terms of the protection afforded to them under the First Amendment. For one commentator, ‘This represents a welcome break with the American judicial tradition of underestimating the social significance of new media’.⁶⁶

⁶⁴ 117 S Ct 2329 (1997).

⁶⁵ G Griffith, *Regulating the Internet: American Civil Liberties Union v Reno and other recent developments*, NSW Parliamentary Library Briefing Paper No 19/1996, p 4.

⁶⁶ Rosen J, ‘The end of obscenity’, *The New Republic*, 15 and 22 July 1996, p 6.

The US Government appealed against that decision. In June 1997 the Supreme Court unanimously dismissed the appeal, finding that the key provisions of the CDA abridged the freedom of speech protected by the First Amendment on the grounds of vagueness, that they lacked precision and, as a consequence of this, were too wide ranging. The scope of the Act, it was said was not limited to 'commercial speech or commercial entities'. Moreover, in delivering the opinion of the court, Justice Stevens added that 'the community standards' criterion as applied to the Internet 'means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message'. In the terminology of First Amendment jurisprudence, the CDA was found to be a 'content-based' blanket restriction on speech; it could not therefore be equated with certain 'content neutral' regulations of speech which set limits on the 'time, place and manner' in which certain material is published or broadcast, as may be the case in respect to such 'invasive' material as free-to-air television programs or billboards. The CDA was found to be over burdensome to adults, both in its potential to restrict material available to them and in its tendency to usurp the role of parents in deciding what is and is not appropriate for their children. Put another way, in the US context the CDA went too far in entrenching the state as the 'paternalist protector of minors'.⁶⁷

3.2 The second *ACLU v Reno* case⁶⁸

After these reversals the US Government sought to reformulate its legislative approach to safeguarding minors from unsuitable material on the Internet. This was in the form of the *Child On-Line Protection Act (COPA)*, passed by the US Congress on 7 October 1998 and signed into law by President Clinton on 21 October 1998. According to one commentator, COPA 'has tried to get around the difficulties of the CDA case by creating a definition of harmful material which is remarkable for its specificity'.⁶⁹ Thus, under section 231(e)(2)(B) Congress defined material that is harmful to minors (those under 17 years of age) as:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that -

- (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
- (B) depict, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

⁶⁷ T O'Donnell, 'Between the devil and the deep blue sea? A reflection on the legal dilemmas presented by the Communications Decency Act 1996 and *Reno v ACLU & others*' (1998) 27 *Anglo-American Law Review* 397 at 435; for a detailed commentary on the case see also - GE Simon, 'Cyberporn and censorship: constitutional barriers to preventing access to Internet pornography by minors' (1998) 88 *The Journal of Criminal Law and Criminology* 1015-1048.

⁶⁸ The case may be found at - http://www.epic.org/free_speech/copa/pi_decision.htm

⁶⁹ J Corker, 'Child On Line Protection Act halted for now' (1998) 17(4) *Communications Law Bulletin* 15.

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- (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Under section 231(1) criminal and civil penalties would be imposed on a person who 'knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors...'.⁷⁰ Affirmative defences are available under section 231(c) which provides:

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors -

- (A) by requiring use of credit card, debit account, adult access code, or adult personal identification number;
 (B) by accepting a digital certificate that verifies age; or
 (C) by any other reasonable measures that are feasible under available technology.

In the event, COPA was prevented from coming into operation by a temporary restraining order granted on 19 November 1998 by Judge Lowell Reed Jr of the US District Court. Justice Reed's judgment in the case was handed down on 1 February 1999, in which he found for the plaintiffs, the American Civil Liberties Union, and entered a preliminary injunction against enforcement of COPA. The plaintiffs argued that the law was 'too sweeping and would expose sexually candid sites to criminal prosecution and stiff fines'.⁷¹

In a preface to his decision, Justice Reed noted that the case raised: 'Two diametric interests - the constitutional right of freedom of speech and the interest of Congress, and indeed society, in protecting children from harmful materials - are in tension in this lawsuit'. It was observed that, by typing the word 'dollhouse' or 'toys' into a typical World Wide Web search engine, a child may be able to access sexual images and content. Noted, too, was expert evidence to the effect that 60% of all Internet content originates in the United States, a point which underlines the significance of US decisions in this field for Internet regulation in other jurisdictions, Australia included. Then, in arriving at his conclusion that, for the purposes of entering a preliminary injunction, there was sufficient evidence to suggest that COPA may violate the First Amendment rights of adults, Justice Reed made the following observations:

- consistent with *Reno (No 1)*, Internet regulation of the kind proposed under COPA is a 'content-based' regulation of speech and, as such, is subject to the strictest standards of scrutiny;
- thus, the lower 'context-based' standards of scrutiny which apply to the regulation of general broadcast media or 'commercial' speech do not apply;
- the content of speech may be regulated in order to promote a compelling government interest, but only if the means chosen are 'carefully tailored to achieve those ends', which means they must be the least restrictive to achieve the

⁷⁰ Penalties include a fine of up to \$50,000, imprisonment for up to 6 months, or both.

⁷¹ R Ciolli, 'Bid to shield children from Net porn blocked', *The Sydney Morning Herald*, 3 February 1999.

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- government's goal;
 - the first step in determining whether a statute passes strict scrutiny is to assess the burden the statute places on speech;
 - a statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint of free expression;
 - one such deterrent may be a financial disincentive created by the statute;
 - the relevant inquiry in determining the economic burden in complying with the requirements of the statute is to focus on the 'burden imposed on the protected speech...not the pressure placed on the pocketbooks or bottom lines of the plaintiffs...';
 - strict scrutiny is required, not because of the risk of driving certain commercial Web sites out of business, but the risk of driving this particular type of protected speech from the marketplace of ideas;
 - at the same time, Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards;
 - the ultimate burden of establishing that COPA is the least restrictive means and narrowly tailored to its objective (said to be the regulation of commercial pornographers) rests with the Government. It must show, too, that the benefit gained outweighs the loss of constitutionally protected rights.

Having established this framework, Justice Reed then noted: (a) there was a substantial likelihood that COPA would deter speech by imposing an economic burden in complying with its requirements, in particular as a result of the potential costs involved in installing such devices as credit card or adult verification screens; and (b) his concern that COPA had not chosen the least restrictive means to achieve its purpose. He referred in this regard to comparable cases establishing the proposition that responsibility for making choices about the availability of sexually explicit material to children should rest 'on the shoulders of the parent', and pointing to the dangers of 'over inclusiveness' in statutes of this kind, that is, by limiting the content of the Internet to material which is suitable for children. With these concerns in mind, a preliminary injunction was granted, presumably leaving the actual constitutionality of COPA to be decided at a later time.

3.3 *Mainstream Loudon and Others v Board of Trustees of the Loudon County Library*⁷²

As if the two *ACLU v Reno* cases were not enough to illustrate the difference in approach to censorship laws in Australia and the US, this *Loudon County Library* case makes the difference clearer still. Briefly, the case involved a challenge to a policy of a public library prohibiting the access of library patrons to certain content based categories of Internet publications, including all material 'deemed harmful to juveniles'. It was claimed for the plaintiffs, a Loudon County non-profit organisation, that the policy violated their First Amendment rights 'because it impermissibly discriminates against protected speech on the

⁷² The text of the case can be found at - <http://www.techlawjournal.com/courts/loudon/81123op.htm>

basis of content and constitutes an unconstitutional prior restraint'.⁷³ The Court found:

- that the library was a 'limited public forum' and, as such, the public had to be allowed to exercise whatever rights were consistent with the nature of the library and with the Government's intention in designating the library a public forum;
- the receipt and communication of information via the Internet was consistent with both;
- the library's policy was subject, therefore, to a strict scrutiny analysis and could only be justified if it served a compelling state interest and was narrowly drawn to achieve that purpose;
- the library's policy neither narrowly tailored, nor did it further any compelling government interest;
- moreover, the policy was 'over inclusive' because, on its face, it limited the access of all patrons, adult and children, to materials deemed fit for children;
- also, the library's policy constituted an unconstitutional prior restraint in that it provided inadequate standards for restricting access and inadequate procedural safeguards to ensure prompt judicial review.⁷⁴

3.4 Comments

The interest of these cases derives largely from the fact that so much Internet material originates in the US and, therefore, given the technological realities of cyberspace, what happens there is sure to have important ramifications for Australian Internet regulation. Commenting on the first *ACLU v Reno* decision, Sir Anthony Mason said that it may transpire that 'United States constitutional values will ultimately play a large part in determining what the acceptable international solution is' to the question of Internet regulation.⁷⁵

It is also interesting to point to the contrasting approaches to the protection of freedom of speech in Australia and the US, in particular the different considerations that arise where the protection of minors is concerned. That such protection is a valid interest of the state is recognised in both countries, as well it might be, but the scope and rationale for legitimate state intervention appears to be drawn very differently, with any suggestion of state

⁷³ The doctrine of prior restraint requires that the discretion of the decision-maker be confined by sufficient standards and adequate procedural safeguards. It has been held that 'Permitting government officials unbridled discretion in determining whether to allow protected speech presents an unacceptable risk of both indefinitely suppressing and chilling protected speech' - *Freedman v Maryland* 380 US 51 (1965). Even unprotected speech cannot be censored by administrative determination without sufficient standards and adequate procedural safeguards.

⁷⁴ The case is summarised in - *Bulletin of Legal Developments*, Issues Nos 23 and 24, December 1998, p 278.

⁷⁵ 'Free speech taken for granted', *The Australian*, 11 September 1996.

paternalism being treated with the utmost suspicion in the US. In Australia, on the other hand, the state's role in protecting minors 'from material likely to harm or disturb them' (to use the terminology of the 1995 Classification Act) seems to be accepted more or less as a matter of course. A further contrast to note is the US concern with laws which abridge the First Amendment because they are vague, over inclusive, rely too much on the discretion of administrators and are generally not sufficiently narrowly tailored to achieve their purpose. In Australia, on the other hand, the substantive parts of the censorship laws, as set out earlier in this paper, would appear to exemplify by US standards most, if not all, these characteristics. For example, the prospect of a provision like that banning materials that 'promote, incite or instruct in matters of crime or violence' being judged to be reasonably appropriate and adapted to its achieve its legitimate purpose in the US would be remote, to say the very least. A further reflection is that, at least to the extent to which both jurisdictions make reference to contemporary community standards, Australian and US censorship law and jurisprudence can be said to have certain conceptual similarities in common. However, the application of these conceptual frameworks is radically different in the two countries, to the extent that the decision of the Federal Court in the *Rabelais* case would be almost unrecognisable to a US audience as an instance of freedom of speech jurisprudence, just as the result of the decision in the *Loudon County Library* case would be inconceivable in an Australian context. Paradoxically, it is in the US, where First Amendment restrictions apply, that regulations seeking to control Internet content have been tried, whereas in Australia most jurisdictions, NSW included, have avoided any precipitous move towards legislating in this complex area.

4. REGULATING THE INTERNET IN AUSTRALIA ⁷⁶

4.1 Internet complexities, legislative developments and the Wood Royal Commission

The foregoing discussion of Internet regulation in the US is of course restricted to one aspect of what is a much larger subject. The focus here is on censorship or the regulation of content on the Internet. However, it should be noted that most countries are now grappling with the problems of introducing regulatory schemes to deal with such issues as the protection of privacy in the use of electronic transactions,⁷⁷ as well as to deal with breaches of copyright on the Internet. All these matters are in their way equally important and equally problematic. Certainly, the story of the stop-start attempts to introduce a censorship regime into the world of cyberspace here in Australia suggests that content regulation is no exception to this rule.

⁷⁶ This section of the paper supersedes the July 1997 Update to Briefing Paper No 19/1996, *Regulating the Internet: American Civil Liberties Union v Reno and other recent developments* by G Griffith.

⁷⁷ This is discussed in G Griffith, *Privacy Law Reform: Issues and Recent Developments*, NSW Parliamentary Library Briefing Paper No 20/1998. Note that in January 1999 the Federal Attorney General released a draft Electronic Transactions Bill for comment - 'Encouraging growth in electronic commerce', *Media Release*, 28 January 1999.

In fact, legislation for the purpose of banning objectionable material on the Internet and restricting access to material unsuitable for minors has been introduced in three Australian jurisdictions, Victoria, Western Australia and the Northern Territory.⁷⁸ This legislation is set out in some detail at Appendix A.

Comparing the legislation in question, Graham Greenleaf has drawn out the differences between the various statutes. All are concerned with banning 'objectionable material' and with protecting minors from 'unsuitable material'. However, in the WA model it is a defence to prosecution that a defendant complied with a code of practice relating to computer services, or that the article involved is one of recognised literary, artistic, or scientific merit or a bona fide medical article transmitted for the public good. Whereas in Victoria it is a defence if 'the defendant believed on reasonable grounds that the material was not objectionable material'. For Greenleaf these and other divergences suggested that the real need is for a uniform, national scheme.⁷⁹

In NSW, on the other hand, after the abandonment of the 1996 draft model State and Territory offence provisions, something of a wait and see policy appears to have been adopted in respect to Internet content regulation. The one area which has excited considerable comment and interest is that of the availability of child pornography on-line. In particular, the *Wood Royal Commission into the NSW Police Service* dealt with the issue in some detail, noting among other things that it favoured the introduction into the *Crimes Act 1900* of an offence of publishing child pornography, which should include 'conventional and on-line publication'. It was suggested in this regard that the definition of 'publish' under section 578C (the publication of indecent articles) should be expanded to include:

the use of a computer service by a person to transmit, make available for transmission, obtain possession of, demonstrate, advertise the availability for transmission of, or request the transmission of, an article that is known or reasonably suspected by that person to contain child pornography (as defined in the Crimes Act).⁸⁰

The Royal Commission went on to say that a defence should be available where the person charged shows that the article concerned is of recognised literary, artistic or scientific merit, or a bona fide medical article; and in either case that the relevant activity is justified as being for the public good. Appropriate exemptions should also be available, in the opinion of the Royal Commission, for any service provider or operator of a telecommunications facility,

⁷⁸ Part 6 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Vic); Sections 99-102 of the *Censorship Act 1996* (WA); Part 7 of the *Classification of Publications and Films Amendment Act 1995* (NT).

⁷⁹ Greenleaf G, 'Law in cyberspace' (1996) 70 *Australian Law Journal* 33.

⁸⁰ Royal Commission Into the NSW Police Service, *Final Report, Vol I V: The Paedophile Inquiry*, August 1997, p 1148.

save where that person knowingly permits, offers or encourages its service or telecommunications facility to be used for any such activities.

In addition, the Royal Commission favoured the introduction into the Crimes Act of an offence to proscribe:

the use of an on-line service to make any request, suggestion, or proposal constituting an invitation or encouragement to a person under the age of 16 years to engage in sexual activity (with the maker of that communication, or anyone else) knowing the recipient to be under 16 years of age, or recklessly careless as to whether the recipient is under that age.⁸¹

In response, the Government introduced amendments to section 578C of the Crimes Act under the *Crimes Amendment (Child Pornography) Act 1997*, which created a new offence of publishing child pornography which can be dealt with on indictment. The offence carries a maximum penalty for individuals of a fine of \$110,000 and imprisonment for five years or, in the case of a corporation, a maximum fine of \$220,000. In fact, the amendment does not redefine the word 'publish' in this context, for the reason that the existing definition is already very broad enough to cover Internet offences.⁸² On the other hand, further to an amendment introduced by the Opposition, provision is made for the forfeiture of any computer used to publish child pornography. The 1997 legislation also expanded the operation of section 91G of the Crimes Act, removing the reference to 'employing' a child for pornographic purposes for money, and extending the offence to cover the 'use' of children for pornographic purposes generally.

It should be noted, in addition, that in 1996 the possession of child pornography was made an offence in NSW under section 578B of the Crimes Act which gives police powers to enter and search premises for child pornography.⁸³ However, proceedings for an offence against that section could not be commenced before the article in question had been classified by the Commonwealth Classification Board. In 1998 the section was amended to make it clear that a person can still be arrested for, or charged with, an alleged offence against section 578B before the material concerned is classified.⁸⁴ This anomaly in the scheme came to light as a result of police raids in Sydney against the international on-line paedophile ring, Wonderland, in relation to which an editorial in *The Sydney Morning Herald* commented that 'the board's classification of material should not be a precondition for an arrest on child pornography charges'.⁸⁵ In the event, at least one man has now been

⁸¹ Ibid.

⁸² NSWPD, 26 November 1997, pp 2589-2590.

⁸³ *Crimes Amendment (Child Pornography) Act 1995*.

⁸⁴ *Crimes Legislation Further Amendment Act 1998*.

⁸⁵ Editorial, 'Cybercrime', *The Sydney Morning Herald*, 5 September 1998.

jailed in NSW as a consequence of those police raids,⁸⁶ while in Western Australia at least one offender has been given a two-year suspended sentence.⁸⁷ If nothing else, these cases would seem to suggest that such illegal (objectionable) material as child pornography on the Internet, at least the accessing and down loading of such material, will be found to constitute an offence under relevant State and Territory criminal laws.

Other recommendations of the Wood Royal Commission relevant to the Internet and paedophile activity are set out at Appendix B.

4.2 Australian developments - Senate Community Standards Committee

In June 1997 the Senate Select Committee on Community Standards relevant to the Supply of Services Utilising Electronic Technologies (the Senate Community Standards Committee) released its *Report on Regulation of Computer On-Line Services Part 3*. Among other things, the Committee recommended that all Australian jurisdictions legislate to make it ‘an offence to use a computer service to transmit, obtain possession of, demonstrate, advertise or request the transmission of material which is or is likely to be a Refused Classification or to be in a restricted category because it is likely to cause offence to a “reasonable adult” as described in the National Classification Code’. In other words, material which in the U.S. would be labelled ‘obscene’ (in Australia illegal, ‘objectionable’ material Refused Classification), as well as the US category of ‘indecent’ material (in Australia ‘R’ and ‘X’ restricted material which is likely to cause offence to a reasonable adult) would all be subject to criminal sanctions under a uniform, national regime. However, protection from prosecution would be available to those Internet service providers who, in good faith, restrict access to material that could cause offence.

Further, the introduction of legislation requiring industry codes of practice was recommended by the Senate Community Standards Committee, as was the establishment of an independent complaints handling body. The Committee also recommended that the Australian Broadcasting Authority be directed ‘to investigate the development of reliable age verification procedures for accessing material not suitable for children through on-line services’.

As the submissions to the Committee showed, opinion was highly divided on the issue of Internet regulation, with the views ranging from strong support for the kind of regulatory regime envisaged in the report to more or less absolute opposition to any form regulation. Between the two were those who advocated industry self-regulation. Responses to the report were equally divided. On the critical side, the editorial comment in *The Sydney*

⁸⁶ ‘Porn from net’, *The Sydney Morning Herald*, 4 December 1998. It is reported that Nelson Liam was jailed for at least six months for being in possession of down loaded images.

⁸⁷ A Buggins, ‘Child porn man skips free of court’, *The West Australian*, 16 January 1999. Note that the sentence has been criticised as being too lenient - D Reed, ‘Arena: child porn man deserves jail’, *The West Australian*, 19 January 1999.

Morning Herald stated that the recommendations:

provide a typical example of the political reflex to try to do something, even when that something is impossible to achieve. The policing of the Committee's recommendations, if the Federal Parliament were ever misguided enough to pass legislation entrenching them, would require an army of bureaucrats to supervise what might be shown on perhaps hundreds of thousands of screens. The notion, too, runs counter to the essential element of the Internet, which is to provide access to people in their homes to information held around the world.⁸⁸

The editorial went on to cite the views of the President of the NSW Law Society, Patrick Fair, who reported to have said that the Senate Committee's recommendations impose a much higher benchmark than is set in the US, 'And as the vast majority of Internet content originates in the US, Australians would be able to avoid the restrictions proposed by the Senate Committee'. The editorial concluded:

Forcing providers to verify the age of users through pin numbers is not a solution, either. Older people can make their Internet accounts available to under-18s. The best answer, as it generally is on matters of censorship, is to trust parents to use the special software that screens out unsuitable Internet sites. This is a parental, not a political, problem.⁸⁹

In NSW, having surveyed these developments and some of the controversy arising from them, the Wood Royal Commission concluded:

The political will to intervene in an area as delicate, and as important, as the information industry, particularly one that is emerging and has the complexity and international ramifications of the Internet, is necessarily one of caution. Significant questions need to be resolved, including the definition of which aspects of the activities of service providers, content providers and recipients the Commonwealth and the State and Territories, respectively should regulate.⁹⁰

4.3 Australian developments - proposed national regulatory framework

On 15 July 1997 the Federal Government announced its own approach to Internet regulation, in the form of a proposed national regulatory framework based to a large extent

⁸⁸ 'Interporn', *The Sydney Morning Herald*, 2 July 1997.

⁸⁹ Ibid.

⁹⁰ Royal Commission Into the NSW Police Service, *Final Report, Vo I V: The Paedophile Inquiry*, August 1997, p 1143.

on the ABA's 1996 report, *Investigation into the content of on-line services*. In a joint news release, the Federal Minister for Communications and the Arts and the Attorney-General announced a largely self-regulatory framework designed to 'encourage the on-line service provider industry to develop codes of practice in relation to on-line content, in consultation with the ABA'. The proposed arrangements, it was said, 'recognised that on-line service providers were often not in a position to be aware of all material transmitted through their service, and cannot be held responsible in every stage for material they have not created'. It was anticipated that most on-line service providers would comply with the proposed code of practice and that they would act quickly to resolve complaints. However, as the Attorney General noted, there was still a need for legislative safeguards 'to deal with matters of serious public concern and flagrant breaches of codes or relevant laws within Australia'.⁹¹ An accompanying background document outlined the main elements of the proposed national framework in these terms:⁹²

- Amended of the *Broadcasting Services Act 1992* (BSA) to provide for a self-regulatory framework for on-line service providers (persons supplying carriage services which make content accessible on demand to the public) which is broadly consistent with that applying to narrow casting services in the BSA and to carriage service providers in the *Telecommunications Act 1997*. The proposed amendments will provide:
 - that on-line service providers are subject to rules set out in the BSA;
 - for the development of codes of practice by sectors of the on-line service provider industry in consultation with the Australian Broadcasting Authority (ABA) to govern the operations of that sector;
 - for a complaints mechanism under which any person may complain initially to an on-line service provider regarding a matter set out in a code of practice, with provision for investigation of unresolved complaints by the ABA;
 - for a sanctions regime that includes fines for, serious breaches of the BSA by on-line service providers;
 - that the ABA will be able to seek to have a court order the suspension or termination of a service for persistent or the most serious breaches of the BSA.
- The framework in the BSA will not hold on-line service providers responsible for the

⁹¹ Commonwealth Minister for Communications and the Arts/Attorney General and Minister for Justice, Joint Media Release, *National framework for on-line content regulation*, 15 July 1997.

⁹² Set out at Appendix C is a document from the Department of Communications and the Arts entitled, *Principles for a regulatory framework for on-line in the Broadcasting Services Act 1992*.

content accessed through their service where the on-line service provider is not responsible for the creation of that content; however, on-line service provider rules in the BSA, will require that an on-line service to publish material that is or would be refused classification under Office of Film and Literature Classification guidelines or publication of which would otherwise be illegal under an applicable State or Territory law.

- ▶ The Attorney-General will encourage the co-operative development of uniform State and Territory offence provisions regulating on-line content users, including the publication and transmission of certain material by users; these provisions will not regulate on-line service providers, except to the extent that on-line service provider acts as a content originator.
- ▶ Section 852E of the Federal *Crimes Act 1914* will be amended to put the concurrent operation of State and Territory offence provisions beyond doubt.

At present, little if any of this agenda has been acted upon.⁹³ Indeed, the Federal Government appeared to emphasise a more stringent ‘criminal’ approach to Internet censorship in December 1997, with the Federal Attorney General announcing that the Standing Committee of Attorneys General in Hobart had agreed to ‘Tough laws for offensive Internet material’.⁹⁴ Commonwealth legislation, it was said, would not override State or Territory laws applying to people who place offensive or illegal material on the Internet; nor would it give immunity to Internet Service Providers (ISPs) from liability for State and Territory offences. It was the Commonwealth’s view that ‘ISPs should be criminally liable under State/Territory laws for conduct which goes beyond passively allowing their systems to contain material placed there by others’. The effect of the proposed provisions, the Press Release continued, would be ‘to extend criminal liability beyond the complicity offences, which require some degree of active participation, to a new offence of knowingly, though passively, allowing another person to commit an offence’. However, as if retreating to a more conciliatory approach with the Internet industry, on 19 January 1998 the Federal Attorney General and the Minister for Communications, the Information Economy and the Arts issued a joint press release reaffirming the Government’s ‘commitment to a balanced and effective regulatory regime for the Internet’, thereby avoiding any suggestion of establishing ‘an overly restrictive regulatory regime’. In this press release consultation with the Internet Industry Association was emphasised. So, too, was the determination to prosecute ISPs who ‘actively participate’ in placing illegal material, such as child pornography, on the Internet, a position the Internet industry itself supported.

⁹³ For a commentary on the twists and turns of Federal policy on Internet regulation see - A Lambert, ‘Round and round we go - federal government policy on Internet censorship in Australia’ (1998) 3 *Media and Arts Law Review* 52. Note that a minor amendment to the Commonwealth *Broadcasting Services Act 1992* was made in July 1997 which enabled the Minister to issue a new direction to the ABA to continue its work in the on-line area. However, at this stage the ABA still lacks the legislative power to undertake the more substantive aspects of the work envisaged under the proposed national regulatory framework.

⁹⁴ Media Release, 12 December 1997.

But the press release then closed with the reassuring (for industry ears) statement that:

The Government recognises that a service provider should not face criminal sanctions for the use of the service in circumstances beyond his or her knowledge and control, or where the service provider has taken all reasonable steps to prevent use of the service for the dissemination of illegal material.⁹⁵

Consistent with the above, as well as with the proposed national regulatory framework as outlined in Appendix C to this paper, more recent reports suggest that an Internet regulatory scheme is near completion in which the ABA could fine ISPs who knowingly allow illegal content generated in Australia onto the Internet.⁹⁶

In the meantime, the ABA has published a number of relevant reports, including in October 1997 a pilot comparative study commissioned by UNESCO, *The Internet and Some International Regulatory Issues Relating to Content*,⁹⁷ and in June 1998 the *Report of the Children and Content On-Line Task Force to the ABA*. Of the latter it has been said that 'While the report does not really offer any new insight or surprises, it does confirm the direction the ABA is heading in terms of content regulation. A mix of industry codes, voluntary labelling, education and parental guidance will form the core of their intervention'.⁹⁸ This approach was also reflected in the 30 November 1998 *Joint Statement From Australia and the United States on Electronic Commerce* where it was said:

⁹⁵ 'Regulation of Internet content', *Media Release*, 19 January 1998.

⁹⁶ L Martin, 'Internet firms may be told to remove porn', *The Sydney Morning Herald*, 17 March 1999.

⁹⁷ The report presents a good overview of developments in other countries, including the UK where a largely self-regulatory approach, based on the Internet Watch Foundation, has been established. More up to date information, including the Foundation's March 1998 report, *Rating and Filtering Internet Content: A United Kingdom Perspective*, is available at - <http://www.internetwatch.org.uk>. At the European Union level, in 1996 the European Commission adopted a Green Paper on *The Protection of Minors and Human Dignity in Audiovisual and Information Services*, as well as a *Communication on Illegal and Harmful Content on the Internet*. On 21 December 1998 the Council of the European Union approved an *Action Plan on Promoting Safer Use of the Internet by Combatting Illegal and Harmful Content on Global Networks* which has four 'action lines': creating a safe environment through industry self-regulation; developing filtering and rating systems; encouraging awareness actions; and support actions - <http://www2.echo.lu/iap/pressrel.htm>

⁹⁸ C Connolly, 'ABA interim report on content regulation' (1998) 1 *Internet Law Bulletin* 93 at 94. For the views of the ABA Chairman see - D Flint, 'Regulation of content on the Internet - an Australian perspective' (1998) 1 *Telemedia* 158. Note, too, endorsement by the Minister for Communications of a 'pornography filter' at the launch of Ifilter for the Brisbane software firm Inofpro, a product designed to prevent children (or, for that matter, employees using their employers' computers) from accessing unsuitable sites - 'Creative filter to combat net porn', *Courier Mail* (Brisbane), 2 March 1999; 'Strict rules for TV films', *The Sydney Morning Herald*, 2 March 1999.

Empowerment of users, including parents in relation to material which may be unsuitable for children, should be achieved through information and education, as well as through the availability of filtering/blocking systems or other tools. Industry self-regulation will assist in the process of content labelling. Industry will need to deal appropriately with complaints about prohibited content. We encourage international cooperation between law enforcement authorities to prevent, investigate and prosecute illegal activities on the Internet and the illegal use of e-commerce by criminal and terrorist organizations.⁹⁹

Worth noting, too, is the CSIRO report from June 1998, *Blocking Content on the Internet: a Technical Perspective*, which sets out the technical issues involved in blocking material which is delivered on the Internet. Among its conclusions is that 'content blocking implemented purely by technological means will be ineffective', but that, where there is market demand, ISPs should 'be encouraged to offer differential services to clients, and in particular that services for minors be created, based on access to the Internet through a proxy server'. The report continued: 'ISPs may incur some costs in setting up services such as these. These could either be passed on to clients in increased fees, or an ISP may see some competitive advantage in providing such [sic] environment to clients. Alternatively, the Government may consider providing some incentives to ISPs to offer such differentiated services'.¹⁰⁰ Note that the CSIRO report related only to content which is generated outside Australia, but accessed by Australians. Of locally generated content which is either illegal or unsuitable for minors, the report stated: 'Content blocking that is hosted in Australia should not be handled by blocking techniques. If locally hosted material is illegal, then the hosting organisation (which can easily be identified) is required by law to remove it. If the material is offensive, then the hosting organisation can again be contacted directly'.¹⁰¹ The Federal Government's reported plan to use the ABA to regulate only content generated within Australia would seem to be consistent with the findings of this CSIRO report.

The one definite development which has taken place to date has originated from the Internet industry itself, with the formulation of an Industry Code of Practice.¹⁰² Apparently, the

⁹⁹ This Joint Statement, in turn, reflected the views expressed by Mr Ira Magaziner, senior advisor to President Clinton on policy development, in a speech in 1998 at a conference entitled, *Enabling Australia* - <http://enabling.australia.Telstra.com.au/bkgrnd/trans/tsira,.htm>

¹⁰⁰ CSIRO, *Blocking on the Internet: a Technical Perspective*, June 1998, http://www.noie.gov.au/reports/blocking/index.htm#_Toc422907829. At appendix 5 the report also sets out a proposal for a framework for an international initiative.

¹⁰¹ Ibid.

¹⁰² The full text of the code is available at - <http://www.iaa.net.au>. The code is not yet finalised. As at 12 February 1999 paras 11(5) and (6) have been suspended subject to review. The ABA noted in 1997 that sectors of the Internet industry, including Eros (the association representing the adult entertainment industry) had developed draft codes of practice - ABA, *The Internet and Some international Regulatory Issues Relating to Content*, October 1997, p 36.

intention is that this code should operate initially in a self-regulatory model, but that later it may be adapted to apply to whatever co-regulatory model that emerges once the Federal Government has formulated its policy in this area.

5. CONCLUSIONS

Censorship of the Internet is obviously a key issue for future debate, both at State and Federal level. At this stage, there is no doubt that such illegal (objectionable) material as child pornography on the Internet, at least the accessing and down loading of such material, constitutes an offence under relevant State and Territory criminal laws. The more difficult issue relates to the role played by ISPs in the transmission of such material, especially where the actual complicity of the ISP is in question. Should direct regulation be limited to content generated within Australia itself, as suggested by the Federal Government? It is questions of this sort that any content regulation must answer. But it must also deal with material which, though not illegal, may be deemed 'unsuitable' for minors. In this regard the new laws (following those models already established in three Australian jurisdiction) will almost certainly adopt a form of content regulation which refers to the classification schema administered by the OFLC under the 1995 Classification Act. In its turn, this will then lead us back towards the issues of interpretation and constitutionality discussed in the first part of this paper in relation to the *Rabelais* case.

APPENDIX A

Interstate Legislation Regarding the Internet,
The Wood Royal Commission into the
New South Wales Police Force,
Final Report,
Volume VI, August 1997

APPENDIX B

*Recommendations relating to the
Internet and Paedophile Activity,*
**The Wood Royal Commission into the
New South Wales Police Force,
Final Report,
Volume V: Chapter 16, August 1997**

RECOMMENDATIONS

The Commission recommends:

- ◆ Creation of indictable criminal offences with respect to the following activities (paras. 16.63 - 16.67):
 - the publication of child pornography, including the transmission of the same by means of an on-line service (para. 16.81);
 - the use of an on-line service to encourage a person under the age of 16 years to engage in sexual activity (para. 16.82); and
 - the use of a child for pornographic purposes, whether 'employed' for that purpose or not (para. 16.35).
- ◆ Amendment of the definition of 'listening device' pursuant to the *Listening Devices Act 1984* to incorporate the definition of listening device used in the *Australian Security Intelligence Organisation Act 1979* (Cth) (paras. 16.87 - 16.89).
- ◆ Provision be made under Listening Devices Regulation 1994, to enable a listening device warrant to be obtained in connection with the investigation of offences relating to the possession of child pornography (para. 16.90).
- ◆ Any scheme for regulation of the Internet make provision for Internet service providers to disclose information (the identity of account holders, dates and times of access to on-lines services and the sites accessed) to a law enforcement agency when an authorised officer, employed by the agency, certifies that the disclosure is reasonably necessary for the enforcement of the criminal law (para. 16.91).
- ◆ The grant of legislative authority where a police officer has reasonable cause to suspect that a person has used computer encrypted information in connection with the commission of a criminal offence to require the user to supply the decryption key. Failure to supply the key, in the absence of a lawful excuse, should be made an offence (para. 16.92).
- ◆ Consideration be given by the Commonwealth to the amendment of the following Acts:
 - the *Telecommunications (Interception) Act 1979* (Cth) to include offences relating to the possession, distribution and production of child pornography and offences relating to the sexual assault or exploitation of children as 'Class 2' offences (para. 16.23).
 - the *Crimes Act 1914* (Cth), s. 85ZE to clarify the applicability of that provision to the transmission by means of an on-line service of material which would be regarded by reasonable persons as being, in all the circumstances, offensive (para. 16.63).
- ◆ Support be given to the development of a Website hotline, similar to those developed in Holland and the UK, to which offensive material can be reported, backed by industry, government and law enforcement agencies, with a requirement that the operator of the hotline report paedophile material immediately to a law enforcement agency without first giving any warning or opportunity for removal of the material (paras. 16.36 - 16.38).
- ◆ Support be given to the development of labelling technology, like PICS, which can be combined with appropriate software to limit the material which can be accessed by minors; and the development of reliable and practicable age verification procedures (para 16.77).

- ◆ Action, by way of funding, training and inter-Service co-operation, to enhance the capacity of law enforcement in relation to child sexual abuse, including promotion of the CIT program of the National Police Research Unit, the deployment within the Service of computer investigative specialists and the provision of current technology in the form of software and hardware in aid of investigation (para. 16.94).
- ◆ The offence of possession of child pornography (both for personal use and for sale) be made indictable and the maximum penalties increased (paras. 16.97 & 16.99).
- ◆ Development by the proposed Children's Commission of a program to educate parents as to what is on the Internet in terms of child pornography and the filter and blocking technology available to them (para. 16.104).

APPENDIX C

Principles for a regulatory framework for on-line Services in the Broadcasting Services Act 1992

**Department of Communications and the Arts,
July 1997**

PRINCIPLES FOR A REGULATORY FRAMEWORK FOR ON-LINE SERVICES IN THE BROADCASTING SERVICES ACT 1992

1. The *Broadcasting Services Act 1992* (BSA) should be amended to establish a national framework of effective industry self-regulation for on-line service providers, supervised by the Australian Broadcasting Authority (ABA), in relation to content transmitted through on-line networks.

Objectives

2. The regulatory regime should aim to :
 - (a) encourage on-line service providers to respect community standards in relation to material published by means of their service; and
 - (b) encourage the provision of means for addressing complaints about content published by means of an on-line services; and
 - (c) ensure that on-line service providers place a high priority on the protection of minors from exposure to material which may be harmful to them.
3. The legislation should encourage the development of self-regulatory mechanisms and in particular avoid inhibiting the growth and development of the on-line services industry by placing unreasonable regulatory constraints on the on-line services provider industry regarding the publication and transmission of material.
4. The legislation should codify the responsibilities of an on-line service provider in relation to objectionable content and other content that is of concern to the community accessed by means of the on-line service provider's network.

Structure of regulatory regime

5. The structure of the regulatory regime for on-line service providers should be broadly consistent with the self-regulatory framework applying to broadcasters and narrowcasters under the BSA and that to apply to carriage service providers in the *Telecommunications Act 1997*.
6. The legislation should require a carriage service provider providing access on demand to a member of the public to an on-line service to comply with standard on-line service provider rules set out in the BSA.
7. The legislation should provide for a complaints mechanism under which
 - (a) regarding a matter set out in a code of practice, any person may complain initially to an on-line service provider, with provision for the ABA to adjudicate the complaint if it is not resolved by the on-line service provider.
 - (b) regarding breaches of the BSA or service provider rules, complaints may be made directly to the ABA.
8. Subject to principle 24(a) below, the legislation should not impose liability on on-line service providers with regard to content accessed by means of the relevant on-line service provider's network where the on-line service provider is not responsible for the creation of that content.

9. An on-line service provider who is also acting as a content originator or end-user should be subject to relevant State and Territory laws applying to the publication and transmission of that material by means of an on-line service.

Defining “on-line service providers”

10. An on-line service provider will be a carriage service provider (as defined in the Telecommunications Act) providing access to a member of the public to an on-line service.

Persons not falling within the definition of “on-line service providers”

11. A content originator or end-user of an on-line service not providing access to that on-line service will not be an on-line service provider for the purposes of the regulatory regime.
12. A provider of network infrastructure (carrier) will only be subject to the regulatory regime applying to on-line service providers to the extent that they are also providing access to an on-line service.

Defining “on-line service”

13. An on-line service is a service that makes content accessible on demand to the public by means of a telecommunications network, whether or not the service is available for a fee.
14. The definition of an “on-line service” is intended to encompass only those on-line services with interactive capability, ie where the service allows the multi-directional transfer of content upon demand between an end-user and other end-users connected to the network.
15. The definition of a telecommunications network is that contained in the Telecommunications Act, ie a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy.
16. The definition of a telecommunications network should be technologically neutral and cover on-line services provided by way of fixed links, radiocommunication links, satellite, fibre and cable.

Where a person is unsure which service they are providing

17. The legislation should include a provision modelled on current section 21 of the BSA to allow a person who is providing, or proposing to provide, a service regulated under the BSA to apply to the ABA for an opinion as to whether the service is an on-line service or a broadcasting service.
18. The ABA should have a power, modelled on section 19 of the BSA, to determine, by disallowable instrument, additional criteria or clarify existing criteria in relation to the definition of an on-line service.

Defining “content”

19. “Content” includes material transmitted in the form of
 - (a) text;
 - (b) data;
 - (c) speech, music or other sounds;
 - (d) graphics or other visual images, whether static, moving or otherwise;
 - (e) software; and
 - (f) such other forms of content that are determined by the Minister by disallowable instrument.

Services excluded from the definition of “on-line service”

20. An on-line service should not include:
 - (a) a service which transmits material solely by facsimile or voice telephony;
 - (b) a service which is not accessible to the public, such as an intranet;
 - (c) a service which only carries private or restricted distribution communications such as e-mail messages;
 - (d) a broadcasting or narrowcasting service within the definition of the BSA; and
 - (e) such other services that are determined by the Minister by disallowable instrument.

Defining on-line service provider rules

21. On-line service provider rules are generic provisions in the BSA which apply to the conduct of all on-line service providers.
22. Additional on-line service provider rules may be determined by the ABA consistent with the objects of the BSA. Such determinations are to be subject to public consultation and to be disallowable instruments.
23. The ABA should not be able to determine an on-line service provider rule that requires an on-line service provider to receive prior approval from the ABA or any other body in relation to particular content (see section 129 BSA).
24. On-line service provider rules should include:
 - (a) that on-line service providers not knowingly allow a person to use their service to publish content that would be refuse classification under OFLC guidelines or otherwise be illegal under a State or Territory law;
 - (b) that an on-line service provider not use an on-line service in the commission of an offence against another Act or a State or Territory law;
 - (c) that an on-line service provider comply with any standards determined by the ABA;
 - (d) that an on-line service provider comply with any additional on-line service provider rules determined by ABA.

Defining ABA standards

25. ABA standards are standards determined by the ABA that are to apply to on-line service providers or a sector of on-line service providers in relation to matters to be covered by codes of practice where a code or practice fails or no code has been developed. Such determinations are to be subject to public consultation and be disallowable instruments (see section 122 BSA).

Codes of practice

26. The legislation should encourage groups representing the on-line service provider industry to comply with codes of practice formulated by the industry in conjunction with the ABA and other relevant bodies in relation to matters set out in the legislation (see Part 6 of the Telecommunications Act and section 123 of the BSA).
27. The ABA may define industry sectors for the purposes of registering codes of practice.
28. A code of practice may apply to the whole on-line service provider industry or an industry sector.
29. The ABA must register a code or practice for the industry or an industry sector where it is satisfied that the code provides appropriate community safeguards and there has been consultation on the proposed code, provided that no previous code of practice has been registered for the industry or that specific sector.
30. No more than one code of practice is to be applicable to any on-line service provider.
31. Where a complaint is made regarding an on-line service provider (see principles 38-42) who is not a member of an industry group that has developed a registered code, the ABA may declare a registered code that is to apply to that on-line service provider. Such a declaration is to have no effect until the affected on-line service provider is notified.
32. The ABA may request a body or association representing a particular sector to develop a code of practice in relation to a particular matter or matters to be applicable to that sector.
33. If the request referred to in principle 32 is not complied with within a specified period, the ABA may determine an ABA standard about the matter or matters to apply to the specified sector of service providers.
34. The ABA may determine a standard on a particular matter or matters where the ABA is satisfied that an existing code does not provide appropriate community safeguards on the matter. Before determining a standard in these circumstances, the ABA must request the body or association that developed the code to address the deficiencies in the code.
35. The ABA should be required to seek public comment before determining a standard on a particular matter (see section 126 BSA); ABA determined standards are to be disallowable instruments.

Matters contained in codes of practice

36. The BSA should set out matters to be addressed in codes of practice, without limiting the matters to be covered, subject to principle 37. The matters which may be covered by codes of practice include:
- (a) reasonable procedures to prevent the on-line publication of content that would be refused classification, in particular:
 - (i) the removal of material that is or would be refused classification under OFLC guidelines or otherwise be illegal under an applicable State and Territory law from the on-line service provider's system where the relevant on-line service provider is made aware of the existence of the objectionable material being hosted on their system; and
 - (ii) to encourage a service provider who is made aware of material that is or would be Refused Classification under OFLC guidelines or otherwise be illegal under an applicable State and Territory law hosted by another service provider to notify that service provider of the existence of that material;
 - (b) ensuring that on-line service providers encourage content providers to display appropriate warnings on material that would be classified unsuitable for minors under OFLC guidelines;
 - (c) means to ensure on-line access by minors is with parental or other supervisor permission;
 - (d) information for content originators in relation to their responsibilities under relevant Commonwealth, State and Territory law;
 - (e) methods for the handling and resolution of complaints from the public about content accessed on-line (including reasonable procedures to deal with complaints concerning material originating outside of Australia) or compliance with other matters contained in the code or practice;
 - (f) the development of an Australian on-line labelling scheme;
 - (g) the provision of adequate information to users concerning the availability, application and appropriate use of content filtering software;
 - (h) such other matters relating to on-line content as are of concern to the community.

Matters excluded from codes of practice

37. Codes of practice should not encompass carriage service issues covered by the Telecommunications Act.

Complaints procedures

38. The complaints procedure should be modelled on current Part 11 of the BSA.
39. Any person may complain to an on-line service provider in relation to a breach of a registered code of practice.
40. If the relevant on-line service provider does not reply to a complaint within the specified timeframe or does not provide a satisfactory response to the complaint, the person should be able to request the ABA to investigate the matter.
41. Where so requested, the ABA should be required to investigate the complaint, except where the complaint is frivolous or vexatious, or where the on-line service provider has already taken remedial action.
42. A complaint relating to offences under the BSA or a breach of an on-line service provider rule may be made directly to the ABA.

Breaches of on-line service provider rules and codes of practice

43. The legislation should provide that it is an offence to breach on-line service provider rules and that a person who continues to breach the service provider rules is guilty of a separate offence for each day the breach continues (see section 139 BSA).
44. The ABA should be allowed to issue a notice directing an on-line service provider to take action to ensure that the service is provided in a way that conforms to standard service provider rules or a registered code of practice. Failure to comply with such a notice is to constitute an offence. (see sections 141 and 142 BSA).
45. If the ABA is satisfied that a person is providing an on-line service other than in accordance with on-line service provider rules, the ABA should be able to apply to a court for an order requiring the on-line service to cease, or to be suspended for a specified period (it is intended that an application to a court by the ABA would only be made in extreme circumstances). The ABA should be able to seek that the court apply a cessation or suspension order to an individual or group of individuals and their associates or to an incorporated body, its directors and their associates.

Role of ABA

46. The legislation should give the ABA the following discretionary powers and functions in relation to the regulation of on-line services;
 - (a) giving an opinion as to whether a service or a proposed service is a broadcasting service or an on-line service for the purposes of the BSA;
 - (b) determining additional criteria or clarifying existing criteria in relation to the definition of an on-line service;
 - (c) determining additional on-line service provider rules;
 - (d) determining ABA standards;
 - (e) registering industry codes or practice;

- (f) defining industry sectors or classes of on-line services for the purposes of registering codes of practice.
- (g) declaring that a particular registered code is to apply to a particular on-line service provider;
- (h) issuing notices directing an on-line service provider to comply with a service provider rule or code of practice;
- (i) applying to a court for an order of cessation or suspension of a service where an on-line service provider is in breach of on-line service provider rules;

47. In addition, the ABA will:

- (a) monitor the operation of codes of practice, including ensuring that any registered codes provides appropriate community safeguards and advises of the options available to users, parents and guardians for the protection of minors from material which may be harmful to them;
- (b) investigate and resolve complaints concerning compliance with registered codes of practice where an on-line service provider has either failed to respond to a complaint from a person or where a person considers the response from an on-line service provider to be unsatisfactory;
- (c) investigate complaints relating to breaches of on-line service provider rules;
- (d) exercise its functions and powers in relation to on-line service providers in a manner consistent with the objects, regulatory policy and the role of the ABA (as amended to include on-line service providers) set out in sections 3, 4 and 5 of the BSA;
- (e) co-ordinate community education programs in relation to on-line services, in consultation with relevant industry and consumer groups and government agencies;
- (f) conduct or commission research into issues relating to on-line services;
- (g) liaise with other regulatory bodies internationally regarding co-operative arrangements for the regulation of on-line services, including collaboration on the development of multilateral codes of practice and the development of on-line content labelling techniques.