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Australian media classification: depictions, descriptions, and child protection as logic of regulation

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Abstract
This chapter addresses the workings of the Australian media classification system. This system is one of the most censorious of all Western states, particularly regarding content distributed online. I describe it so as to explore how music can be deemed child exploitation material. What this means is that commercially available recordings can be classified in Australia as child pornography, and prohibited from sale or distribution. As I will show over the following pages, the scope of the prohibition is disconcerting.

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This chapter addresses the workings of the Australian media classification system. This system is one of the most censorious of all Western states, particularly regarding content distributed online. I describe it so as to explore how music can be deemed child exploitation material. What this means is that commercially available recordings can be classified in Australia as child pornography, and prohibited from sale or distribution.\(^1\) As I will show over the following pages, the scope of the prohibition is disconcerting.

In describing the reach of this particular prohibition across the distinct policy fields through which it is enacted, therefore, I show how uneven and piecemeal policy development produces a category of media content which is simultaneously extraordinarily broad, and impossible to police consistently or effectively. The consequences include inconsistent application of the law, inadvertent capture of a wide range of material (including that produced by those the law is purportedly designed to protect), bad faith or half-hearted “turning a blind eye” on the part of those tasked with law enforcement (thus undermining the intelligibility and plausibility of other regulations), and inappropriate use of the media classification system in pursuit of censorious political ends.

\(^1\) Racial vilification, copyright, and defamation law also all apply to music and there are documented instances of such applications in Australia, although in the interests of space I do not attend to these frameworks here. I have similarly limited myself to the Australian law with respect to representations of children. Other countries (notably, Japan and Finland) have quite different systems.
Chapter Ten

The Australian National Classification Code, the document at the core of this system, opens with the assertion that “adults should be able to read, hear, see and play what they want” as a first principle. The caveats following this assertion are of interest for a number of reasons.

Firstly, sexualised representations of children constitute the foremost media content prohibited in Australia. This extends to representations of imaginary children. This flashpoint highlights the ascendance of a particular and unassailable structuring logic around which cultural anxiety coalesces into policy: child protection. This is an important aspect of the Australian media classification system, but it is not the exclusive focus of attention here. The formulation and definition of the class of prohibited content in Australia is historically and contextually specific, and evidences policy responses to specific anxieties. Exploring the media classification framework thus draws out and highlights particular ideas of morally contentious behaviour, and thereby, the influence of particular and vocal constituent groups on policy development in Australia. A national tradition of paternalist conservatism referred to in Australia as “wowserism” can be made out in the legislation, intersecting with a more recent normative risk logic around perceived threats to the sanctity of childhood. This kind of intersection bears scrutiny productively for anyone interested in music censorship.

Secondly, music censorship commonly brings to mind particular kinds of extremism: military dictatorship, religious fundamentalism and so on. But music censorship, or “regulation”, is more often a rather mundane matter of bureaucratic administration and classification. It involves considering particular kinds of media, their location, transmission, and apparent or imagined purpose, in the light of other kinds of media, specifically: policy documents. Censorship is administrative: it is administratively expressed, and conducted with reference to the definitions provided in legislative and policy documents. It involves precedent, procedure and policy. It is and should be understood as a bureaucratic process, relating (musical) texts to other texts, orienting these sorts of texts to each other such that particular outcomes are entailed.

The definitions encountered in the policy and legislative documents I discuss objectify the types of media content they describe, and project moral stances into and through those texts and the relations to them they establish. Users of policy and those professionally obliged to comply with or apply it must construe the media they encounter against the definitions and criteria given by the policy. It matters how these definitions are worded, and how these policy documents constitute fields of action across which they render these definitions consequential. For these reasons, I
attend closely to the internal logic evident in and across these documents, rather than simply taking these documents as given and describing how the apparent perspectives the documents represent sit in broader debates about censorship. The approach taken draws on institutional ethnography, where documents of this kind are scrutinised on the grounds that they are the means by which social organisation and action is coordinated across time and space, and institutional forces (for example, the institutional ability to determine what kinds of media one may encounter) thereby standardised across multiple sites (Smith 2005, 166).

The interest here therefore is in a kind of repetition or reverberation across policy instruments, and how in this reverberation, the scope and reach of a particular definition expands. There is a category in Australian media law: “potential prohibited content”. A thing can thus be prospectively or hypothetically prohibited, such that actually prohibiting it becomes surplus to requirements. Any such thing may therefore conceivably be so treated—without, that is, going to the trouble of actually classifying it so as to prohibit it. The prohibition thereby simultaneously acknowledges and exceeds its own limits. A hypothetical space is established for media as a kind of prohibited possibilia, or more precisely, a category of material imagined as already forbidden, as legal impossibilia.

We might or might not agree about whether some album, or album cover, or song, or set of lyrics (etc.), was offensive, or obscene. We could argue about whether a right to artistic expression in some case or another stands, or is overridden by some other concern. These would be valuable exercises, but they would not tell us much about how music censorship as an element in a system of cultural administration actually works: in, around, and through texts. They would tell us, rather, about our own ethics and aesthetics with respect to particular musical texts (Whelan 2015, 64–67).

There is also a pragmatic reason for not getting embroiled in debates about specific contentious musical works. If we are aware of music, which is or likely would be criminal to possess or distribute, is it wise to draw attention to this music and those who have an interest in it? A further elaboration of this point is that for researchers under the employ of risk-averse universities, learning more about such music or providing detailed descriptions of it could be problematic. In this way, the chilling effects of censorship contribute to an evidence deficit in policy development and evaluation. In short, describing such music in detail might not be the best defence for it (if it merits defence). It is better to turn attention to the frameworks by which prohibition is enacted in policy. Moreover, it is important for researchers to know how the Australian classification
framework functions, as a specific network of policies, agencies, discourses and logics.

Over the following pages I will develop this argument, and discuss some of the issues around the Australian media classification framework that might be of interest to scholars researching music and contemporary music censorship. I describe the Australian classification scheme as it is presented in legal and policy instruments, focusing particularly on the categories of “refused classification” and “potential prohibited content”. I move through the definitions that populate the Australian classification policy landscape by order of severity and scope. I then discuss how “child abuse materials” is formulated in legislative terms, with particular attention to “descriptions and depictions” (that is, representations which do not involve actual children). I point towards a case involving Australian musicians that went through the courts some years ago, before concluding with a discussion of some of the significant features of the Australian system.

The Labelling Code

The Australian media classification framework developed historically from an iteration of the community standards test. It is recognisable to anyone familiar with the United States motion picture ratings system. Australia has G, PG, M, MA 15+, R 18+, and X 18+ (the latter for pornographic media). These ratings are applied to television programmes, films, publications, games, and other kinds of content, including online content.

This framework is confusing for a number of reasons, but three of the most important reasons it is confusing are the discrepant mosaic of Federal and State legislation, the historical emergence of the current classification system, derived as it is from a patchwork of legacy legislation referring to discrete media forms (video games, print media, broadcast television and so on), and the various agencies tasked with enforcing the legislation. These agencies include but are not limited to the Australian Communications and Media Authority (ACMA), the Australian Customs and Border Protection Service (ACBPS), and the Classification Board.

Notionally, the creative industries are self-regulating, so Australian media industry bodies also have their own guidelines. The Australian music industry, in the shape of the Australian Music Retailers Association (AMRA) and the Australian Recording Industry Association (ARIA), has since 2004 voluntarily classified and labelled recordings with reference to the Recorded Music Labelling Code of Practice. This is the “softest” and
the broadest of the formulations in use in Australia, essentially an industry consumer guide. This initiative, analogous perhaps to the Recording Industry Association of America’s Parental Advisory Label Program, came at the behest of government entreaties, prompted in turn by campaigning from Christian groups (Cannane 2004). The Labelling Code is used to rank recordings deemed to merit classification, from Levels 1 up to 3. AMRA members are not permitted to sell Level 3 recordings to minors. The Cannibal Corpse album *Torture*, and Tyler, The Creator’s *Goblin*, both released in 2012, are examples of recordings classified as Level 3.

Recordings “Exceeding Level 3” are not to be issued or distributed by ARIA or sold by AMRA members. Such recordings are described as

containing lyrics which promote, incite or instruct or exploitatively (“exploitative” means appearing to purposefully debase or abuse for the enjoyment of listeners, and lacking moral, artistic or other values) or gratuitously (“gratuitous” means material which is unwarranted or uncalled for, and included without the justification of artistic merit) depict drug abuse; cruelty; suicide; criminal or sexual violence; child abuse; incest; bestiality; or any other revolting or abhorrent activity in a way that causes outrage or extreme disgust to most adults. (ARIA 2014)

The Labelling Code is intended to inform consumers and is not legally binding. However, as we will see shortly, in tone, phrasing and terminology, it self-consciously mimics the content classification schedule found in the National Classification Scheme, the definitions of “objectionable goods” issued by Customs, the broadcasting policy framework, and the legislation from which these bodies derive their authority to act in relation to such content.

Note that the music that would be classified as Exceeding Level 3 would be so classified on the basis of its lyrics. The possibility of causing outrage or extreme disgust with sound alone is not raised by the Code. Incomprehensible but nonetheless outrageous or disgusting lyrics—as often encountered with the vocal styling of death metal bands (such as Cannibal Corpse)—would fall under the Code insofar as there is evidence of them, such as in printed liner notes.

That the Australian music industry follows this code has an implication often noted in discussions of media regulation, in that determining the degree to which industry self-censorship is occurring is not possible. We cannot determine the extent to which music is not being released by ARIA, or the extent to which musicians are amending what they would otherwise do in order to comply with the Code and thereby secure contracts with ARIA members and access to AMRA distribution channels. This is a
A variant of what Martin Cloonan refers to as “market censorship” (2004, 4). ARIA publicly lists recordings that have been classified at Level 3, but not recordings classified as exceeding that level.

The Classification Act

The status most closely analogous to Exceeding Level 3 according to the National Classification Scheme, as it were “above” R 18+ and X 18+, is “Refused Classification” or RC. Refused Classification is a confusingly named category, because it refers of course to content that has been classified. It has not actually been refused classification—it might be better to think of it as having a classification of “Refused”. To sell, hire out, advertise, distribute or import RC material is an offence. Most RC material is legal to possess for personal or private use, excluding in the state of Western Australia and in some areas of the Northern Territory, where possession is an offence. Possession of some categories of RC material for personal or private use (notably “child abuse materials”) is an offence in the same way dissemination of such material would be. Being found to be in breach, either by possession or distribution, importation etc. may carry significant penalties, varying according to a broad range of factors, but possibly involving fines of up to A$275,000 (around €170,000) and/or a custodial sentence of up to ten years’ imprisonment (Australian Customs and Border Protection Service 2009).

According to the Classification (Publications, Films and Computer Games) Act 1995 No. 7 of 1995—Schedule, “publications” meriting RC status would be those which:

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

Almost identical definitions follow in the same legislation for films and computer games (the word “describe” is omitted from “(a)” in each instance). There is no account as to why causing offence to reasonable adults is so undesirable (with some artistic forms, it might be the entire point), or why the defence of those standards trumps individual rights.
Some light can be shed on what might be meant by “revolting or abhorrent phenomena”, offending “against the standards of morality, decency and propriety generally accepted by reasonable adults”, or causing “offence to a reasonable adult”, by consulting the *Guidelines for the Classification of Films 2012* (Minister for Justice 2012). This instrument is provided to the Classification Board and the Classification Review Board to aid them in determining what classification a particular film should receive. In delineating what will *not* receive an X 18+ rating—what would *exceed* such a rating—the *Guidelines* state that:

No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers. Fetishes such as body piercing, application of substances such as candle wax, “golden showers”, bondage, spanking or fisting are not permitted. As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age or over to be portrayed as minors.

Material featuring fetishes other than those listed above has been refused classification, so one of the operative phrases here is “such as”—there is, as it were, an *et cetera* clause. The *Guidelines* go on to state that films warranting an RC classification would include or contain material such as:

**CRIME OR VIOLENCE**
Detailed instruction or promotion in matters of crime or violence. The promotion or provision of instruction in paedophile activity. Descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years. Gratuitous, exploitative or offensive depictions of:
(i) violence with a very high degree of impact or which are excessively frequent, prolonged or detailed;
(ii) cruelty or real violence which are very detailed or which have a high impact;
(iii) sexual violence.

**SEX**
Depictions of practices such as bestiality. Gratuitous, exploitative or offensive depictions of:
(i) activity accompanied by fetishes or practices which are offensive or abhorrent;
(ii) incest fantasies or other fantasies which are offensive or abhorrent.

**DRUG USE**
Detailed instruction in the use of proscribed drugs.
Material promoting or encouraging proscribed drug use.

**Customs Regulations and “objectionable goods”**

Anybody who travels through an Australian airport is required to sign a declaration avowing that they are not in possession of any “illegal pornography”, although this phrase is not used in the legislation. In restricting importation, Customs refer to “Pornography and other objectionable material”, where this category includes publications, films, computer games and any other goods that describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty [sic], violence, terrorist acts 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. (ACBPS 2014)

Efforts to bring such material into Australia require written requests submitted to the Customs Classification Branch. A private or personal use justification in the request is not sufficient to guarantee receipt of an import permit. An attempt to import prohibited or restricted material without a permit is an offence and can be prosecuted. The relevant legislation here is the *Customs (Prohibited Imports) Regulations 1956—Reg 4A*.

RC material as per the *Classification Act* and objectionable goods as per *Customs Regulations* are not strictly speaking synonymous: the category of objectionable goods is broader. Customs regulations follow domestic policy, however, to the extent that any change to the latter would entail the former being brought into alignment with it.

**The Broadcasting Services Act**

In the *Broadcasting Services Act 1992—Schedule 7*, the definitions used by Customs and found in the *Classification Act* are mapped onto online “content”. This involves a significant extension of scope, and the introduction of an interesting new category so as to accommodate this extension. “Content” is defined in the *Act*:

(a) whether in the form of text; or
(b) whether in the form of data; or
(c) whether in the form of speech, music or other sounds; or
(d) whether in the form of visual images (animated or otherwise); or
(e) whether in any other form; or
(f) whether in any combination of forms.

The *Broadcasting Services Act* is important because “content” so defined puts forms of representation that in other formats would be acceptable, off the table where they occur online. Certain kinds of fictional texts and images, for example, that would be permissible in print, enter into a framework applicable to film where they are presented online because the legislation treats websites as a delivery mechanism more like film than print. A peculiarity of the Australian system is a tendency towards duplication, redundancy, and “double handling” of similar or even the same material in different media formats. For example, a television show which has been given a classification as such must be classified again to be distributed on DVD.

The *Broadcasting Services Act* grants the Australian Communications and Media Authority (ACMA) the power to take action against websites hosted within Australia (with financial penalties for sites that fail to respond in an adequate time frame), obliging them to take down the offending material or face legal consequences, and to notify internet filtering software companies in the event the material is hosted outside of Australia. ACMA may also notify local law enforcement in the hosting country and in Australia if the material is of a sufficiently serious nature. ACMA may take these courses of action on its own initiative, or on receipt of complaints from members of the public. Penalties for noncompliance could extend to fines of up to A$55,000 (around €34,000).

The two kinds of content mentioned in the *Broadcasting Services Act* that could be subject to this kind of sanction are “prohibited content” and “potential prohibited content”. Content is

*potential prohibited content* if the content has not been classified by the Classification Board, but if it were to be classified, there is a substantial likelihood that the content would be prohibited content.

These categories, of prohibited and potential prohibited content, are however also broader than that of RC material, and of objectionable goods: prohibited and potential prohibited content includes RC material, X 18+ material; and R 18+ and MA 15+ material where, according to the *Act*, “access to the content is not subject to a restricted access system” (such as an effective age verification system). The same kinds of media content are handled more stringently where they come through Customs than were one to purchase them legally from a shop (which one could easily do, albeit more easily in the Australian Capital Territory—where Canberra, the
nation’s capital is—than in New South Wales or other states), and more stringently again were one to access them online. These definitions render Australian digital media regulations some of the most severe among Western nations. Furthermore, paraphrasing some remarks made about legislation in another context by the current Australian Attorney-General, the regulatory system described above is “overly long, unnecessarily complex, often comically outdated and all too often, in its administration, pointlessly bureaucratic” (Knott 2014b).

A cursory look at the various definitions provided above would indicate certain consistent themes in the classificatory scheme, foremost among them: sexualised depictions of children; sexual violence or other “revolting or abhorrent” behaviour including bestiality (this behaviour being generally but not exclusively sexual); and crime and violence (with terrorism and drug use as distinct sub-categories). In each instance there are grounds for querying the scope and reach of the definitions.

The classification scheme addresses depictions or descriptions of criminal actions (such as child sexual abuse), as well as courses of action that are legal to engage in (for example, consensual fetishistic sex acts), but not legal to depict. There are two different problems here. The first is that there are courses of behaviour that are permitted, and yet representations of that course of behaviour cannot be disseminated. The second is that, with characteristic double handling, evidence of criminal activity already covered by the criminal code falls foul of the media classification scheme.

Questions have been raised as to whether the media classification system (which presents itself as intended for advising consumers about entertainment products) is the optimal instrument to capture criminal behaviour (Australian Law Reform Commission 2012, 274). This confusion goes both ways. Media classification can, of course, be shown to be censorious in its implications, but enforcement of the criminal law can also occur in pursuit of material that is “offensive” (that is to say, not in contravention of the criminal code). This implies overreach: law enforcement resources (mis)applied without adequate oversight in the pursuit of the offensive. The 1980 Swedish film Barnens ö (Children’s Island), for example, was refused classification in 2013 after the Australian Federal Police referred it to the Classification Board. It had originally been given an R 18+ rating (Knott 2014a).

The scope for prohibition is wide-ranging. Lumby, Green and Hartley have described the following examples as meeting the criteria for “potential prohibited content” online (2009, iii):

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Knott 2014b

Australian Law Reform Commission 2012

Lumby, Green and Hartley (2009)
A site devoted to debating the merits of euthanasia in which some participants exchanged information about actual euthanasia practices.

A site set up by a community organisation to promote harm minimisation in recreational drug use.

A site designed to give a safe space for young gay [sic] and lesbians to meet and discuss their sexuality in which some members of the community narrated explicit sexual experiences.

A site that included dialogue and excerpts from literary classics such as Nabokov’s *Lolita* or sociological studies into sexual experiences, such as Dr Alfred Kinsey’s famous *Adult Sexual Behaviour in the Human Male*.

A site devoted to discussing the geo-political causes of terrorism that published material outlining the views of terrorist organisations as reference material.

My objective here is not to rehearse the merits or otherwise of the legality of euthanasia or drug use. The response to terrorism indicated by the regulations is also predictable. The third and the fourth example Lumby and her colleagues provide, however, are particularly noteworthy for present purposes, and one of the aspects of the regulations that come to be interesting here is the use of *depicts* and *describes*. What do these words mean?

**Crimes Legislation Amendment Explanatory Memorandum**

We have already seen how the *Broadcasting Services Act* defines prohibited and potential prohibited content with respect to any *form* of media: text, data, speech, music or other sounds, visual images (animated or otherwise), any other form, or any combination of forms. The definition of “child abuse materials” in the NSW *Crimes Act 1900* sec. 91FA is more robust: it defines “materials” as “any film, printed matter, data or *any other thing of any kind* (including any computer image or other depiction)” (emphasis added). The clear implication is not only that the material can be in any medium—for example, an audio recording. Whatever medium the representation is in, its reach extends beyond representations involving actual children to imaginary or fictional children. This can be unpacked with reference to the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004*. As a Bill before the Parliament, this Act (enacted in 2004) was accompanied by an Explanatory Memorandum, as is customary. The Explanatory Memorandum is illuminating as to non-actual images of children:
Child abuse material is defined to cover material that depicts or describes a person who is under 18, or who appears or is implied to be under 18, as a victim of torture, cruelty or physical abuse, and does so in a way that reasonable persons would regard as being, in all the circumstances, offensive. Paragraph (a) of the definition deals with “depictions” and is intended to cover all visual images, both still and motion, including representations of children, such as cartoons or animation. Paragraph (b) deals with “descriptions” and is intended to cover all word-based material, such as written text, spoken words and songs.

Material that does not necessarily contain actual images of children is covered by the definition, because although it may not directly involve an abused child in the production, its availability can fuel further demand for similar material. This can lead to greater abuse of children in the production of material to meet this demand.

The qualification requiring that reasonable persons must regard the material, given all the circumstances, as offensive allows community standards and common sense to be imported into a decision on whether material is offensive. Proposed section 473.4 lists the matters that should be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive as follows:

- the standards of morality, decency and propriety generally accepted by reasonable adults
- the literary, artistic or educational merit (if any) of the material, and
- the general character of the material (including whether it is of a medical, legal or scientific character).

Could a song be child abuse material? The answer to this question in Australia is yes. Why is this so?

The Memorandum indicates a process in a sequence of steps. The first step is that, even where actual children are not involved in any way in a particular representation, the availability of such representations can “fuel further demand for similar material”. A supply of offensive representations of fictional children could stimulate demand for “similar material”. We move in the next step from fantasy representations of children, couched with reference to their interpretations by reasonable persons and offensiveness and so on, to criminal acts involving actual children.

The Memorandum thus envisons a tipping point: the existence of material (thus far only involving imaginary children) can drive demand (for “similar material”), which would in turn incentivise production (of material involving actual children). The production and circulation of child abuse material is a matter of supply and demand, with a direct (one might even say causal) relationship between representations of fictional and actual people. Insofar as demand incentivises supply in the account, this appears also to be a kind of “organic” market: with producers of child
exploitation material motivated by profit (as opposed to some other motive), and with consumers presumably paying money. That the actual distribution of child abuse material might be arranged otherwise is not considered.

It is tempting to speculate as to whether, by this logic, the *Hostel* film franchise (for example) should also be prohibited, because its existence *could* drive demand for actual “snuff” footage of torture, violence and murder. One could wonder also whether actual footage, e.g. of civil disturbances, should perhaps be even more vigorously prohibited. After all, if fictional representations can have actual effects, surely actual representations must have more immediately tangible actual effects? This kind of argument is possible, but it is not commonly encountered. It is a problematic argument for a number of reasons. One such reason is that, at least as far as the kinds of fictional representations of children under consideration are concerned, there is no evidence for it. The mechanism described here remains firmly in the conditional. The Memorandum and the corpus of documents in which it sits are thus like “rationality badges” (Clarke 1999, 16). They represent an assertion on the part of the administration that the situation is manageable, something can be done about it, plans and processes are in effect, steps have been taken and so on.

In a discussion of *McEwan v Simmons & Anor*, for example, a conviction involving a determination that the term “person” applies successfully to the cartoon characters from *The Simpsons*, the NSW Child Pornography Working Party cite a submission from the Public Defender. According to his submission, a kind of “zero tolerance” approach is necessary towards fictional representations lest (exploitative and abusive) “behaviour may be normalised and cognitive distortions reinforced” (NSW Department of Attorney General and Justice 2010, 42, emphasis added). This thinking follows a common line in justifications for censorship: someone—but not us, perhaps someone intellectually inferior to us—*might* take the fiction as it were “literally”, and come to the conclusion thereby that the production, distribution, and consumption of child abuse material, and indeed child sexual exploitation, are somehow acceptable, or at any rate more alluring or enticing than they would otherwise appear. This zero tolerance, incitement argument is a particular iteration of the “supply-demand spiral” argument described above. The zero tolerance argument (notable insofar as it arose in the course of an actual prosecution) is stronger in that it is framed not as an intervention into the development of an aberrant criminal market, but as an intervention into an aberrant psychological process and the behaviour that *might* follow from it.
The legislation can thus be queried: to the extent to which the conceptualisation of the real problem it is attempting to capture actually refers successfully to the social arrangements of child abuse material production; and to the extent that this imagining involves a supply-demand spiral driving the production of child abuse material, incorporating an abrupt switch from fictional to actual representations, and a conditional assertion that the circulation of fictional representations may “reinforce cognitive distortions” and thereby “normalise” child abuse.

The Memorandum also points toward the interesting double circularity in establishing relations between the risk of documentary evidence of criminal acts (of child abuse), and representations that are offensive. Again, while criminal behaviour might be offensive, offensive behaviour is not always criminal. Yet the legislation slides consistently and as it were seamlessly from one to the other. That reasonable persons must regard the material, given all the circumstances, as offensive allows community standards and common sense to be imported into a decision on whether material is offensive [taking into account] the standards of morality, decency and propriety generally accepted by reasonable adults.

Let us assume that adults and persons are equivalent here and that the operator is their “reasonableness”. Assuming also that “community standards and common sense” and the “standards of morality, decency and propriety generally accepted by reasonable adults” are roughly coterminous, the definition bootstraps in a circular fashion. The (i) reasonable person considers the material, in the circumstances, and evaluates on the basis of (a) community standards and common sense, and forms a decision on the basis of the (a) standards of morality etc. generally accepted by (i) reasonable persons. A magistrate customarily stands in for the “reasonable person” in this circular tautology.

The Memorandum is additionally informative in the final two remarks as to the “merit” and “character” of the material concerned. These are the matters to be taken into consideration in coming to a determination as to whether material is offensive, and were at one time the grounds upon which a defence could be raised in the event of a prosecution for “child abuse material” (Grealy 2013, 77 n2). They point towards what we might understand as considerations of genre convention:

the literary, artistic or educational merit (if any) of the material, and the general character of the material (including whether it is of a medical, legal or scientific character).
This wording echoes older ideas of “revolting and abhorrent” material as that which is “in the prurient interest” or which has the tendency to “deprave and corrupt”. The provisos concerning merit and character point to the possibility that material may potentially appear offensive, but, because of some contextual features that permit it to be understood as e.g. artistic, medical, legal, or scientific, not prohibited. These sorts of references to literary or artistic merit are commonly described as the aesthetic alibi: artistic freedom as a “special case of freedom of speech”, for otherwise offensive material, where such material is presented “within the protective shield of an aesthetic frame” (Jay 1998, 110–11). The reasonable person will consider these provisos in coming to her decision as to the offensiveness of the material in question.

**Avagoyamugs**

In 2001 the Australian metal band Intense Hammer Rage had a contract with Razorback Records and recorded the album *Avagoyamugs* for the label, which is based in the United States. They had previously worked with record labels in Indonesia, Japan and Spain. Razorback Records had CDs of the album pressed in the United States, and 207 of these were shipped to two members of the band, Bradley Rice and Chris Studley, at their addresses in Burnie, Tasmania. Customs officers at Melbourne Airport seized these packages in April and August of 2001, suspecting them of being in contravention of *Customs Regulations* and the *Classification Act*. Neither Razorback Records nor Intense Hammer Rage had sought to have the recording classified by the Classification Board (at that time known as the Office of Film and Literature Classification). The intercepted packages included CDs, liner notes with lyrics, and album artwork. Police raided the band members’ houses. They were obliged to attend Burnie Magistrates Court on numerous occasions.

On 15 May, 2003, all three members of the band pleaded guilty to charges of importing a prohibited import, and each of them was fined $500. The Magistrate indicated that he did not impose the maximum $5,000 fine because the band had not profited from the CD (Kazmierczak 2003). He ordered that the CDs held by Customs be forfeited and they were destroyed. On 27 June, 2003, the band again appeared in court. Rice and Studley

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2 The Memorandum does not consider the possibility that someone might collect texts with “literary, artistic or educational merit”, or “of a medical, legal or scientific character”, but with unpleasant or malevolent intentions. Such a possibility is sometimes raised in discussions of “the paedophilic gaze” (Adler 2001).
were charged with selling an objectionable unclassified publication, and advertising an objectionable unclassified publication. Byard faced these two charges and an additional charge of possessing a child abuse product. All three pleaded guilty to all charges. Byard was on this instance fined a total of $2,500, and the other two band members were each fined a further $1,250 each (Encyclopedia Metallum 2014).

Avagoyamugs is an “objectionable good”, and as such refused classification. ARIA classified the recording as Exceeding Level 3. It is not the only such recording to be refused classification in Australia. In this context, Phillipov discusses the Perth band Choke and their album *Smokin’ Tailpipe Action*, indicating also that albums by the bands Cannibal Corpse and Deicide (both from the United States), and Pungent Stench (Austria) have been either refused classification or given a rating prohibiting sales to minors (2008, 225–226).

The Intense Hammer Rage case is an instructive one, and there are a number of notable points about this situation that, in concluding, will be attended to here. I do not wish to be understood as advancing another argument that proceeds, like the “zero tolerance” argument described above, in the conditional: albums might be unjustifiably refused classification or prohibited, and this would be bad, and so the classification system is not good. Such an argument would not be particularly compelling, for the following reasons.

Firstly, this is not the most interesting thing to be said about what is wrong with the classification system. Or perhaps more precisely, this is not the thing that is most wrong with the classification system. I will return to this presently.

Secondly, this conditional argument, as a critique, implies that there is some reason why speech of this sort should be defended. Such a defence would have to run independently from any concern as to the implications of regulating fictional “depictions and descriptions” as though they were documents evidencing acts of child abuse (or as though they would in a straightforward way lead to the production and demand for such documents, with the more or less explicitly implied “cognitive distortions” and “normalisation”). Australia does not have a constitutional right to freedom of expression, although it is often said that the right to free political communication is “implied” in the Constitution. Even where there is such a right, what is the justification for it if it involves making music about sexually abusing children? What would the point be of defending such music?

One of the reasons transgressive music subcultures are of interest in this regard is that they throw up particular challenges and thus insights
distinct from those encountered with more sympathetic cultural practices. Consider for example Harry Potter slash fiction produced by fans which depicts and describes characters from the popular franchise in various sorts of intimate scenarios: Malfoy and Potter, for instance, or Granger and Snape. In terms of the legislation described above, this material is potential prohibited content. It would be hard to make a compelling argument that this popular literary practice, produced and consumed as it often is by young people, is seriously doing anybody any harm.

Or consider the Japanese manga genre *yaoi* or “Boys Love” (BL), popular among young women in Japan and internationally, which features visual depictions of sexual encounters between fictional males who, like the students of Hogwarts, are or “appear to be” minors. BL is “a female gendered space, since its participants—writers, artists, readers, and the majority of editors—are female” (Mizoguchi 2003, 53). As with Harry Potter slash, it would be implausible to suggest that this genre could lead to an increase in the demand for actual child abuse material. Yet this material is also potential prohibited content.

I draw attention to these genres, because here we encounter a curious feature of the progressive liberal left response to media censorship: that such censorship is in and of itself bad. It is easy and satisfying to imagine music censorship as a straightforward process with clear moral positions. Music is good; censorship is bad. It is cool to like music, and it is hip to call out the prudes for being so squeamish. This position exhibits distinct forms of incoherence with respect to works like *Avagoyamugs*. One such incoherence is as regards content. Censorship might be unappealing, but there are some forms of “low-value” speech which the liberal left will feel some discomfort defending (for example, racist hate speech). Cultural tolerance is great, but not so much for neo-Nazis or those with aesthetic interests in representations of paedophilia or sexual torture. Another such incoherence is an impoverished conception of contemporary political administration and its alternatives. While the category of Refused Classification doubtless seems paternalistic, progressive critiques of it, like the idea that decisions about this kind of material should best be left to the market, tend in their effects towards right-wing libertarianism (Flew 2011, 13). The same incoherence can sometimes be seen in arguments for the regulation of media concentration, where such regulation, as applied to, for instance, News Corp, is understood as “good censorship”. On these grounds, free speech arguments are for current purposes not particularly productive.

Perhaps the justification lies in “literary, artistic or educational merit”—not the right to say what one likes, but the value or importance of
the expression or the message. *Avagoyamugs* could be a text like *Lolita*, although, unsurprisingly, Burnie Magistrates Court did not find it so. Such merit, following the “aesthetic ideology”, is usually considered self-evident, although it is an artefact (notably, of the capacity to assert “art” as a bracketed context and successfully impose this interpretation). The tendency of the courts is to reproduce and enforce conservative notions of cultural hierarchy (literature is art, grindcore probably isn’t, upstanding representatives of the bourgeoisie are the best-placed citizens to make the call as to which is what). Allan Byard gestured at something like this argument, saying in defence of the album that the songs on *Avagoyamugs* were based on true-crime books purchased legally in a local Burnie bookshop (Moore 2012).

The considerations of merit and character, in pointing to aspects of genre as legitimation, do some informative and productive work in this context. We could go further: by acknowledging that Australian society is not a totality but rather diverse and heterogeneous, and as such the ideal of community standards involves also particular and highly specific competencies and literacies. The community of listeners who might have been interested in *Avagoyamugs* (the number of CDs forfeited and destroyed—207—is perhaps indicative here) are well familiar with the standards by which the artistic merit of such an album is judged, and indeed of the canon which renders pursuit of obscene or transgressive themes, *reductio ad absurdum*, a sensible and rewarding aesthetic logic. The law is useful here to the extent that it indicates precisely the taboo to be broken. The controversy was good for Intense Hammer Rage, and in 2004 they received a grant of $1,100 from Arts Tasmania to travel to Melbourne for live events.

**The standards of morality, decency and propriety generally accepted by reasonable adults**

This more localised understanding of community standards, however (the standards of the community of people who might actually take an interest in a particular media text), was phased out some time ago in Australia. In the 1990s, academics and other professionals with expertise in research on media and media audiences were barred from participation in the processes of Australian media classification: their very expertise implied that they were desensitised (Beattie 2009, 8). The preference was instead for audiences who could somehow channel the dead centre of Australian national culture; this would be more “democratic”. The regulations described above indicate the extent to which this imagined community has
in turn been superseded, by the haunting figure of the rhetorical child who must be saved.

The attribute of the Australian media regulation framework which is perhaps most wrong is essentially the fantastic redundancy of its scope with reference to these depictions and descriptions. In researching for this chapter, I contacted ARIA several times to ask them if they had a list of recordings classified as Exceeding Level 3: the negative library or *index prohibitorum* of music in Australia. ARIA did not respond. Such a list would however be meaningless. Getting content classified costs money. Those costs hit the likes of Razorback Records harder than they do Sony, for example. Most media producers don’t bother, so most content is not classified. The redundancy of the framework, though, is not of the sort that would mean that it could be wholly ignored (at least, not by those professionally obliged to follow policies of institutional and legal compliance). Needless to say, the universe of online content is accessible to any Australian with viable internet access, including content which is refused classification and prohibited and potential prohibited content. *Avagoyamugs* is undoubtedly just a few keystrokes away, as are countless releases that would presumably be similarly prohibited were they encountered by interested parties with the access and inclination required to make something happen about them. This can and has periodically had real consequences for particular people with the misfortune to be in the wrong place at the wrong time with the wrong media. The critical consequence of this legislative redundancy is therefore unpredictable and arbitrary applications of the framework, most likely motivated by local political objectives. Given that most applications of the framework result in plea bargains to the police, it is not possible to determine how frequently this occurs.

There is one thing that the framework is very good at. I have discussed legislative and policy instruments here that are intended and designed to have certain social effects. Their ostensible function is to regulate media, and through so doing, to protect children. This goal is closely linked in the framework (and formally, in terms of the historical development of the policy, is an addition) to the goal of curtailing and thereby managing the risk of offense. These instruments have a more profound sociological function, however, in demonstrating how the symbolic borders of the nation might be institutionally enacted and dramatised around care for the child. There is a paradoxical conjuncture: a rationalist fantasy of the effectiveness of the means of administrative and bureaucratic control to legislate and impose definitions, alongside an absolute imposition of the sanctity of childhood as an emotive, moral end. The policy thus shows us
how the nation can be imagined in the circulation of ideas across texts, namely, legal texts, which conjure or gesture towards other texts, both real and imagined, and the real and imaginary harms which these texts might index. In this sense, it is right that neither evidence nor expertise should play a role in the development of Australian media regulation policy; they might stand in the way of assurances that the standards of morality, decency and propriety generally accepted by reasonable adults have been settled and are universally in force and actionable.

References

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