

Refused Classification

In this article, Jessica Azzi considers the relationship between early book censorship laws and the current classification law.

If you had a million years to do it in, you couldn't rub out even half the 'Fuck you' signs in the world. It's impossible¹

That's real cute, Holden. But you've been banned.

After completing a three year project researching the history of book censorship in Australia as part of the Australian Literature Resources' project 'Banned in Australia', Martina Bullock and Nicole Moore made a 'conservative' estimate that 500 scholarly or literary texts had been banned from entering Australia from 1901 until 1973.² Additionally, they estimated that

16,000 titles of all genres, including pulp fiction, erotica, underground pornography, magazines, comics, art books and pamphlets were banned by Customs between the early 1930s and early 1970s.³

The Refused Classification (RC) label (which has the effect of banning publications, films and computer games) has been the recipient of much recent attention since Senator Conroy, Minister for Broadband, Communications and the Digital Economy, announced plans for mandatory internet filtering.⁴ These plans evoke memories of Australia's history of rigorous censorship, the not-so-distant predecessor of the RC label. This article explores the development of the RC label from a book censorship scheme implemented by a prohibition of imports through the Commonwealth Government's power over customs.

*the banning of *The Catcher in the Rye* in 1956 was a catalyst for a review of Australian censorship*

Broadly, for a large part of the last century, recommendations and decisions to censor were underpinned by concerns over material that was obscene and/or would deprave the minds of those exposed to it.⁵ For much of the twentieth century, Australia had a rigorous

book censorship scheme, presided over by the Commonwealth Government through the *Customs Act 1901* (Cth).⁶ While this scheme ostensibly extended only to imports, it had a much broader reach, reflecting the infancy of the Australian publishing industry in the early to mid twentieth century. At that time, it was common for Australian manuscripts to be sent to Britain for publication.⁷ Upon their return to Australia they were subject to the legislation governing imports. Constitutional limits meant that the Commonwealth's power to regulate censorship was limited to imports; material which was not imported was dealt with by the States.⁸

"How the Stories became secret"⁹

Three Commonwealth departments were responsible for the prohibition of publications: The Commonwealth Department of Trade and Customs, the Postmaster-General's Department, and the Attorney General's Department.¹⁰ Books which fell into at least one of the following categories were targeted:

- publications which were blasphemous, indecent or obscene;¹¹
- publications which unduly emphasised matters of sex or of crime or were calculated to encourage depravity;¹² and,
- seditious publications.¹³

The Department of Trade and Customs played the biggest role, making the decision to prohibit entry of a publication and enforcing the prohibition through Customs. The Postmaster-General's Department was empowered by the *Post and Telegraph Act 1901* (Cth)¹⁴ to deliver publications, and its powers extended to confer a discretion to the Director of Post and Telegraphs to refuse to transmit or deliver any issue of a periodical which contained obscene or indecent matter.¹⁵ The prohibition of works which fell into the seditious category was carried out by the Attorney General's Department. The Book Censorship Board was established in 1933 by then Prime Minister Joseph Lyon's conservative United Australia Party, and in 1937 was renamed the Literature Censorship Board.¹⁶ Its role was to make censorship recommendations concerning the first two categories and to pass these recommendations onto the Minister for Customs and Trade, the latter being responsible for making the decision to prohibit.¹⁷

1 JD Salinger, *The Catcher in the Rye* (1951).

2 Martina Bullock and Nicole Moore 'Introduction' *Banned in Australia: Introducing Australia's Bibliography of Banned Books*, 2008: <http://www.austlit.edu.au/specialistDatasets/Banned/bullockMoore> (last accessed 20 June 2010) (Bullock and Moore, *Banned in Australia Bibliography*).

3 Ibid.

4 Department of Broadband, Communications and the Digital Economy, *Measures to increase accountability and transparency for Refused Classification material* December 2009: http://www.dbcde.gov.au/__data/assets/pdf_file/0020/123833/TransparencyAccountabilityPaper.pdf (last accessed 20 June 2010) at 1 (DBCDE, *December 2009 Paper*).

5 For example, *Customs Act 1901* (Cth) s52(c) (repealed).

6 *Customs Act 1901* (Cth).

7 Nicole Moore, 'Secrets of the Censors: Obscenity in the Archives' in National Archives of Australia, *Presented at the National Archives of Australia*, 2 May 2005: <http://www.naa.gov.au/about-us/research-grants/margaret-george-award/former/moore-paper-2004-old.aspx#seventeen> (last accessed 20 June 2010) (Moore, *Secrets of the Censors*).

8 Gareth Griffith, "Censorship in Australia: Regulating the Internet and Other Recent Developments", *Briefing Paper 04/02*, Parliament of New South Wales (March 2002).

9 Moore, *Secrets of the Censors*.

10 Ibid.

11 *Customs Act 1901* (Cth) s52(c) (repealed).

12 *The Customs (Prohibited Imports) Regulations 1938* Schedule 2 item 14 (repealed).

13 *The Customs (Prohibited Imports) Regulations 1938* Schedule 2 item 14 (repealed).

14 *The Post and Telegraph Act 1901* (Cth) s29(3) (repealed).

15 *The Post and Telegraph Act 1901* (Cth) s29(3) (repealed).

16 Moore, *Secrets of the Censors*.

17 'Best Selling American Novel Banned' *The Sydney Morning Herald* (1 August 1945): <http://www.naa.gov.au/about-us/research-grants/margaret-george-award/former/moore-banned.aspx> (last accessed 18 June 2010).

The first Australian book to be prohibited from import into Australia was Norman Lindsay's *Redheap*, in May 1930, prior to the establishment of the Book Censorship Board.¹⁸ The decision was made on the grounds that excerpts from the book were indecent or obscene.¹⁹ Interestingly, the complaints which initiated the banning of *Redheap* were made by a Victorian member of federal parliament in whose electorate the fictional town of Redheap was located.²⁰ This aspect of the decision reflects the role that influential vocal minorities are capable of playing in a classification scheme.²¹

The focus of classification legislation shifted from concepts of depravity or corruption of minds to, in the seventies, community standards

In 1944 the Literature Censorship Board recommended the banning of Kathleen Winsor's *Forever Amber*. A thousand page bodice ripper set in England in the midst of the Bubonic Plague, Hollywood turned it into a film in 1947. It was the highest selling book in the US during the 1940s in the US,²² although it was banned in 14 American states, with the Massachusetts' Attorney-General listing 70 references to sexual intercourse, 39 illegitimate pregnancies, seven abortions, 10 descriptions of women undressing in front of men, and 49 "miscellaneous objectionable passages".²³ In making his recommendation that *Forever Amber* be prohibited from entry into Australia, Dr LH Allen, Chair of the Literature Censorship Board, from 1937 until 1957,²⁴ wrote "popularity is no sure guarantee of worth. The source of its notoriety is more properly to be found in a crude and obvious appeal to the sex instinct".²⁵ The then Minister for Trade and Customs, Senator Richard Keane made the decision to ban the novel commenting "I consider it an undesirable book and not an acquisition to the literature of the Commonwealth".²⁶

Books prohibited from being imported into Australia were placed on a list, and in 1935 Thomas White, then Minister for Trade and Customs, announced in Parliament that "any importer of books can get a complete list of those books which are banned".²⁷ Despite the Minister's assertion importers had only limited access to this list,

which was kept completely secret from consumers until 1958.²⁸ National Australia Archives (NAA) records show that the Department of Trade and Customs were fearful of disclosing the list.²⁹ Advice was given against the disclosure of the list from a Customs official to the Comptroller-General of the Department of Trade and Customs:

*There is a very keen desire on the part of certain organisations to obtain a list of the prohibited books and if they could obtain copies there is little doubt that the lists would be used to criticize the Department.*³⁰

From censorship to classification

In their construction of the history of book censorship in Australia, Bullock and Moore identify the banning of *The Catcher in the Rye* in 1956 as a catalyst for a review of Australian censorship of books.³¹ Since its publication in 1951, it had been both popular and held up as one of the best American literary works of the fifties, to the point that it was gifted by US ambassadors to foreign governments around the world.³² The Parliamentary Library's copies of *The Catcher in the Rye* were seized by Customs from the Library in September 1957; the banned books list was still secret at this time and the Parliamentary Librarians were unaware that the novel had been banned.³³ The folklore surrounding this banning is certainly not short on melodrama: in September 1957, Customs, at an Australian airport, seized copies of *The Catcher in the Rye* which were innocuously sent as a gift from the US Government to the Commonwealth Government.³⁴

The following year Minister Denham Henty, then Minister for Trade and Customs, in the Menzies government, put in place a review of the banned books list which was to take place every five years, and permitted partial disclosure of the banned books list.³⁵ From the list, 178 titles were gazetted in Parliament, marking it the first time the list had been officially made public.³⁶ Over the next few decades the Commonwealth's power over classification yielded, and state classification legislation developed, indicating the limits of a customs head of power to regulate classification.

The focus of classification legislation shifted from concepts of depravity or corruption of minds to, in the seventies, community standards.³⁷ The 1968 case, *Crowe v Graham*,³⁸ foreshadowed the pending change. Windeyer J held that when determining whether

18 'Redheap': banned in Australia', *Sydney Morning Herald* (22 May 1930).

19 'Redheap Banned: Mr Norman Lindsay's First Novel', *The Argus* (17 April 1930): <http://www.middlemiss.org/matilda/2009/08/reprints-the-banning-of-redheap-by-norman-lindsay.html> (last accessed 20 June 2010).

20 Moore, *Secrets of the Censors*.

21 Donald McDonald, 'Sense and Censorbility', Speech delivered at Currency House, Sydney, 26 September 2007.

22 Moore, *Secrets of the Censors*.

23 Elaine Showalter, 'Emeralds on the home front', *The Guardian* (10 August 2002): <http://www.guardian.co.uk/books/2002/aug/10/featuresreviews.guardianreview19> (last accessed 18 June 2010).

24 Moore, *Secrets of the Censors*.

25 Decisions, with Comments, on Literature Forwarded by the Customs Department to the Commonwealth Book Censorship Board, 1933–1957, NAA: A3023, Folder 1945/1947.

26 'Best Selling American Novel Banned' *The Sydney Morning Herald* (1 August 1945): <http://www.naa.gov.au/about-us/research-grants/margaret-george-award/former/moore-banned.aspx> (last accessed 18 June 2010).

27 Commonwealth, House of Representatives, *Parliamentary Debates*, Volume 146 at 135.

28 Bullock and Moore, *Banned in Australia Bibliography*.

29 *Ibid.*

30 Stephen Payne, 'Aspects of Commonwealth Literary Censorship in Australia, 1929-1941' MA Thesis, Australian National University, 1980.

31 Bullock and Moore, *Banned in Australia Bibliography*.

32 *Ibid.*

33 *Ibid.*

34 David Fickling, 'Restricted Viewing', *The Guardian* (7 July 2003): <http://www.guardian.co.uk/world/2003/jul/07/worlddispatch.filmcensorship> (last accessed 20 June 2010).

35 Moore, 'Secrets of the Censors'. Moore estimates that Kathleen Winsor's *Forever Amber* was removed from the list in 1958.

36 National Archives of Australia: Attorney-General's Department, Central Office; C4480, National Literature Board of Review correspondence on censorship and legislation, 1938-59; 1958/23, Commonwealth of Australia records about importation of prohibited publications and letters about censorship 1958.

37 Darryl Williams, "From Censorship to Classification" (1997) 4 *Murdoch University Electronic Journal of Law* 4: <http://www.murdoch.edu.au/elaw/issues/v4n4/will441.html#n34> (last accessed 20 June 2010).

Customs Act 1901 (Cth).

38 (1968) 121 CLR 375.

material was indecent the proper inquiry was whether it offended against community standards of decency, rather than whether it depraved or corrupted susceptible minds.³⁹ In 1970, the then Minister for Customs and Excise, Don Chipp, spoke of the need for adults to be able to see, hear, and read what they wish;⁴⁰ a principle underpinning current classification law.⁴¹ The R rating for films was introduced in 1971 and adults were able to view films, that otherwise, if subject to customs legislation, would likely have been refused entry into Australia.

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Accordingly, classification legislation at state level was reformed so that it shifted from the concept of depravity embedded in the *Customs Act 1901* (Cth) towards community standards and the reasonable adult.⁴² These changes at State level were accompanied by the *Classification of Publications Ordinance 1983* (ACT),⁴³ the Commonwealth legislation at the heart of the reforms. It contained two restricted categories for film and videos ('R'⁴⁴ and 'X'⁴⁵), and two for literature (Category 1⁴⁶ and Category 2⁴⁷), and material was to be judged according to the degree of offence it would cause a reasonable adult.

RC today

The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**Classification Act**) sets out the legislative framework for the classification of publications, films and computer games and provides that classification decisions are to be made in accordance with the National Classification Code (**Code**),⁴⁸ which is extracted below:⁴⁹

Classification decisions are to give effect, as far as possible, to the following principles:

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

Furthermore, the *Guidelines for Classification of Publications* and *Guidelines for the Classification of Film and Computer Games*⁵⁰ (collectively **Guidelines**) are also available to assist the Classification Board label material. The former, inter alia, instructs that:⁵¹

Publications that appear to purposefully debase or abuse for the enjoyment of readers/viewers, and which lack moral, artistic or other values to the extent that they offend against generally accepted standards of morality, decency and propriety will be classified 'RC'.

The classification of online content is also reliant upon the Code and the Guidelines. The Australian Communications and Media Authority (**ACMA**) can issue a take-down notice to the owner of a website with an "Australian connection" which hosts,⁵² streams,⁵³ or links⁵⁴ to prohibited content or potential prohibited content. Content hosted overseas is subject to a 'blacklist' which is passed on by the ACMA to filtering vendors who then prohibit the access to blacklisted content of those who have purchased filtering services.⁵⁵ Prohibited content and potential prohibited content respectively include, that which the Classification Board has classified RC or X18+, and content for which there is a substantial likelihood that it if it were classified by the Classification Board it would be classified RC.⁵⁶

The amendment of the Classification Act in 2007 controversially introduced a provision whereby material that advocates the doing of a terrorist act is refused classification if there is a risk that the praise may lead a person, regardless of their age or mental impairment, to engage in a terrorist act.⁵⁷ Placed in the chronology of the development of Australian classification law, this amendment is a step back in time. It moves away from the reasonable adult, and instead asks classifiers to consider the impact of material on an unreasonable person who is not an adult.⁵⁸ How is a reasonable adult to consider this impact? Similarly, proposed plans for mandatory internet filtering of legal online material, readily accessible in other jurisdictions, are also backward looking, and undermine developments which have seen Australian classification law move away from its early days of rigorous censorship.

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39 Ibid, at 395, 398.

40 Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 11 June 1970 at 3372.

41 *National Classification Code*.

42 See for example *Classification of Publications Act 1973-74* (SA).

43 *Classification of Publications Ordinance 1983* (ACT) (repealed).

44 *Classification of Publications Ordinance 1983* (ACT) s35(2) (repealed).

45 *Classification of Publications Ordinance 1983* (ACT) s35(3) (repealed).

46 *Classification of Publications Ordinance 1983* (ACT) s35(1) (repealed).

47 *Classification of Publications Ordinance 1983* (ACT) s35(3) (repealed).

48 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s9.

49 *National Classification Code*.

50 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s12.

51 *Guidelines for the Classification of Publications 2005*.

52 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 47

53 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 56.

54 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 62.

55 DBCDE, *December 2009 Paper*, 3.

56 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 1.

57 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s9A.

58 Explanatory Memoranda accompanying the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*, 12.