AUSTRALIA'S NATIONAL CLASSIFICATION SYSTEM FOR PUBLICATIONS, FILMS AND COMPUTER GAMES: ITS OPERATION AND POTENTIAL SUSCEPTIBILITY TO POLITICAL INFLUENCE IN CLASSIFICATION DECISIONS

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The purpose of this article is to examine Australia's regulatory system for the classification of publications, films and computer games, the National Classification System ('NCS'), and to question whether its classification decision process is susceptible to political influence. Formed in 1995 as a cooperative scheme between the Commonwealth, States and Territories, the NCS was created to overcome problems associated with former classification schemes that operated on a non-national basis in each Australian jurisdiction. It is argued that, although the current system is superior to the ones of the past, it still allows, or at least perceivably allows, political influence in censorship decision-making, as was historically the case. This is because documents used by the Classification Board and Classification Review Board ('the Boards') to make classification decisions are ambiguous and often inconsistent, and, even with redrafting, would remain so without the benefit of judicial precedent. The ambiguity created by the classification documents legitimates the possible exercise of political influence through a variety of means.

I INTRODUCTION

Although 'censorship' and 'classification'[1] are terms widely and fiercely contested in their meaning and application in Australia, there has been to date relatively little academic attention paid to the workings of the key feature of this country's

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1 The more traditional term 'censorship' has now been replaced in Australian media regulation parlance by 'classification': see, eg, Des Clark, 'Does Art Censorship Create a More Decent Society?' (Speech delivered at the Melbourne Workers Theatre, Melbourne, 23 July 2005) 2.

classification framework, the NCS. The NCS is responsible for classifying, and regulating the dissemination of, publications, films and computer games. The purpose of this article is to redress somewhat this relative paucity of analysis, with a particular emphasis on the integrity of the process of classification decision-making undertaken under the system's scope. There are three reasons for this focus. First, classification decisions by the Boards are often highly controversial and thus attract much publicity.[2] Secondly, the current system is now arguably the normative centrepiece of Australia's censorship system given the use of NCS concepts and expertise by classification institutions in other areas.[3] Thirdly, the classification and censorship of films, publications and computer games now largely take place free from the previous check of judicial scrutiny: although the common law offence of obscene libel[4] is now codified in all Australian jurisdictions with the exception of the Australian Capital Territory,[5] it is today of marginal relevance as obscenity cases concerning material (as opposed to behaviour) are now rarely brought before the courts.[6]

This article argues that, although the current system is superior to earlier models, the NCS still allows, or at least perceivably allows, political influence in censorship decision-making.[7] Part II will give a detailed account of the current operation of the NCS; Part III will highlight aspects of the NCS that allow for the operation of political influence; and Part IV will offer some suggestions for reform.

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2 See, eg, the nationwide banning of the 2002 film *Ken Park* directed by Larry Clark and Edward Lachman (see, eg, Philippa Hawker, 'Festival Movie Banned from Australian Screens', *The Age* (Melbourne), 4 June 2003, 6); the South Australian banning of the 2004 film *9 Songs* directed by Michael Winterbottom (see, eg, Nick Henderson, 'Sorry, This Film is Banned', *The Advertiser* (Adelaide), 20 August 2005, 13); the 2008 Bill Henson 'controversy' (see, eg, David Marr, 'Board Clears Henson Images', *The Sydney Morning Herald*, 2 June 2008, 3); and the 2006 nationwide banning of two Islamic publications on the instigation of the then Commonwealth Attorney-General, Mr Philip Ruddock (see, eg, 'Two Islamic Books Banned for Inciting Terrorism', *Australian Associated Press General News*, 11 July 2006). This banning of the Islamic works was upheld by the Federal Court of Australia: *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108. Concerned that the Classification Review Board still permitted six other works, Mr Ruddock introduced in September 2007 the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*, which created *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ('*Classification Act*') s 9A(1), which states that a 'publication, film or computer game that advocates the doing of a terrorist act must be classified RC' (refused classification, ie, banned).

3 See, eg, import restrictions imposed by the Australian Customs Service ('ACS') (see below n 27) and Internet content regulation (see generally *Broadcasting Services Act 1992* (Cth) sch 5).

4 See generally Des Butler and Sharon Rodrick, *Australian Media Law* (3rd ed, 2007) 365-6; Scott Beattie and Elizabeth Beal, *Connect + Converge: Australian Media and Communications Law* (2007) 179; *Crowe v Graham* (1968) 121 CLR 375, 379 (Barwick CJ), 399 (Windeyer J).

5 See Paul Mallam, Sophie Dawson and Jaclyn Moriarty, *Media and Internet law and Practice* (revised ed, 2005), vol 1 (at update 41) ¶1.6090.

6 Ibid (at update 41) ¶1.5790. See also Bede Harris, 'Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia' (2005) 8 *Canberra Law Review* 25, 48.

7 Here, 'political influence' will be used to denote any ulterior motive for suppressing non-criminal material that should not be considered in the execution of a public classification duty. Such a motive could be based on personal religious, moral or ideological values of the decision-maker or a pressure group.

II THE NATIONAL CLASSIFICATION SYSTEM: ITS CONSTITUENT PARTS AND OPERATION

Created by the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ('*Classification Act*') and complementary State and Territory legislation,[8] the NCS has, since July 2007, been overseen by the relatively new Classification Operations Branch of the Commonwealth Attorney-General's Office. Actual censorship decisions that attempt to regulate access to content, on the other hand, are made by the Boards. The Boards in their current form have been in operation since the creation of the NCS in 1996.

Key features of the NCS will now be examined in more detail.

A Foundational Instruments

The NCS is a cooperative scheme between the Commonwealth and States and Territories. The primary constitutional basis of the Commonwealth's enacting of the *Classification Act* is the s 51(xxxvii) referral power, which allowed the Commonwealth to enter into a cooperative scheme with the States, who in turn retained their pre-federation powers to classify material within their borders.[9] This was done in a 1995 Intergovernmental Agreement[10] in which the participating States and Territories[11] agreed to the Commonwealth's making classifications on their behalf, and to pass complementary enforcement laws.[12] These arrangements are enshrined in the *Classification Act*.[13] Furthermore, the parties also agreed that Commonwealth classifications should be made according to classification guidelines and a classification code,[14] which would be amended only by unanimous agreement[15] between the

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8 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ('*NSW Act*'); *Classification of Computer Games and Images Act 1995* (Qld) ('*Qld Games Act*'); *Classification of Films Act 1991* (Qld) ('*Qld Films Act*'); *Classification of Publications Act 1991* (Qld) ('*Qld Publications Act*'); *Classification (Publications, Films and Computer Games) Act 1995* (SA) ('*SA Act*'); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) ('*Tas Act*'); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ('*Vic Act*'); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) ('*WA Act*'); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ('*ACT Act*'); *Classification of Publications, Films and Computer Games Act 1985* (NT) ('*NT Act*').

9 See the *Colonial Laws Validity Act 1865* (Imp) s 5 for the wide-ranging powers of the colonial (now State) legislatures.

10 *Agreement Between the Commonwealth of Australia the State of New South Wales the State of Victoria the State of Queensland the State of Western Australia the State of South Australia the State of Tasmania the Australian Capital Territory and the Northern Territory of Australia Relating to a Revised Co-operative Legislative Scheme for Censorship in Australia* (1995), <http://www.classification.gov.au/resource.html?resource=215&filename=215.pdf> at 13 March 2009 ('IGA'). This was recommended in 1928: Commonwealth, Royal Commission on the Moving Picture Industry in Australia, *Report* (1928) 31 (recommendation 39).

11 Tasmania and Western Australia initially declined to join the NCS in relation to publications. However, Tasmania joined in 2001 (see *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (Tas)), and Western Australia in 2003 (see *Censorship Amendment Act 2003* (WA)).

12 IGA, above n 10, [4] (see above n 8 for the participating legislation).

13 *Classification Act* ss 3, 4. See also Harris, above n 6, 48.

14 See below Part II(C).

participating ministers.[16] Thus, in its conception, the NCS is the result of political compromise.

B Commonwealth Bodies

The Classification Operations Branch replaced the Commonwealth's Office of Film and Literature Classification ('OFLC') as the main administrative body of the NCS. It has been argued that this removed a previous check on political decision-making as, unlike the Classification Operations Branch, the OFLC was a separate governmental body.[17] Nevertheless, the support role of the Classification Operations Branch is much the same as its predecessor.[18] Oversight of the whole NCS is exercised by the participating ministers at the Standing Committee of Attorneys-General (Censorship) that meets at least twice a year.[19] Commonwealth censorship policy, however, is the responsibility of a separate branch of the Commonwealth Attorney-General's Department, the Classification Policy Branch in the Legal Services and Native Title Division.[20]

Actual classification decisions are made by the Boards,[21] both of which are independent statutory bodies.[22] First instance classifications are made by the Classification Board[23] when publishers or distributors submit a submittable

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15 IGA, above n 10, [9]. See also *Classification Act* s 6. The guidelines are periodically revised through 'consultation with members of the public': *Guidelines for the Classification of Publications 2005* (Cth) [3].

16 The participating ministers are: the Attorneys-General for the Commonwealth, New South Wales, South Australia, Tasmania, Victoria, Western Australia and the Australian Capital Territory; the Minister for Tourism, Fair Trading and Wine Industry Development for Queensland; and the Minister for Justice and Attorney-General for the Northern Territory: Attorney-General's Department, *National Classification Scheme* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Classificationpolicy_Nationalclassificationscheme> at 13 March 2009.

17 See, eg, Michaela Boland, 'Censorship: Now You See It, Now You Don't', *The Australian Financial Review*, 14 March 2007, 57.

18 Attorney-General's Department, *Classification Operations Branch* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Organisational_StructureCivil_Justice_and_Legal_Services_GroupClassification_Human_Rights_and_Copyright_DivisionClassification_Operations_Branch> at 13 March 2009.

19 Ibid.

20 See Attorney-General's Department, *Classification Policy Branch* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Organisational_StructureCivil_Justice_and_Legal_Services_GroupClassification_Human_Rights_and_Copyright_DivisionClassification_Policy_Branch> at 13 March 2009.

21 The legislative provision empowering the Boards to carry out their classification functions is *Classification Act* s 4, which permits them to 'exercise powers and perform functions' that 'are conferred on them under an arrangement between the Commonwealth and a State or the Commonwealth and the Northern Territory'. This is unusual in that the powers of classification and review of classification are not further enunciated in the legislation.

22 'A statutory body is simply a body established by statute': Christopher Enright, *Judicial Review of Administrative Action* (1985) 21. See also Attorney-General's Department, *Classification Policy* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Classification_policy> at 13 March 2009.

23 The Classification Board is created by *Classification Act* pt 6 div 1. Classifications at first instance are made under *Classification Act* pt 2 div 2 (see below Part II(C)).

publication, or a non-exempted film or a computer game for classification, or are directed to do so.[24] A 'publication' is defined in the *Classification Act* as 'any written or pictorial matter'; a 'film' as 'a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image … can be produced'; and a 'computer game' as 'a computer program and any associated data … that allows the playing of an interactive game'.[25] The Classification Board also provides classification advice to enforcement agencies (for example, by classifying child pornography material for a criminal prosecution),[26] the Australian Communications and Media Authority ('ACMA') on Internet content, and the Australian Customs Service ('ACS').[27] Permanent Classification Board members are appointed by the Governor-General on the recommendation of the Commonwealth Attorney-General. Appointees should be 'broadly representative of the Australian community',[28] and the Commonwealth Attorney-General must consult with other participating State and Territory ministers before making such a recommendation.[29] Members, who can number up to 20, include a Director, Deputy Director, senior classifiers and other board members.[30] They can sit on the Classification Board for no more than seven years,[31] presumably to guard against 'ossification and isolation from the community'.[32]

The Classification Review Board[33] has similar requirements for the selection of members,[34] and the same maximum tenure.[35] The role of the Classification Review Board is to review classification decisions. Review requests are also regulated by the

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24 See below n 44-6 and accompanying text.

25 *Classification Act* ss 5 (for 'publication' and 'film'), 5A(1) (for 'computer game'). If a music product has multimedia content, it will be classified as either a film or computer game, and hence become subject to the NCS: Classification Website <http://www.classification.gov.au/special.html?n=273&p=197> at 13 March 2009.

26 The Classification Board can provide an evidentiary certificate to law enforcement bodies making a prosecution regarding objectionable material: *Classification Act* s 87.

27 Classification Website <http://www.classification.gov.au/special.html?n=250&p=58> at 13 March 2009. The ACS also has a residual classification power under *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4A, which prohibits the importation of 'objectionable goods'. Such goods include publications, films and computer games that are classified RC (see below Part II(C)), or, in the case of unclassified material, would be classified RC. ACS staff receive NCS training to help achieve consistent classification standards: email from John Peterson (Community Protection, Trade Policy and Regulation Branch, Australian Customs Service) to Michael Dunstan, 14 May 2007.

28 *Classification Act* s 48(2).

29 *Classification Act* s 48(3). Note that this does not include temporary members (see below Part III(B)).

30 *Classification Act* ss 46, 47. Profiles of current members are available at Classification Website <http://www.classification.gov.au/special.html?n=259&p=68> at 13 March 2009.

31 *Classification Act* s 51(3).

32 Gareth Griffith, 'Censorship Controversies: Asking Questions about the OFLC' (2000) 4(1) *Telemedia* 1, 1.

33 The Classification Review Board is created by *Classification Act* pt 7 div 1.

34 *Classification Act* s 74. Profiles of current members are available at Classification Website <http://www.classification.gov.au/special.html?n=261&p=67> at 13 March 2009. The Classification Review Board must have at least three, but no more than eight (or such higher number as prescribed), members: *Classification Act* s 73(c).

35 *Classification Act* s 76(3).

Classification Act.[36] This involves a full merits review, and is hence made *de novo*.[37] Standing to request a review is only available to the Commonwealth Attorney-General, the original applicant for classification or the work's publisher, and a 'person aggrieved by the decision'.[38] This issue will be explored further in Part III(D) below.

C Classifications

Once an application for the classification of a publication, film or computer game is made,[39] the Classification Board will, unless an exemption applies, assign to the work a classification listed in the *Classification Act*.[40] Films must usually be classified before they can be legally exhibited (for example, in a cinema), sold or hired out.[41] Computer games must also be usually classified if they are sold, hired or demonstrated in public.[42] However, given the costs associated with obtaining a classification decision,[43] films and computer games can be exempt from classification if they fall within one of 13 categories for films, or five categories for computer games.[44]

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36 *Classification Act* pt 5.

37 *Classification Act* s 44(1). See also Classification Website <http://www.classification.gov.au/special.html?n=251&p=62> at 13 March 2009. The Classification Board makes around 6 500 decisions a year whilst the Classification Review Board makes around 30. Since 2000, these review decisions have been made public at Classification Website <http://www.classification.gov.au/special.html?n=262&p=66> at 13 March 2009. The Classification Board, however, does not publish its decisions online.

38 *Classification Act* s 42. Thus, a publisher unhappy with a decision can either appeal, or resubmit the work with the sections in question removed: John Dickie, 'Future Directions in Film and Literature Classification' (1989) 1 *Current Issues in Criminal Justice* 107, 109. The second option is controversial as audiences need not be made aware of the cuts, meaning that, indirectly, the NCS could remove material unbeknownst to audiences: Paul Byrne, 'In the Realm of the Censors' (1997) 132 *Communications Update* 14, 14.

39 Applications for classification for publications, films and computer games are made under *Classification Act* ss 13, 14, 17 respectively.

40 *Classification Act* s 7.

41 Formerly, a film needed separate classifications for exhibition and hire/sale, even if the film was exactly the same in both cases: *Classification Act* s 14(3), repealed by *Classification (Publications, Film and Computer Games) Amendment Act 2007* (Cth) s 3; sch 4(1). This repeal was undertaken with the objective of 'standardising classifications regardless of platform': Explanatory Memorandum, Classification (Publications, Film and Computer Games) Amendment Bill 2006 (Cth) 22.

42 See especially Classification Website <http://www.classification.gov.au/special.html?n=253&p=78> at 28 July 2007. The legislative provisions pertaining to this requirement are part of the State and Territory enforcement legislation.

43 Fees are tabled in the *Classification (Publications, Films and Computer Games) Regulations 2005* (Cth), and range between A$520–1840 for publications (reg 5; sch 1 pt 1); A$510-5090 (reg 7; sch 1 pt 2; sch 1 pt 3) for films; and A$470-2040 for computer games (reg 8; sch 1 pt 4). For review fees, see below n 155 and 166 and accompanying text.

44 *Classification Act* s 5B. According to Classification Website <http://www.classification.gov.au/special.html?n=281&p=193> at 28 July 2007, the exemption system enables limited-market products to avoid the otherwise prohibitive costs of classification. However, the exemption does not apply if the film or computer game would be rated M or above: *Classification Act* s 5B(3)(d). Those wishing to obtain an exemption can do either nothing (*Classification Act* s 5B(1), (2)), or obtain an exemption certificate (*Classification Act* pt 2 div 6).

Furthermore, films displayed at film festivals can also be exempt.[45] Publications, on the other hand, are not subject to the same compulsory classification system as films and computer games. Rather, only a 'submittable' publication needs to be classified before it is sold or displayed.[46] A submittable publication is defined as one that is likely to be refused classification, offend a reasonable adult if it is classified unrestricted, or be unsuitable for minors.[47] To reduce non-compliance with the publications system, the Director of the Classifications Board is empowered to call in an unclassified publication for classification in the Australian Capital Territory directly,[48] and in the other States and Territories through their respective legislative provisions.[49] Similar provisions also exist for the calling in of unclassified films and computer games, as well as for the calling in of advertisements of works and already-classified works for reclassification.[50]

Some classifications provide advisory guidelines for audience age. 'Restricted' classifications, on the other hand, impose legal restrictions on audience ages (MA 15+ requires audiences to be either 15 years old or accompanied by an adult, whilst R 18+ and X 18+ require audiences to be 18 years old), or ban the sale/rental/hire/public exhibition of the work (RC). [51] The classifications are:

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45 The Film Festivals Exemption Scheme exempts films at film festivals unless, in the opinion of the Director of the Classification Board, the material would be classified X 18+ or RC: see Office of Film and Literature Classification, *Film Festival Guidelines* (2004), <http://www.classification.gov.au/resource.html?resource=290&filename=290.pdf> at 28 July 2007 especially [8]-[10]. See also Classification Website <http://www.classification.gov.au/special.html?n=284&p=116>at 28 July 2007; Clark, above n 1, 2. Furthermore, the Sydney Film Festival has been given the ability to screen RC, or likely to be RC, films, by the New South Wales Government's 2004 *Sydney Film Festival Direction*: Classification Website <http://www.classification. gov.au/special. html?n=284&p=116> at 28 July 2007.

46 See especially Classification Website <http://www.classification.gov.au/ special.html?n=272&p=194> at 28 July 2007. Given that many such publications are serial magazines, an application for a serial classification declaration can be made under the *Classification* Act s 13(2). This costs less than getting each issue classified: Classification Website <http://www.classification.gov.au/special.html?n=300&p=161> at 28 July 2007. See also *Classification (Serial Publications) Principles 2005* (Cth), <http://www.classification.gov.au/resource.html?resource=662&filename=662.pdf> at 28 July 2007.

47 *Classification Act* s 5.

48 *Classification Act* s 23.

49 *NSW Act* s 46; *Qld Publications Act* s 9A; *SA Act* sch 1 s 1; *Tas Act* s 64; *Vic Act* s 60; *WA Act* s 102A; *NT Act* s 50ZM. The Tasmanian and Western Australian provisions also empower their participating ministers to call in publications, whilst the Queensland provision empowers Queensland classification officers to do the same. See also Mallam, Dawson and Moriarty, above n 5, (at update 41) ¶1.5990.

50 See, eg, *NSW Act* ss 46A (films), 47 (computer games), 48 (advertisements), 48A (reclassification).

51 See *Classification Act* s 42(5).

(1) For submittable publications:
   (a) **Unrestricted**
   (b) **Category 1** restricted
   (c) **Category 2** restricted
   (d) **RC** Refused Classification

(2) For films:
   (a) **G** General
   (b) **PG** Parental Guidance
   (c) **M** Mature
   (d**) MA 15+** Mature Accompanied
   (e) **R 18+** Restricted
   (f) **X 18+** Restricted
   (g) **RC** Refused Classification

(3) For computer games:
   (a) **G** General
   (b) **PG** Parental Guidance
   (c) **M** Mature
   (d**) MA 15+** Mature Accompanied
   (e) **RC** Refused Classification[52]

Each of the ratings with the exception of RC have an assigned symbol (film and computer games share the same set)[53] that must be included with the compulsory issuing of a classification certificate once a classification decision is made.[54] The classification must be accompanied by consumer advice if a film or computer game is given a classification from PG to X 18+.[55]

Classification decisions must be made according to Part 2 Division 2 of the *Classification Act*. This requires the Boards to first consider the moral standards of 'reasonable adults'; the artistic or educational value of the work; the general character of the work; and the likely audience.[56] The Boards must in addition consider whether

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52 Controversially, as computer games cannot be given R 18+ or X 18+ classifications, any such game is therefore refused classification. A March 2008 proposal to introduce an R 18+ category has currently stalled: see Jason Hill, 'Setback for Adults-only Games', *The Age* (Melbourne), 28 January 2009, Green Guide 36.

53 These are made according to *Classification Act* s 8. For the markings themselves, see Classification Website <http://www.classification.gov.au/special.html?n=455&p=134> at 28 July 2007.

54 *Classification Act* s 25. Once a work has been classified, details of the classification can be accessed via the Classification Database <http://www.classification.gov.au/special.html?n=44&p=155> at 28 July 2007.

55 Advice for G films and computer games and Unrestricted publications is optional: *Classification Act* s 20. A review of film and computer game consumer advice was conducted in 2005: see Office of Film and Literature Classification, *Review of Consumer Advice for Films and Computer Games* (2005), <http://www.classification.gov.au/resource.html?resource=519&filename=519.pdf> at 28 July 2007.

56 These matters are listed under *Classification Act* s 11.

the work advocates terrorism.[57] Finally, they must make their decisions in accordance with the National Classification Code ('Code'), the Guidelines for the Classification of Films and Computer Games 2005, and the Guidelines for the Classification of Publications 2005 ('Guidelines').[58] All three documents provide the Boards with guidance for classification decisions, with the emphasis being on 'community standards' (the Code and Guidelines involve public participation in their formulation).[59] The Code outlines the following four principles:

(a) adults should be able to read, hear and see what they want;[60]
(b) minors should be protected from material likely to harm or disturb them;
(c) everyone should be protected from exposure to unsolicited material that they find offensive;
(d) the need to take account of community concerns about: (i) depictions that condone or incite violence, particularly sexual violence; and (ii) the portrayal of persons in a demeaning manner.[61]

The Code then lists, in general terms, the subject material each classification level can contain. This must be read in conjunction with the Guidelines, which further expand on these descriptions.[62] The process in which these descriptions are used is based on an assessed 'level of impact' of the work (that is, 'very high' impact will often warrant an RC classification), and the quantitative and qualitative presence of the 'six classifiable elements' (themes, violence, sex, language, drug use and nudity).[63] The effect of both of these aspects on classifications is also dependent on the context in which they appear and the sequencing or ordering of parts or scenes of the work.[64] However, specific depictions such as detailed instruction or promotion in matters of crime or violence; minors engaged in sexual activity; incest and bestiality; and sexual violence will normally result in an automatic RC classification.[65]

D State and Territory Legislation

Enforcement of classifications falls to the States and Territories in accordance with the 1995 intergovernmental agreement.[66] However, Queensland, South Australia,

57 *Classification Act* s 9A; see above n 2. This section is unique in the *Classification Act* in that it is the only section to explicitly list details for the classification of materials, as opposed to making mention of general guidelines or referring to other documents.
58 *Classification Act* ss 9, 12.
59 See below n 117 and 125 and accompanying text.
60 This is similar to the tempering principle enunciated in the common law cases on obscene and indecent material. See, eg, *Popow v Samuels* (1973) 4 SASR 594, 607 (Bray CJ); Butler and Rodrick, above n 4, 371-2.
61 *National Classification Code 2005* (Cth) [1].
62 See generally *Guidelines for the Classification of Publications 2005* (Cth), above n 15; *Guidelines for the Classification of Films and Computer Games 2005* (Cth). They also provide glossaries for terms used in the classification levels (such as, for example, 'demean').
63 *Guidelines for the Classification of Films and Computer Games*, above n 62, 5-7.
64 Ibid.
65 Ibid 14. See also *National Classification Code*, above n 61.
66 See above Part II(A). However, the Commonwealth government's 2007 'intervention' to prevent child abuse in indigenous communities in the Northern Territory has also seen the introduction of transitional Commonwealth enforcement provisions for the purpose of restricting access to pornographic material in these indigenous communities: see

Tasmania and the Northern Territory also have concurrent classification powers.[67] Queensland has three media-specific classification Acts, each of which permit media-specific State classification officers.[68] The State's publications classification officer has the power, inter alia, to classify unclassified publications, and reclassify publications already federally classified.[69] The computer games classification officer has the same powers with respect to computer games.[70] However, it is rare for the officers to use the reclassification power.[71] The film classification officer's powers, on the other hand, are limited to more administrative matters.[72] It is possible to appeal against Queensland classification decisions to an appeals tribunal.[73] The implications of this are, however, minor, as appeal requests are rare.[74]

In South Australia, Tasmania and the Northern Territory, reserve powers exist in the ability to convene reclassification boards. The *Classification (Publications, Films and Computer Games) Act 1995* (SA) establishes the South Australian Classification Council,[75] which has powers to classify publications, films and computer games,[76] including the ability to reclassify Board classifications.[77] The South Australian

Classification Act pt 10. These provisions are set to expire in August 2012: *Classification Act* s 115.

67 It is likely such arrangements were made to gain the agreement of these jurisdictions to join the NCS. See generally *History of Cooperative National Scheme for the Classification of Films in Australia* [3], [4] <http://www.classification.gov.au/ resource.html ?resource=859&filename=859.pdf> at 28 July 2007.

68 These are the publications classification officer (see *Qld Publications Act* s 6); the computer games classification officer (see *Qld Games Act* sch 2); and the films classification officer (see *Qld Films Act* s 4(5)). The Queensland Acts also allow for the creation of classification inspectors: *Qld Publications Act* s 5; *Qld Games Act* s 30; *Classification of Films Act 1991* (Qld) s 4(1).

69 *Qld Publications Act* ss 9, 10.

70 *Qld Games Act* ss 5, 6. See also s 4.

71 This means that Queensland officers mostly work with unclassified materials: interview with David Cannavan, Classifications Officer, Office of Fair Trading, Department of Tourism, Fair Trading and Wine Industry Development, Queensland Government (Telephone interview, 29 May 2007).

72 *Qld Films Act* pt 7.

73 An appeal against a publication decision can be made under *Qld Publications Act* s 11. To do this, the Publications Appeal Tribunal must be convened under the *Classification of Publications Regulation 1992* (Qld) (enacted under s 38 of the principal Act). The same ability to appeal to the Computer Games and Images Appeal Tribunal exists with regards to computer games under *Qld Games Act* s 8 (see *Classification of Computer Games and Images Regulations 2005* (Qld); *Qld Games Act* s 67). It is also possible to convene the Films Appeal Tribunal (see *Classification of Films Regulation 1992* (Qld); *Qld Films Act* s 65) for classification exemption appeals under s 59 of the principal Act.

74 Since the enactment of the legislation in 1992, the Publications Appeal Tribunal has only been convened once, in 2007: interview with David Cannavan, above n 71.

75 *SA Act* pt 2.

76 *SA Act* pt 3.

77 *SA Act* s 17. The South Australian Classification Council must classify according to the Code and Guidelines (s 18); and pay heed to maters practically identical to those in the *Classification Act* s 11 (s 19). Although not related to the NCS, South Australia also has, uniquely in Australia, a Classification of Theatrical Performances Board, for the South

Classification Council gained attention in 2005, when, for the first time since the inception of the NCS, a film cleared for national release was effectively banned in South Australia, with the South Australia-only reclassification of the 2004 film *9 Songs* from R 18+ to X 18+.[78] In Tasmania, the participating minister has the ability, or in some circumstances must, establish a Review Committee to review a classified film that 'unduly emphasises matters of cruelty or violence'.[79] If the Review Committee so recommends, the minister must then reclassify, or prohibit sale and delivery of the film.[80] Finally, the *Classification of Publications, Films and Computer Games Act 1985* (NT) establishes the Publications and Films Review Board,[81] which has powers relating 'to any matter not subject to an arrangement between the Territory and the Commonwealth'.[82] However, this body has never been convened.[83]

In New South Wales, Victoria, Western Australia and the Australian Capital Territory, it is difficult to alter a federal classification decision. This was evident from the inability of both the Victorian and New South Wales Governments to overturn the 2002 RC classification of the 2000 film *Baise-Moi*.[84] Although an intergovernmental agreement is not usually enforceable at law,[85] action in such a case would probably require not only the amending of the jurisdiction's legislation (and possibly the *Classification Act*), but also breaking the 1995 Intergovernmental Agreement, withdrawing from it,[86] or amending it by unanimous agreement with the other parties.[87] Such action would seem to be rather drastic for the occasional controversial classification decision. However, although State and Territory jurisdictions may find it difficult or burdensome to overturn a decision, it is still possible for State authorities to choose not to prosecute offences related to banned works.[88]

Australia-only classification of theatrical performances. See generally *Classification of Theatrical Performances Act 1978* (SA).

78 Henderson, above n 2. See below this Part for X 18+ classified films.

79 *Tas Act* s 41A; see also s 41.

80 *Tas Act* s 44. The Review Board must use the criteria in *Tas Act* s 42, which are different to the criteria in the NCS.

81 *NT Act* s 7.

82 *NT Act* s 16.

83 See Northern Territory of Australia Remuneration Tribunal (2004) *Report and Recommendation No 2 of 2004* [49] <http://www.dcm.nt.gov.au/dcm/remuneration/pdf/TribunalReport.pdf> at 28 July 2007.

84 See, eg, Olivia Hill-Douglas, 'State "Powerless" to Undo Ban on Controversial Film', *The Age* (Melbourne), 14 May 2002, 5 (concerning Victoria); 'Film Hard to Get Back on the Big Screen – Dickie', *Australian Associated Press*, 13 May 2002 (concerning New South Wales). It was this controversy that led to the passing of the *Sydney Film Festival Direction*: see above n 45.

85 Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) 16 *Public Law Review* 294, 299.

86 IGA, above n 10, [3(3)].

87 IGA, above n 10, [3(2)]. Email from Cheryl Saunders (Professor of Law, University of Melbourne) to Michael Dunstan, 24 May 2007. See also Saunders, above n 85, 296-302.

88 An example of this could be the free availability of X 18+ classified films in the States: see below n 91.

Otherwise, in terms of enforcement, the State and Territory jurisdictions have broadly consistent provisions for all three media.[89] There are also broadly consistent provisions relating to advertisements, exemptions from classification, and general enforcement issues.[90] However, a number of differences exist between the jurisdictions, with the most significant being the ban of X 18+ films in all the State jurisdictions, meaning that such films can be legally purchased only in the two Territories[91] (this includes via mail order).[92] Other differences include the ban on the sale of both Category 1 and Category 2 publications in Queensland (the only jurisdiction to do so);[93] the requirement in Western Australia to sell Category 1 publications in registered premises (again, the only jurisdiction to do so);[94] and the offence of possessing RC classified material in Western Australia (the other jurisdictions require possession with an intent to distribute or sell the material).[95]

Furthermore, some of the jurisdictions' enforcement provisions deal with related, non-NCS classification matters such as the regulation of computer generated images,[96] online information or computer services,[97] sound recordings,[98] and 'sexual' articles.[99] Furthermore, child pornography provisions are sometimes contained in the enforcement Acts.[100] All these provisions make it an offence to possess child pornography material (child pornography would also be classified RC). This is in

89 See generally, eg, *NSW Act* pt 3 (publications), pt 2 (films), pt 4 (computer games).

90 See generally, eg, *NSW Act* pt 5 (advertisements), pt 6 div 3 (exemptions), pt 6, pt 7 (general enforcement issues).

91 See *NSW Act* s 6; *Qld Films Act*; *Qld Publications Act* ss 37, 39; *SA Act* ss 30, 38; *Tas Act* ss 22, 36; *Vic Act* ss 8, 9, 15(1); *WA Act* ss 69, 73. Cf *ACT Act* ss 9(2), 22; *NT Act* ss 37(2), 49. This is controversial: see, eg, Harris, above n 6, 52, 55–6; Tony Pitman, 'What's Wrong with Seeing Sex? Offensiveness and the Flawed Australian Censorship System' (2000) 53 *Australian Rationalist* 12, 18; David Wilson, 'Call for Uniform Approach to Porn', *The Age* (Melbourne), 6 January 2008, 8. However, anecdotally, X 18+ films are freely available for illegal purchase in the States: see, eg, Dickie, above n 38, 113. In 2007, an adult products company unsuccessfully argued that pornographic films depicting actual sex should be classified R 18+ instead of X 18+: see Caroline Overington, 'Be Adult about Porn, Pleads Industry', *The Australian* (Sydney), 28 February 2007, 3; *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752.

92 See, eg, Dickie, above n 38, 113; Harris, above n 6, 52.

93 *Qld Publications Act* ss 4, 12.

94 *WA Act* s 64(1). See also *WA Act* pt 11 concerning the registration of premises.

95 *WA Act* ss 62 (publications), 81(1) (films), 89(1) (computer games).

96 *Qld Games Act* sch 2 defines computer games as including such images. Cf *Classification Act* s 5A.

97 *SA Act* pt 7A; *Vic Act* pt 6; *WA Act* pt 7 div 6; *NT Act* pt VII.

98 *WA Act* s 5.

99 *NT Act* pt XI.

100 See *Crimes Act 1900* (NSW) s 91H; *Qld Games Act* s 26, sch 2 (definition); *Qld Films Act* ss 3 (definition), 41; *Qld Publications Act* ss 3 (definition), 14; *Criminal Law Consolidation Act 1935* (SA) pt 3 div 11A; *Tas Act* pt 8; *Vic Act* pt 12; *Crimes Act 1958* (Vic) pt I div 1(13); *WA Act* ss 3 (definition), 60; *Crimes Act 1900* (ACT) ss 64–5; *Criminal Code Act 1983* (NT) sch I pt 5 div 2 sub-div 1. Whilst child pornography is defined as sexually depicting a person under or apparently under 18 years of age in Tasmania, the Australian Capital Territory and the Northern Territory, all other State jurisdictions define the crime as sexually depicting a person under or apparently under 16 years of age. See also *Criminal Code Act 1995* (Cth) sch ss 474.19-24 regarding using telecommunications services for child pornography.

contrast to the possession of non-child pornography material classified RC, which does not, except in Western Australia, attract a penalty.

E The National Classification System and the Courts

As discussed in Part I above, since the inception of the NCS, judicial (or quasi-judicial) intervention in classification decisions has been minimal. Some unlikely potential avenues are a charge of statutory or common law obscenity, a possible intervention through the implied constitutional right of freedom of political speech,[101] or a declaration of incompatibility with a jurisdiction's 'bill of rights'.[102] The only other possible scope is judicial review of a classification decision *qua* administrative decision. However, this too is not likely, given what has been described as the unique nature of the NCS within Australian administrative law:[103] a merits review of a Classification Board classification is only available through another specialist classification body, the Classification Review Board.[104] Although the Administrative Appeals Tribunal ('AAT') is able to review decisions that restrict a person's ability to participate in certain aspects of the classification process, and decisions concerning the waiver of fees,[105] it is not able to review any substantive classification decisions.[106] This means that the only option left for an aggrieved party is to apply for non-merits judicial review. Judicial review of Commonwealth administrative decision-making can take place in the High Court and the Federal Court of Australia through their general jurisdictions to hear such reviews,[107] or through ss 5-7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), which codifies the right to review.[108] The *ADJR Act* requires

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101 This argument was raised in a rare classification-related case, *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1997) 145 ALR 464 (Federal Court of Australia); *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 82 FCR 225 ('*Rabelais Case*'), in which the work was classified RC for providing instruction or promotion in matters of crime. However, the argument by the work's producers, both in terms of the specific classification decision and the NCS, was rejected: *Rabelais Case* (1998) 82 FCR 225, 237-9 (French J), 246 (Heerey J), 257-9 (Sundberg J).

102 See *Human Rights Act 2004* (ACT) s 16 (freedom of expression); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15 (freedom of expression). Brief judicial comment on the Victorian provision was made in *X v General Television Corp Pty Ltd* [2008] VSC 344 (Unreported, Supreme Court of Victoria, Vickery J, 8 September 2008) [34]-[40] concerning the screening of the *Underbelly* television series in Victoria.

103 Griffith, 'Censorship Controversies', above n 32, 5; Gareth Griffith, 'Censorship Law in Australia: Reflections on the Rabelais Case (1999) 10 *Public Law Review* 99, 99.

104 *Classification Act* pt 5 (see above n 36 and accompanying text). See also Griffith, 'Censorship Controversies' above n 32, 5; Griffith, 'Censorship Law', above n 103, 99.

105 *Classification Act* ss 22G (additional content assessors), 22J (barring notices), 91(5) (the waiver of fees). The Commonwealth Attorney-General may also provide for AAT review in a scheme relating to the assessment of television series films: *Classification Act* s 14B(4)(f).

106 The AAT can review decisions only if the relevant enactment provides that it can: *Administrative Appeals Tribunal Act 1975* (Cth) s 25.

107 See *Australian Constitution* s 75(v) (High Court of Australia); *Judiciary Act 1903* (Cth) s 39B (Federal Court of Australia); Roger Douglas, *Douglas and Jones's Administrative Law* (5th ed, 2006) 657-61.

108 This involves a decision (s 5), conduct relating to a decision (s 6), and the failure to make a decision (s 7).

the applicant to have requisite standing,[109] and for the decision, conduct, or failure to make decision to be made under an enactment, to be of an administrative character, and to be justiciable.[110] However, given that a judicial review can only examine the procedural aspects of the decision and not the correctness of the decision itself,[111] the substantive legal cost relative to the economic value of a classified work is likely to dissuade most from seeking judicial review.[112] This means that the only practical avenue of review is through the Classification Review Board, although, as discussed below in Part III(C), this too is problematic.

III SUSCEPTIBILITY TO POLITICAL INFLUENCE

How is susceptibility to political influence in classification decision-making possible? After all, as noted earlier, the Boards that make classification decisions are independent statutory bodies,[113] which means the Commonwealth Attorney-General does not have the 'right to give directions to the [bodies] or to veto [their] actions', as no power to do so is conferred by the *Classification Act*[114] (the minister can only appeal Classification Board decisions to the Classification Review Board).[115] Thus, one could accept the view of the OFLC that the NCS is 'superior to all previous schemes, with uniformity in legislation, classification standards and fees',[116] which is supported by the importance accorded to public consultation[117] and the OFLC's commissioning of 'Community Assessment Panels' (discussed in Part III(A) below).

Considering Australia's past systems of classification,[118] there is much merit in this view. However, it is submitted that, because the idea of a doctrinal basis for a system of systematic classification without binding or influential legal precedent is unattainable, political interests still *have the ability* to influence or overturn classification

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109 See below Part III(D).

110 Concerning the meaning of 'decision', and the enactment requirement, see *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') s 3(1). See also Douglas, *Administrative Law*, above n 107, 677-84 ('decision'); 670-7 ('enactment'); 665-70 ('administrative character'); 695-25 ('justiciability'). These issues did not seem to bar judicial review in the *Rabelais Case*: see *Rabelais Case* (1998) 82 FCR 225, 256-7 (Sundberg J).

111 See, eg, *Rabelais Case* (1998) 82 FCR 225, 259-60 (Sundberg J).

112 This path was probably taken in the *Rabelais Case* due to the appellants' facing potential criminal charges. It was also taken, unsuccessfully, by the NSW Council for Civil Liberties in *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108. The grounds of review argued in that case were that the decisions in question involved errors of law, were an improper exercise of power under *Classification Act* s 44, were not based on sufficient evidence, and were not authorised by the *Classification Act*.

113 See above n 22 and accompanying text.

114 Enright, above n 22, 22.

115 See *Classification Act* s 42; above n 38 and accompanying text.

116 *History of Cooperative National Scheme*, above n 67, 2.

117 See, eg, Classification Review Board, 'Review Board Determines *Viva Erotica* X 18+' (Press release, 7 December 2006) <http://www.classification.gov.au/resource.html?resource=937&filename=937.pdf> at 13 March 2009.

118 For the history of Australian censorship, see generally Peter Coleman, *Obscenity, Blasphemy and Sedition*: *100 Years of Censorship in Australia* (revised ed, 1974); Ina Bertrand, *Film Censorship in Australia* (1978); *History of Cooperative National Scheme*, above n 67; Roger Douglas, 'Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship' (2002) 30 *Federal Law Review* 135.

decisions. The means to do this are: a) the ability of the Commonwealth government to select Board members when a work is initially classified; b) the ability of the Commonwealth Attorney-General, given this possibility of selection influence, to obtain a reclassification, or to request a review by the Classification Review Board; and finally c) the ability of interest groups to request a review directly through the standing provision of the *Classification Act*. These four issues will now be considered in turn.

A The Inherently Unstable Nature of Classification Doctrine

It was noted above in Part II(C) that the Boards base their classification decisions on section 11 of the *Classification Act*, the Code, and the Guidelines ('classification documents'). However, a cursory glance reveals a high level of ambiguity, which, as it will be argued, could legitimise the exercise of political influence in, for example, the decision to ban a work for the only reason being that it is not privately acceptable to members of the Commonwealth Government.[119] This ambiguity is immediately illustrated by the Code's four overarching principles (adult freedom, protection of minors, protection from unsolicited materials, and community concerns of harm). There is a prima facie inconsistency between principles one and three, which emphasise the right of adults to choose, and two and four, which argue that this right should be fettered. Is the principle of freedom of adults qualified by community concerns? If so, how? And then, what exactly are 'community concerns', and how are they measured? It is argued that community concerns are gauged through the Community Assessment Panels, whose stated purpose is 'to test the extent to which the decisions made by the Classification Board reflected current Australian community standards'.[120] This is done by having community members view rated films and, since 2004, computer games.[121] To date, classifications assigned by the Panels have been broadly consistent with those assigned by the Classification Board, which suggests that, however nebulous 'community concerns' are, the Boards are aware of them. However, the validity of these results must be questioned as, other than one R 18+ film viewed by the Sydney Panel in 1998, no films or computer games rated R 18+ or above were assessed by the Panels, and no opinions were sought from Panel participants on RC material.[122] Given that the banning of materials invokes the most controversy, and does indeed deserve attention, this oversight must be questioned.

If this deficiency in the use of Panels is granted, however, could the ambiguity of 'community standards' be overcome by the use of the classification documents? Current Classification Review Board Convenor Ms Maureen Shelley implicitly argues that they do. According to her, 'the Guidelines represent community standards' because their formulation, as noted above, is based on a process of public submissions, and the agreement of the participating minister.[123] It is submitted, though, that this is

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119 According to at least one commentator, 'the guidelines lack clarity, and are poorly drafted': Tara Gutman, 'Lolita's Lesson Learned' (1999) 155 *Communications Update* 18, 21.

120 Attorney-General's Department, *Classification Policy Research* <http://www.ag.gov.au/www/agd/agd.nsf/ Page/Classificationpolicy_Research> at 28 July 2007.

121 Ibid.

122 See Urbis Keys Young, *2004 Community Assessment Panels* (2005) ii; Keys Young, *Community Assessment Panels Report* (2000) 5; Keys Young, *Community Assessment Panels Report* (1998) 6. These are available at ibid.

123 Classification Review Board, above n 117.

not the case. The Code repeatedly uses ambiguous terms and concepts such as 'in such a way that they offend against the standards of morality, decency and propriety', 'likely to cause offence to a reasonable adult', 'promote, incite or instruct in matters of crime or violence', 'explicitly', and 'unsuitable for a minor'.[124] The Guidelines are also ambiguous as, even though glossaries are provided, it is again difficult to know the meaning and application of numerous terms. Some examples include: 'high impact', where 'impact' concerns the 'strength of the effect on the reader/viewer'; 'offensive', which is described as '[m]aterial which causes outrage or extreme disgust'; and 'treatment', described as '[t]he way in which ... material is handled, with regard to such factors as detail, emphasis and tone'.[125] Furthermore, although, as discussed in Part II(C) above, the Guidelines enunciate a process of classification (namely, understanding 'the importance of context'; and 'assessing impact' using the six classifiable elements individually and cumulatively, as well as through 'considering the purpose and tone of a sequence'),[126] it is rather difficult to pinpoint how this is applied.

Ambiguity is a problem in itself, but it also provides the basis for inconsistent interpretation. This inconsistency is heightened by the existence of differing theoretical principles behind classification. Classification/censorship is generally based either on a community morals approach ('whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest'),[127] or a harms-based approach (that 'material should be proscribed on the ground that it causes harm (rather than that it offends societal moral codes)').[128] According to Dr Bede Harris, given that section 11 appears to be based on the community morals approach and that the Code principles appear to be based on the harms-based approach, an 'internal tension' is created in the scheme, which only further undermines its doctrinal basis.[129] Another problematic issue has been identified by Dr Peter Hutchings. He argues that the scheme is internally inconsistent because it tries to incorporate 'law' and 'equity' considerations such as the quantitative use of specified criteria like the classifiable elements (law) and considerations of artistic merit and context (equity).[130] Unlike the common law, there is no explicit acknowledgement of the possibility of decision-making being either rule based or discretionary, nor guidance for when which process should be used and which has precedence. This creates further risk of inconsistency (and thus, political influence) if the Boards oscillate between the two.

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124 For a discussion of the potentially ambiguous meaning of the term 'offensive', see Pitman, above n 91, 14.

125 See *Guidelines for the Classification of Publications 200*5, above n 15, 16-19.

126 See *Guidelines for the Classification of Films and Computer Games*, above n 62, 5-6.

127 Harris, above n 6, 26, quoting *Roth v United States*, 354 US 476, 484 (1957).

128 Harris, above n 6, 28. This justification is the newer of the philosophies, and is often used in terms of gender equality and/or sexual violence. See also, eg, Michelle Evans, 'What's Morality Got to Do With It? The Gender-based Harms of Pornography' (2006) 10 *Southern Cross University Law Review* 89.

129 Harris, above n 6, 53. See also Rebecca Huntley and Jane Mills, 'Reformers Aim for Uniform Legislation' (1998) 140 *Communications Update* 30, 30.

130 See Peter Hutchings, 'Censorship, Violence and the Law' (1993) 9 *Australian Journal of Law and Society* 43, 44.

B Board Selection

Given similar concerns in the wider context of Australian administrative law,[131] the selection process for Board members is of vital importance. As discussed above in Part II(B), the Commonwealth Attorney-General recommends permanent members 'broadly representative of the Australian community'[132] to the Governor-General, after conferring with other participating ministers. To facilitate this process, advertisements for applicants are periodically made on a national basis and a candidate shortlist through an official selection panel, which includes representatives from each jurisdiction, is given to the Attorney-General to consider.[133] Although this process reduces the risk that 'Board members are out of touch with current community standards',[134] there are two concerns. First, the Attorney-General may simply choose to ignore the shortlist and the views of the other participating ministers.[135] This was dramatically illustrated in 2007 when Mr Donald McDonald, former Australian Broadcasting Corporation Chairman and personal friend of the then Prime Minister, became Director of the Classification Board despite a contrary suggestion from the shortlist, and against the wishes of other participating ministers.[136] Secondly, even if such a dramatic intervention does not take place, it is submitted that the favouring of 'ordinary citizens' at the expense of expert candidates[137] still allows political manipulation, as 'ordinary citizen' is much less objective than, say, professional qualifications or industry experience. And even if such a criterion can be defined, how can the community be truly represented by around a dozen or so Classification Board members? Or by sometimes as little as three members for a specific decision?[138] Thus, although the current process of 'broad selection' is potentially beneficial in that it brings a variety of views to classification decisions, it also legitimates politically-

131 See, eg, Gabriel Fleming, '"The Proof of the Pudding is in the Eating": Questions About the Independence of Administrative Tribunals' (1999) 7 *Australian Journal of Administrative Law* 33, 47-9 concerning appointments to the Migration Review Tribunal.

132 *Classification Act* s 48(2).

133 Attorney-General's Department, *National Classification Scheme* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Classificationpolicy_Nationalclassificationscheme> at 28 July 2007; letter from Kelly Williams, Assistant Secretary, Classification Operations Branch to Michael Dunstan, 27 July 2007.

134 Daryl Williams, 'From Censorship to Classification' (Speech delivered at Murdoch University, Perth, 31 October 1997).

135 Tina Kaufman, 'Call for Public Scrutiny of Classification System' (2000) 163 *Communications Update* 13, 13.

136 See, eg, Mark Metherell, 'States Brand Job Selection a Charade', *The Sydney Morning Herald* (Sydney), 14 April 2007, 4.

137 At the time of writing, some Board members do have industry experience, such as Joseph Mlikota and David Simon of the Classification Board, and Anthony Hetrih of the Classification Review Board.

138 See Marcus Casey, 'Sex, Violence and Other Classified Information', *The Daily Telegraph* (Sydney), 6 May 2005, 37. It is not clear how individual members, or the number of members, are selected for classifications, although 'straightforward' decisions often have three members, whilst 'blockbusters' often have seven. However, it is argued that a RC-classified film should be seen by a majority of permanent Classification Board members, including the Director: see Griffith, 'Censorship Controversies', above n 32, 4.

aligned appointments made under such a guise.[139] It also allows the changing of membership for political reasons (through, for example, the non-renewal of a member's term) using the argument that current members are not 'in touch' with community values.[140]

Another concern is the appointment of 'temporary' members to the Classification Board.[141] Such members can be appointed by the Attorney-General directly without recommendation to the Governor-General, and with no consultation with participating ministers.[142] Furthermore, although a temporary member can be appointed for only three months,[143] it is arguable that such a member can be repeatedly appointed for up to seven years in total to be used for a controversial decision.[144] The concerning nature of this problem is illustrated by the 1999 film *Romance*, directed by Catherine Breillat. In what has been described as a 'saga', it is alleged that the film was originally given a classification before it was eventually seen by seventeen Classification Board members, who in a 9-8 decision awarded a RC classification (the film was eventually classified R 18+ on review).[145] Of these seventeen, three apparently were temporary members, with one whose term had already officially expired.[146]

The issue of selection also leads to the greater issue of independence generally. Due to the lack of information on this matter and the recent structural changes to the NCS, however, it is difficult to explore further matters of member and Board independence, whether external (concerning the relationship between the Boards and the Commonwealth executive) or internal (concerning how individual board members interact with their superiors).[147]

C The Rehearing of Classification Decisions

Reclassification is done by the Classification Board. This can take place if more than two years have elapsed since the previous classification, and can be done on the instigation of the Commonwealth Attorney-General, a participating minister requesting the Attorney-General to do so, or on the Classification Board's own

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139 Concerning the appointment of Mr McDonald discussed above, it was argued that his appointment would 'ensure the board remained 'broadly representative of the Australian community'': Peter Ker, 'Censure as PM's Pal Turns Censor', *The Age* (Melbourne), 14 April 2007, 4.

140 See, eg, Griffith, 'Censorship Controversies', above n 32, 2; Byrne, above n 38, 16. It is also arguable that such a selection process leaves the Boards lacking in the technical expertise: see, eg, Des Partridge, 'Film Doyen Blasts Censors', *The Courier-Mail* (Brisbane), 8 August 2003, 12.

141 *Classification Act* s 50(1). This cannot be done for the Classification Review Board.

142 *Classification Act* s 48(1), (3).

143 *Classification Act* s 50(2).

144 Griffith, 'Censorship Controversies', above n 32, 3-4.

145 Kaufman, above n 135, 13.

146 Ibid. Kaufman also suggests that these three temporary members were specifically called by the Commonwealth Attorney-General to reverse the initial appraisal, due to the personal dislike of the film by government members.

147 Interview with Pamela O'Connor, Senior Lecturer, Monash University (Telephone interview, 26 April 2007). For the independence of tribunals generally, see, eg, Kristy Richardson, 'Defining Judicial Independence: A Judicial and Administrative Tribunal Member Perspective' (2006) 15 *Journal of Judicial Administration* 206.

volition.[148] It appears that this power is consistent with the overarching aim of classifying according to community standards, as it allows for the classification of a work to change with these standards. However, it could also be used to call for a reclassification under a more politically favourable membership. These two potential uses are illustrated by director Pier Paolo Pasolini's 1975 film, *Salò o le 120 giornate di Sodoma* ('*Salo*'). Originally allowed at some film festivals in 1976, *Salo* was then refused classification, but later unanimously reclassified R (now R 18+) in 1993.[149] Another reclassification request was made in 1997 by the Commonwealth Attorney-General, at the behest of the Queensland participating minister.[150] Thus, the film was reclassified twice. The first, 17 years after the original decision, arguably was the result of societal change. However, the second was made only four years after the first. Could such a reversal have been because of changes in Australian society?[151] This is unlikely, given the opinion of former Director of the Classification Board Des Clark, who stated that during a similar time period (2000-05), he had not 'noticed Australian society becoming notably more conservative or more permissive'.[152]

But the saga of *Salo* did not end there, as the second reclassification agreed with the first. Undeterred, the Queensland minister then requested a review with the Classification Review Board, which once again classified the film RC.[153]

The incident is illustrative of the potentially useful political expediency of the review process. As mentioned above in Part 0(0), such a review is *de novo*, and thus is made afresh with the law and facts before the review body (as opposed to the scope of judicial review as discussed above in Part 0(E)). Given the abovementioned arbitrariness of the classification documents, such a *de novo* review encourages merely *different* — but not necessarily more 'correct' — findings to the original decision, without the need to find a change in societal views. This is especially so given that Classification Review Board members operate on a part-time basis (unlike Classification Board members) and that they are not necessarily more experienced (they need not have Classification Board experience).[154] Therefore, if the Commonwealth Government is unhappy with a classification decision, it can try its luck and ask for a review. Although this possibility could be countered by the ability of other persons to also request a review (as discussed above in Part 0(0), the original applicant for classification or the work's publisher, and those 'aggrieved' by the original decision), given that any application not made by the Attorney-General usually costs A$8 000,[155] such a possibility is mostly restricted to commercial appeals by distribution companies concerning wide-release works. For others not granted a

148 *Classification Act* ss 38, 39.
149 Clark, above n 1, 6.
150 Ibid.
151 This is unlikely, according to Byrne, above n 38, 16.
152 Barry Divola, 'Censors Working Overtime', *The Sun-Herald* (Sydney), 25 September 2005, 22.
153 Clark, above n 1, 6.
154 See Classification Website <http://www.classification.gov.au/special.html?n=251&p=62> at 13 March 2009.
155 *Classification Act* s 43(1)(d); *Classification (Publications, Films and Computer Games) Regulations 2005* (Cth) reg 14; sch 1 pt 8. Cf *Classification Act* s 91A.

discretionary fee waiver (see below Part III(0)), merits review would thus often, like judicial review, be prohibitively expensive.[156]

It may also be that the Boards apply the criteria in the classification documents differently, or that the Classification Board does not take the Classification Review Board's decisions into consideration (although Classification Board decisions are submitted as evidence,[157] this issue is not explicitly addressed). The Administrative Review Council has highlighted this problem as a lack of 'normative effect' between the original and reviewing decision makers.[158]

D Interest Group Standing for Classification Review

If it is not expedient for the Commonwealth Government to directly influence a classification decision, another possibility is to encourage like-minded interest groups to request the review instead. As already suggested above in Parts II(B) and III(C), this could take place using the aggrieved persons provision.[159] When the *Classification Act* was originally enacted this provision remained unqualified, which meant that 'aggrieved person' took the same meaning as the term in the *ADJR Act*.[160] This grants standing to a person with a private right violated, or with a special interest, greater than 'a mere intellectual or emotional concern' in a public right beyond that of the general public.[161] However, after two interest groups wishing the 1997 film *Lolita* directed by Adrian Lyne to be reclassified RC were denied standing to the Classification Review Board,[162] the relevant section was amended to include persons and organisations with a much wider range of interests in the 'contentious aspects' of a work subject to a 'restricted decision'.[163]

Precedent exists for a wider or more flexible standing test for classification matters.[164] However, this allows an NCS classification to be contested by politically-aligned fringe groups who have not even examined the work.[165] This is because, as mentioned above, the A$8 000 fee can be waived at the discretion of the Director of the Classification Board or Convenor of the Classification Review Board.[166] It has been

156 Most non-government review applications are made for general release films by distributor companies: see Classification Website <http://www.classification.gov.au/special.html?n=262&p=66> at 28 July 2007.

157 Classification Review Board decisions note this fact. See, eg, below n 177.

158 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) [2.11].

159 *Classification Act* s 42(1)(d).

160 See *ADJR Act* s 3(4).

161 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 527, 530 (Gibbs J).

162 Gutman, above n 119, 18. Originally, three interest groups wished the film reclassified RC because of their belief that it condoned child abuse. The two groups that eventually applied for reclassification were both organisations from Western Australia; one had 30 members, whilst the other had six.

163 *Classification Act* s 42(3)-(5). See also *Classification (Publications, Films and Computer Games) Amendment Act (No 1) 2001* (Cth). This has some similarity with the *Administrative Appeals Tribunal Act 1975* (Cth) s 27: interview with Pamela O'Connor, above n 147. For 'restricted decision' see *Classification Act* s 42(5).

164 *Ogle v Strickland* (1987) 13 FCR 306, 319-20 (Lockhart J), 321-2 (Wilcox J).

165 Gutman, above n 119, 18. In the *Lolita* case, the two interest groups in question consisted of six and 30 members respectively.

166 *Classification Act* s 91; *Classification (Waiver of Fees) Principles 2000* (Cth).

argued that this was the case for 'Christian based' interest groups and the former conservative Commonwealth Government of Mr John Howard[167] with such films as *Ken Park* and *Mysterious Skin*.[168]

IV SUGGESTIONS FOR REFORM

The NCS overcame many of the problems of previous classification systems by creating a nationwide cooperative scheme that vested the power to classify works in two administrative decision-making bodies, the Boards. However, because the doctrinal basis for classification decisions is ambiguous and possibly contradictory, and this ambiguity can no longer be resolved by judicial precedent, a Commonwealth Government can 'legitimately' interfere in this process through Board selection, the rehearing of classification decisions, and by allowing certain interest groups access to the review process.

But where should one go from here? Some may argue that, given the past problems and inefficiency of court-based classifications,[169] the need for informal and flexible decision-making to cope with the increasing number of classifications,[170] and the unavoidably political nature of classification decisions,[171] this may be the best system possible. However, targeted reforms of the doctrinal basis behind classification decisions and the rules that govern the composition and the day-to-day operation of the Boards are highly plausible.

A Doctrinal Reform

As noted in Part III(A) above, key notions of NCS doctrine — including 'community standards/concerns', either understood empirically, as revealed through the Community Assessment Panels, or theoretically, as detailed in the classification documents — used to make classification decisions are inherently vague. However, the difficulties associated with this vagueness are compounded by an inconsistency of purpose (the community morals and harm-based approaches), and an inconsistency of decision-making procedure (quantitative ('law') and qualitative ('equity') considerations). To address the problem of vagueness, it is thus necessary to first address these issues of inconsistency.

Concerning the inconsistency of purpose, it is apparent that the two approaches will (or should) lead to different classification criteria. Thus, section 11 of the *Classification Act* should be redrafted to express the harms-based approach, as it is now seen as the more acceptable basis for an open society.[172] This would be generally consistent with the harms-based approach of Australian anti-vilification legislation.[173] The redrafting should be primarily concerned with replacing the requirement that the

167 See, eg, Casey, above n 138.
168 See above n 2.
169 See, eg, Griffith, 'Censorship Law', above n 103, 102.
170 For administrative tribunal informality and flexibility generally, see, eg, Fleming, above n 131, 53.
171 Griffith, 'Censorship Controversies', above n 32, 4.
172 See generally Harris, above n 6. See also Beattie and Beal, above n 4, 177-84.
173 See generally LexisNexis, *Halsbury's Laws of Australia* (at 2 July 2008) 80 Civil and Political Rights, II Civil Rights, (1) Equality and Discrimination, C Discrimination, 'VIII Racial, Homosexual and HIV or AIDS Vilification' [80-700]-[80-710].

Boards first consider the moral standards of 'reasonable adults' with a requirement that they consider, for example, the actual or potential harm caused directly or indirectly, by a given work, to members of the community. This will also make section 11 of the *Classification Act* consistent with the core principles of the Code,[174] which already express the harms-based approach (the other requirements of section 11 — concerning the artistic and general character of a work, and its likely audience — are more 'passive' in the sense that they could be consistent with either approach). This unification of section 11 and the Code should also be accompanied by a revision of the Code's four core principles so as to avoid, as discussed in Part III(A) above, the potential inconsistency between principles a) and c) (concerning the freedom of adults to choose) on the one hand, and b) and d) (concerning harms) on the other. This could be done by expressly stating that concerns regarding the causing of harm are an exception to the general freedom for adults to choose.

One could then address the inconsistency in decision-making procedure by explicitly paying heed to the difference between qualitative and quantitative decision-making processes. To do this, the Boards should be given the necessary direction for when and how to use both rule- and discretion-based decision-making in a consistent manner. This could involve the explicit recognition of which criterion uses which process; greater directions on which criteria should take precedence; relevant legal training; the use, or explicit non-use, of specific, publicly available, previous Board decisions that deal with relevant matters; and the creation of publicly-available decision-making guidelines that are consistent with court-based decision making.

These necessary reforms are insufficient, however, if the underlying problem of vagueness of principles, and their case-by-case application, are not addressed. To do this, it is suggested that greater judicial/quasi-judicial oversight be incorporated into the process. Courts have without question struggled with the same inherent subjectivity of classification decisions, such as defining what is meant by 'community' and gauging 'community standards'.[175] Nevertheless, Board decisions do not have the interpretative structure of transparent and binding/persuasive precedent,[176] nor a set of rules of interpretation. Although there is evidence of legal-type reasoning and advice in classification decisions (such as defining the meaning of inciting or instructing crime[177]), given that such advice is inherently ad hoc and informal, and

174 For the principles of the Code, see above Part II(C).

175 Butler and Rodrick, above n 4, 368-70.

176 See also Gutman, above n 119, 21.

177 See, eg, Classification Review Board, *The Absent Obligation: And Expel the Jews and Christians from the Arabian Peninsula* (2006) [5] <http://www.classification.gov.au/resource.html?resource=880&filename=880.pdf> at 13 March 2009, in which the Classification Review Board mentions in passing the *Rabelais Case*, and cites *Chief Executive Officer of Customs v Carman* (Unreported, District Court of Queensland, McGill DCJ, 2 November 2004). The decision in the latter case, which in turn refers to the *Rabelais Case*, considers the meaning of 'promotion' and 'incitement'. See also Classification Review Board, *The Peaceful Pill Handbook* (2007) <http://www.classification.gov.au/resource.html?resource=989&filename=989.pdf> at 28 July 2007, which quotes extensively from the *Rabelais Case*. However, John Dickie, former director of the Classification Board, has noted the crime matter raises difficulties for classification: Dickie, above n 38, 116. Furthermore, Merkel J in *obiter* has questioned what 'crime' in this context actually means: *Brown v Members of the Classification Review Board of*

that apparently inconsistent applications of the documents still take place,[178] this is still insufficient. This therefore leaves policymakers to choose between more or less court involvement: court involvement could create an actively growing body of case law that would provide guidance for Board members, but could also create unworkable costs, inefficient use of court resources, and time delays. The balance could, however, be achieved by allowing the *possibility* of final merits review by the Administrative Appeals Tribunal. This is because, even if rarely used, the Tribunal's authoritative rulings, or their potentiality, should encourage normative efficacy in Board decisions.[179] This creation of a body of classification case law would also bring the NCS into line with other areas of administrative decision-making that allow judicial or quasi-judicial oversight.[180]

B Operational Reform

These doctrinal reforms must be supported by conducive Board selection and the making of classification decisions. To achieve this, a number of operational reforms could be made to provide greater accountability and transparency. Some of these reforms that concern the selection and use of Board members could include:

(1) Ensuring that the Commonwealth Attorney-General follows recommendations made by the panels and other participating ministers with regard to the selection of Board members, or, ensuring that any deviations are made for specific and exceptional reasons.

(2) Creating and publicising a default position on the renewal or non-renewal of members (for example, a certain number of renewals contingent on performance indicators of a similar nature to other areas of public service). With sufficient planning with regard to workloads and required expertise, such a move should not create capacity problems, and will also balance the already accepted need to regularly renew the composition of the Boards with the need that members are not reselected for political reasons.

(3) Removing the possibility of using temporary members, or limiting their usage to specific and exceptional cases. As with suggestion two, this should not create capacity problems if there is sufficient planning.

(4) Tightening the selection criteria for the Classification Review Board to ensure that its members are differentiated from those of the Classification Board (by, for example, requiring expert or previous Classification Board experience). This would help ensure that Classification Review Board decisions are not mere alternatives to those of the Classification Board, and is consistent with the Classification Review Board's role as a body of higher authority.

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the Office of Film and Literature Classification (1997) 145 ALR 464, 478 (Merkel J). For the Classification Review Board seeking legal advice, see, eg, *NSW Council for Civil Liberties Inc v Classification Review Board* (2006) 236 ALR 313 (Edmonds J); Griffith, 'Censorship Law', above n 103, 102.

178 See, eg, Harris, above n 6, 51; Divola, above n 152.

179 For normative efficacy, see above n 157 and accompanying text.

180 See, eg, the issuance of general visas and the Migration Review Tribunal.

(5) Requiring a minimal number of Classification Board members to make classification decisions. This might vary according to the type of decision made: for example, a decision to refuse giving a classification to a given work might require more members.

It might also be useful, in the context of selection, to reconsider the issue of using 'expert' Board members. As mentioned above in Part III(B), the selection process emphasises 'broadly representative' community members,[181] as opposed to selecting relevant artistic, legal or academic experts. Like the issue of judicial oversight, however, this focus involves a trade-off: the increased awareness of community standards that it arguably engenders comes at the potential price of the selection of politically-aligned members (due to the inherent vagueness of the 'broadly representative' criterion), a lack of needed technical expertise (especially when considering that non-entry level public service positions often require relevant industrial experience or training), and the susceptibility of inexperienced members to political influence imparted by internal indoctrination procedures. Therefore, it is suggested that the 'expert-versus-community' balance be redrawn to require a limited number of appointees with relevant experience in, for example, the arts (such as in the creation of works, or leadership in the artistic community), the law (in relation to the discussion above in Part IV(A), a legal practitioner could help ensure legal compliance with due process) and/or academia (for example, in fields such as law, sociology, criminology, ethics, or artistic reception and interpretation). Selected alongside other members from the community, it would be difficult to argue that these experts could take the Boards 'out of step' with general community views. Rather, they should assist in making the Boards more professional and independent, and less prone to political influence.

Operational reforms should also be made to the process of appealing and rehearing classification decisions, given the anomalies (exemplified by the '*Salo* saga') outlined above in Parts III(C) and III(D). To begin with, considering the right to appeal classification decisions, serious thought should be given to restore the common law definition of 'person aggrieved', which was expanded to include persons and groups with a range of interests.[182] As it has turned out, this expanded definition has, coupled with the discretion to waive appeal fees, raised the possibility of the politically-inspired intervention of interest groups with a tenuous connection to the actual classification decision.[183] Therefore, it is submitted that reversing this change, coupled with a reduction in the discretion to waive fees (such as, for example, by requiring that waivers be granted only after considering the applicant's ability to pay and direct interests affected) could strike a better balance between granting access to genuine parties and excluding 'mere busybodies'. It is unlikely that this restriction would seriously undermine access by genuine parties, given the ability of the Commonwealth Attorney-General (who should act in the public interest) to request a review or reclassification.[184]

Furthermore, concerning reclassifications made by the Classification Board, it might also be useful to extend the minimum two year waiting period for works that have

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181 See above n 28 and accompanying text.
182 See above n 163 and accompanying text.
183 See above n 162 and 167 and accompanying text.
184 See above n 38 and 146.

already been awarded a classification, while retaining that period for works that have been refused classification. This is to counter the possibility, already suggested, of a Commonwealth Government making use of a change in Classification Board personnel to ban a work already granted release, because of a political agenda:[185] not only is it questionable that there could be such a reversal in community values in such a short period of time so as to lead to the banning a previously accepted work, but it is also somewhat questionable to enforce such a ban after a work's general release.

Finally, further reforms also need more information to be made public. This is especially the case with the recent creation of the Classification Operations Branch:[186] one is simply not able to assess the full ramifications for independence of the removal of institutional separation without knowing how the Branch operates on a daily basis. It is also a relevant matter concerning the issue of normative effect between the two Boards.[187] It is clear that normative efficacy is highly desirable, and not just from the perspective of political influence. But more information is also needed here on the relationship between the Boards, detailed decisions of the Classification Board, and how the Classification Review Board actually uses these Classification Board decisions.[188] Given the importance of debates concerning the NCS, one is hopeful that that such information will be forthcoming in the near future.

185 See above Part III(C).
186 See above n 17 and accompanying text.
187 See above n 158 and accompanying text.
188 Ibid.