

11th April 2011

## **Submission to the Senate Committee Inquiry into the Australian film and literature classification scheme**

### **1. Executive Summary**

The National Association for the Visual Arts (NAVA) welcomes the opportunity to make a submission to inform the deliberations of the Senate Committee Inquiry into the Australian film and literature classification scheme. In recognition of the changes in community attitudes and because of the new conditions created by changes in technology, it seems timely for this to happen.

However, NAVA finds it disappointing that no representative peak arts organisations were invited to make submissions. This is particularly concerning since there is the possibility that changes to the classification regime are being contemplated which could have a profound impact on freedom of expression for artistic creators in all art mediums. We would strongly recommend that peak representative arts organisation be offered this opportunity with reasonable time allocated for them to undertake the research required to develop their case to inform the deliberations of the Senate Committee. In NAVA's case, we found out about the Inquiry by accident after the date for submissions had already closed. While we appreciate the willingness of the Committee to accept our late submission, we have had only had one week in which to prepare the material and no opportunity for this to be discussed at the public hearings being conducted by the Committee.

In its submission, NAVA will concentrate on the issues of particular concern to the professional visual arts, craft and design sector. In particular within the Committee's Terms of Reference, we will be addressing Items b), e), k), l), m) and o). Recommendations have been included in relation to areas of the law which have flow-on implications for the classification regime: the 'artistic defence'; a bill or charter of human rights; and sedition law.

### **Recommendations**

#### ***j) Artistic defence***

*NAVA recommends that the Senate Committee recommend that:*

- there be a clear articulation and restoration (where necessary) of the 'artistic defence' in any legislation likely to affect artists' freedom of expression*
- where offensiveness of material is to be judged, then 'artistic merit' be included as a relevant consideration*
- classification of a work of art provides a person with a complete defence.*

## **ii) Freedom of Expression**

*NAVA recommends that the Senate Committee recommend that:*

- the Commonwealth Government legislate a bill or charter of human rights which includes a section protecting citizens' freedom of expression*
- the Commonwealth Government fulfills its promise to make the changes to sedition law as elaborated in the Australian Law Reform Commission's report 'Fighting Words: a review of sedition laws in Australia', July 2006.*

## **iii) Dealing with artists and artworks in the classification system**

*NAVA recommends that:*

- classification not be mandatory for all artworks*
- artworks exhibited in bone fide art galleries be exempted from classification*
- the responsibilities of the Classification Board be widened to allow it to call in or receive artworks where there has been a complaint which is not deemed frivolous, vexatious, misconceived or lacking in substance*
- classification of artworks be done either without charge if artists bring the works to the Classification Board themselves, or with the cost being borne by the complainant if the works are called in as the result of a complaint*
- the classification of artworks by the Classification Board should never be used as a means of censoring material that is otherwise legal.*

## **iv) The role of 'artistic merit' in decision-making**

*NAVA recommends that:*

- if artworks are to be assessed by the Classification Board, this should be done through measuring them against clearly articulated criteria for 'artistic merit' and*
- the criteria of 'artistic merit' should be devised in consultation with a Standing Committee of Art Experts.*

## **v) Consistency across classification and regulatory authorities**

*NAVA recommends that:*

- the Senate Committee proposes a re-examination of the various state laws with a view to standardization, but with the objective of ensuring the principle of all adults having the right to make informed choices within the law about what they want to experience, express and communicate.*

## **vi) The interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority in supervising broadcast standards for television and Internet content**

*NAVA recommends that:*

- a review system, similar to the one used by the Classification Board be established for the ACMA, which should only be able to prohibit and blacklist 'illegal' content, and*
- this blacklist or prohibition be transparent and open to scrutiny.*

**vii) The effectiveness of the National Classification Scheme in dealing with new technologies and new media, including mobile phone applications, which have the capacity to deliver content to children, young people and adults**

*NAVA recommends that:*

*- in relation to Refused Classification, X18+, R18+ and MA 15+ content in any virtual environment, the Classification Board recommend that access be mediated through a filter landing page where the nature of the content is described according to the same categories used for film and television*

*- the Classification Board and the ACMA allow access to legal material deemed unsuitable for under 18s by requiring the adoption of an age verification scheme in virtual environments.*

*- the Senate Committee recommend to the Commonwealth Government that it endorses and supports free distribution of software programs for Australian households that will act as filters for unsolicited material. This software would have the capacity to generate landing pages that require the users to log in with their date of birth if wishing to view content that would be given a MA 15+, R18+ or X18+ rating.*

We would be happy to provide any further information or speak to this submission and can be contacted at

Yours sincerely

Tamara Winikoff  
Executive Director  
National Association for the Visual Arts (NAVA)

## **2. Introduction**

### **2.1 The National Association for the Visual Arts (NAVA)**

The National Association for the Visual Arts (NAVA) is the peak body representing and advancing the professional interests of the Australian visual arts, craft and design sector, a sector that includes approximately 44,000 professional practitioners and about 1000 galleries and support organisations.

Since its establishment in 1983, NAVA has worked to bring about appropriate policy and legislative change to encourage the growth and development of the visual arts in Australia. It sets best practice standards and works towards increasing professionalism within the industry. It also provides direct services to the sector and its members through offering expert advice, representation, resources and a range of other services.

NAVA's vision is an arts sector that is professional, innovative and central to Australian life, one that is able to grow and expand the creative capital of Australia in an environment that is supportive and focussed on the continued development of contemporary culture and the safeguarding of the rights of arts practitioners. NAVA has made many submissions, recommendations and responses to inquiries and given expert assistance in the development of policies at all levels of government. It has continued to advocate for the rights of artists - economic, social, political and cultural - for their right to freedom of expression and for their economic viability, reputations and artistic practice to be supported in Australia.

NAVA's submission on behalf of its members and constituents is informed through its unique position as the national peak industry body, bridging the worlds of art, policy and legislation development and the three tiers of government. NAVA's constituents are creative professionals who are:

- dedicated to their practice, critical ideas and the production and dissemination of visual culture in Australia
- usually working as sole traders or small to medium enterprises across artforms and media, or providing creative services to other industries
- engaged with new technologies and exploring their potential
- entrepreneurial in seeking professional opportunities in Australia and overseas
- economically vulnerable practitioners with limited ability to enforce their rights
- wanting to abide by existing legislation and protocols while at times challenging orthodoxies.

NAVA's knowledge and experience of the kinds of abuses that artists have been subjected to in Australia, leads us to be very concerned over the need for appropriate legislation and review mechanisms to recognise the value of artistic practice in all its diversity. NAVA urges the Senate Committee in any recommendations or decisions it makes, to uphold the right of freedom of expression not only for artists but for all members of the community.

### **3. Freedom of expression and the role of artists**

#### **3.1 Freedom of Expression**

“Regulation and legal interference in free speech is controversial, especially in a self-stated democratic society. When art and law does collide, the result is often unsatisfactory. The nature of the adversarial system pits conflicting interests against each other: the language of boundless creativity and strict regulation could be seen as comparing apples with oranges”<sup>1</sup>.

Freedom of expression is a universal human right and one that is particularly valued by artists in their role in expressing and questioning the zeitgeist of society.

In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). Article 19 affirms the right to free speech:

*Article 19.* Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Members of the Commonwealth Parliament reaffirmed the principles of the Declaration during a sitting on 10 December 1998 to mark the 50th anniversary of the UDHR and pledged to give wholehearted support to the principles enshrined in the Declaration.

Article 19 of the 1966 United Nations *International Covenant on Civil and Political Rights* (ICCPR) states that:

Everyone shall have the right to freedom of expression ...

While Australia is a signatory to this treaty, in order to incorporate treaties and conventions into Australian law, governments must pass a specific Act of Parliament. Although some parts of the treaty have been implemented in law, such as the *Human Rights Commission Act 1981*, no government has implemented the free speech provisions and therefore they are not enforceable by Australian courts.<sup>2</sup>

Fundamentally, the principle of freedom of expression ensures that the citizenry retains the right to question the wisdom of government and institutions embracing particular ideological positions. Freedom of expression should be able to be used in everything from education and community advocacy through to proceedings in all relevant courts. If freedom of expression binds all government agencies, then it must be used in the development and implementation of government policy. If the right is justiciable, then it can be used in all courts, in both civil and criminal proceedings. Requiring all courts to interpret legislation compatibly with human rights means that freedom of expression will be recognised as a fundamental human right that underpins democracy.

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<sup>1</sup> From *Freedom of Expression* research paper by Jenny Lovric commissioned by the Visual Arts Industry Guidelines Research Project in 2001 and published by NAVA on

<http://www.visualarts.net.au/readingroom>

<sup>2</sup> <http://www.aph.gov.au/LIBRARY/pubs/rn/2001-02/02rn42.htm>

### 3.2. The role of artists in Australian society

“Art is usually a criticism of the world as it is and a vision of the world as it might be. When we don't have the arts, a very important part of us begins to starve and our humanity begins to dwindle.”<sup>3</sup>

Artists are often people who deliberately question certainties. At times of national confidence this is regarded as a strength, that ideas can be shown to withstand the test of rigorous interrogation. In times of rapid change or uncertainty, this ability to see the wisdom of tolerance of difference, can be undermined.

Artists' work can change public opinion and bring to light injustice, flawed thinking and questionable or reprehensible action. NAVA acknowledges that artists can also hold less lofty views and their opinions are not always popular or well understood. Some people may disagree with them. However, the tolerance of any member of the community's right to express their views which are then open to be judged by others is indicative of a healthy liberal democratic society.

NAVA is concerned that there should be no inhibiting of artists being able to exercise their democratic right to represent, discuss and critique ideas through their artwork or other forms of public and private expression. NAVA asserts that, as with all Australian citizens, artists should be free to challenge current orthodoxies as well as government policies, legislation and actions and those of key decision makers. This is particularly significant for artists in protecting their practice, their income and their ability to critique, contributing to an intellectually healthy and engaged society.

### 3.3 The impact of current legislation on artists

*“If we accept that freedom of expression is in the public interest then it is of interest to the public what restrictions are placed on that freedom. And there are already quite a few. The diversity of artistic practice today means that many laws, seemingly unrelated to artistic practice may be breached.”<sup>4</sup>*

Artists rely on the communication, reproduction and exhibition of their work as a means of undertaking their business practice and obligations and earning income. There are some laws and protocols now in force which can be damaging to artists' reputations and incomes and indeed to the public view of art as a whole. These reveal a climate of increasing uncertainty and aversion to risk, limiting artists' capacity and society's as a whole to make informed decisions and access ideas, content and works that are not illegal. Examples are Division 15A of the *Crimes Act* 1900 (NSW) "Child Abuse Material", Section 80.2 of the *Criminal Code* 1995 (Cth) Sedition the sedition section of the federal Anti-terrorism legislation, Child Pornography laws in NSW and the Australia Council for the Arts' 'Protocols for Working with Children in Art'.

NAVA has been extremely concerned that there have been many cases of unjustified interference in artists' legitimate freedom of expression. Because artists' work is often oblique, using metaphorical imagery, quotation or allusion and satire, many meanings can be drawn from it. To some extent these are in the eye of the beholder.

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<sup>3</sup> Stephen Weil, deputy director of the Smithsonian Institution's Hirshhorn Museum and Sculpture Garden in Washington, D.C.

<sup>4</sup> 'Freedom of Expression' paper by lawyer Bill Morrow from the 2006 'The Future Looks so Inciting' NAVA forum as part of Artists Week at the Adelaide Arts Festival.

There is a general perception in Australia that censorship happens very infrequently. However, this is not NAVA's experience. It happens all too often, and can simply be based on a complaint from a member of the public or special interest group or because of the personal views of someone in a position of decision making power.

Often censorship is allowed to go ahead unchallenged because of a power differential. Cases come to NAVA's attention when artists, galleries or art magazine publishers seek advice or intervention from their professional association to assert what they believe to be their rights (see examples in Appendix 1). Censorship is not only damaging to an artist's reputation, but can result in the loss of opportunity for the public exposure and discussion of their work and a loss of income from potential sales or commissions. This also culminates in an imbalance between freedom of expression and the rights of adults to read, hear and see what they want.

NAVA acknowledges that there are occasions when the right to freedom of speech and expression must be balanced against the need to protect vulnerable members of the community against violation of their rights. However, NAVA believes that existing laws in a range of areas (eg vilification, discrimination, blasphemy, obscenity and defamation) offer this protection already, and indeed in some cases are in need of liberalising reform.

For some selected censorship examples see Appendix 1 below.

### **3.4 Bill or Charter of Human Rights**

In the absence of any legal protection of freedom of expression in Australia, through something like a bill or charter of human rights, NAVA is concerned to ensure that there should be no inhibition of artists being able to exercise their democratic right to challenge current ideologies and sovereign actions through their artwork. NAVA asserts that, as with all Australian citizens, artists should be free to challenge current orthodoxies as well as government policies, legislation and actions and those of other key decision makers. However, in the absence of a statutory human rights framework in Australia, NAVA has been extremely concerned that there have been many cases of unjustified interference in artists' legitimate freedom of expression.

For fear of possible misinterpretation of their work or abuse of power by governments or enforcement authorities, artists, galleries and art publishers are often under pressure. With the risk of adverse treatment by police or other authorities, and the seriousness of potential legal consequences, self-censorship can and does occur. The result can often be the stifling of freedom in the expression of opinion, censorship of some forms of inquiry or dissent and the consequent blandness of contemporary cultural expression.

As an example, the federal Sedition law, which originally dated back to 1914 as part of the Commonwealth Crimes Act, was revised conservatively in 2005. The opportunity was not taken to update the law to reflect contemporary attitudes and circumstances. NAVA continues to urge the Attorney General, The Hon. Robert McClelland MP to fulfill the Commonwealth Government's promise to make the changes recommended in the Australian Law Reform Commission's report "Fighting Words: a review of sedition laws in Australia", July 2006.

NAVA and its constituency are only too aware of the way that laws have been used by repressive regimes and individuals in other countries and throughout history to curtail citizens' right. NAVA's knowledge of the experiences of artists in Australia,

leads us to advocate for appropriate review mechanisms and legislative changes to prevent the curtailment of the right of freedom of expression, not only for artists but for all members of the community.

***NAVA recommends that the Senate Committee recommend that:***

***- the Commonwealth Government legislate a bill or charter of human rights which includes a section protecting citizens' freedom of expression***

***- the Commonwealth Government fulfills its promise to make the changes to sedition law as elaborated in the Australian Law Reform Commission's report "Fighting Words: a review of sedition laws in Australia", July 2006.***

### **3.5 The 'chilling effect'**

With the risk of adverse treatment by police or other authorities, and the seriousness of potential legal consequences, self-censorship by artists can occur. The result can often be the stifling of freedom in the expression of opinion. Increasingly, artists feel deterred by policy and legislation from bringing critical ideas into the public domain, diminishing Australia's contribution to international intellectual activity. Artists' self-censorship curtails their artistic practice, limits their capacity to explore often difficult subjects and can result in cultural stagnation. As artists are also contributors to Australia's creative industries, there is a danger of compromising innovation across all areas of creative endeavour, not only within the arts field.

#### **3.5.1 Case Study: Sydney artists Adam Cullen and Cash Brown**

In a climate of nervousness about national security, in 2005 two Sydney based artists, Adam Cullen and Cash Brown, contacted NAVA about whether pending federal sedition law would pose a threat to their planned performance work. They were seeking a gallery that would be willing to allow them to present a satirical performance about how to make a variety of weapons including Molotov cocktails etc, to demonstrate how easy it was to find this dangerous information on the web.

In the period just before revised sedition laws passed through parliament, they gained approval and showed the work at Sydney's Museum of Contemporary Art editing the piece so as not to attract unwanted legal attention. They felt that self-censoring severely compromised the work but was a necessary precaution. With the threat of a possible conviction imposing seven years jail, they were clear that if the law had been in place, rather than run the risk of being misunderstood and taken too literally they would not have gone ahead.

#### **3.5.2 Case Study - PVI Collective**

In 2002, artist group PVI Collective felt under considerable pressure to pull a performance work called *Terror[ist] training school: route 65* from the Artrage festival in Perth. As PVI Collective member Kelli McCluskey explained "with only a few weeks to go until opening night, our publicity campaign was out and everything was going fine, then the Bali bombings happened". PVI opted to postpone the work which was re-exhibited some months later, with an abbreviated title and an explanatory publicity campaign.

### **3.6 Artistic Defence**

Various laws currently allow for a defence to be used where the purpose of the material has an artistic, scientific or educational purpose. This is based on an understanding that art, science and education can be interrogative and serve special purposes that are intended for the public good, even though the material may at



times go against what, in another context would be regarded as problematic.

For example, "child abuse material" under s. 91FB of the *Crimes Act 1900* (NSW) is material that depicts a child in certain limited ways which a reasonable person would regard as offensive. In determining whether a work is offensive the "literary, artistic or educational merit (if any) of the material" must be considered: s. 91FB(2)(b).

Further, classification of a work must provide a defence to the possession, creation or dissemination of certain otherwise prohibited material. Classification can be achieved before publication or exhibition or afterwards where there is concern about a complaint. For example, s. 91H(7) of the *Crimes Act 1900* (NSW) provides a defence to possession, creation or dissemination of child abuse material:

"91H(7) Classified material

It is a defence in proceedings for an offence against section 91H that the material concerned was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification (RC)."

A similar defence is to be found in s. 68(1A) of the *Crimes Act 1958* (Vic), although the prohibition covers only a film, photograph or computer game and not painted works, sculpture or other multi-media.

NAVA supports both the inclusion of 'artistic merit' in determining whether a work of art is offensive or not, as well as classification of the work as a complete defence to any offence of possession, creation or dissemination of a work. However, NAVA does not support the removal of the artistic defence such as occurred recently in NSW in amendments to the *Crimes Act 1900* with regard to child abuse laws.

NAVA supports a defence along the lines of that found in s. 70(2)(b) of the *Crimes Act 1958* (Vic). In that section it is a defence to the prosecution for an offence of knowingly possess child pornography if "the film, photograph, publication or computer game possesses artistic merit or is for a genuine medical, legal, scientific or educational purpose".

**NAVA recommends that:**

- ***there be a clear articulation and restoration (where necessary) of the 'artistic defence' in any legislation likely to affect artists' freedom of expression***
- ***where offensiveness of material is to be judged, then 'artistic merit' be included as a relevant consideration***
- ***classification of a work of art provides a person with a complete defence.***

#### **4.1 Classification as Protection vs Limitation**

As things stand, the Classification Board does not have jurisdiction over visual artworks (other than films, videos and computer games), except where they appear in publications. This has meant that prior to the on-line era, the responsibility for decision-making about the suitability of access to art has been exercised by artists themselves and by the venues or entities responsible for display (eg galleries) and distribution (eg art magazines).

As galleries and art spaces are an understood context for art and people have the choice as to whether to attend, it would seem an obvious zone for exemption from classification, especially as it is the industry's standard to use signage and explanatory panels to alert the public to potentially challenging content.

However, the Bill Henson case has resulted in much public debate, especially about how to deal with edgy content on the internet. Because of the negative public reaction to a photograph by Bill Henson in his 2008 exhibition at the Roslyn Oxley9 gallery, the decision was made to submit his work to the Classification Board despite no legal obligation to do so. The resultant classification of his works as 'PG' and 'Unrestricted' and the ruling by the Board that the work in this exhibition would be "unlikely to offend a reasonable adult"<sup>5</sup>, indicates, as outlined by the submission to this Inquiry by The Arts Law Centre of Australia, "that the photograph was not a submittable publication, and that there was no need for it to be classified. However, because of the negative public reaction to the photograph including from members of state and federal parliaments, it was deemed necessary to submit the work for classification in order to prove it was not offensive". This means that classification is now being considered as a mechanism through which an artistic work is deemed offensive or not offensive.

At the time, the then Prime Minister Kevin Rudd declared that he found the work "revolting". By contrast Malcolm Turnbull was unequivocal in his support for Henson's work. In a transcript from the Victorian Department of Premier and Cabinet, Wednesday 30 March 2011 when asked by a reporter if he would be attending the new Bill Henson exhibition, the Victorian Premier Ted Baillieu responded, "Well I've said before, Bill Henson's an internationally-renowned artist, and I haven't thought about whether I'm going or not. I've read some of the articles, and I think it's – from what I read – it's got fairly wide coverage of his work." The continuing media hype obviously still puts some politicians in an uncomfortable position as to where to place themselves on the spectrum of very divergent public opinion.

For artists who explore sensitive or controversial material it presents a real and tangible dilemma. Do they pay the extensive costs of having their work classified, even when it is not likely to need classification, or do they defend their right to freedom of expression and risk prosecution or censorship?

Since the Bill Henson controversy, the artistic community has become more aware of the role played by the Classification Board and its value in making considered judgments. At the time, Bill Henson's work was classified PG and Unrestricted, putting paid to the speculation that he should be charged.

So does this make a case for the Classification Board being the authority to which controversial artworks are referred and on what conditions? It is true that many of the people appointed to the role of Classification Board members are both experienced in making judgments about a great deal of comparable material and experts in the field of broadcasting, education and culture, community affairs and consumer advice. In addition, they are somewhat removed from the pressure of media hysteria and special pleading by factional and often very conservative lobby groups.

On the face of it, this would seem to be a recommendation for the Classification Board to take on responsibility for the classification of artworks. However, NAVA

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<sup>5</sup> (<http://www.smh.com.au/entertainment/art-and-design/gallery-submits-bill-hensons-latest-images-to-censors-before-new-show-20100424-tkiu.html>)

asserts that the wisdom of this would be dependant on the circumstances, the Classification Board's terms of reference, the criteria used to make the assessments and the experience and attitudes of its board members at the time.

The Classification Board as the authority would seem like an obvious way to avoid pressure from partisan interest groups who often abuse artworks to create controversy in order to further their own interests. However, the cost and time involved in seeking classification is a serious disincentive for artists to use this mechanism to stave off unnecessary restrictions. As has been extensively documented through authoritative research<sup>6</sup>, artists' incomes are often extremely low with about one third living below the poverty level (the median income for artists from their creative and arts related work is around \$25,800<sup>7</sup>).

While the Australia Council has negotiated a waiving of Classification Board fees for its successful grant applicants who are required to comply with the Council's 'Protocols for Working with Children in Art', this represents a small proportion of Australian artists for whom no such exemption currently applies. For them, the cost and time delay caused by classification is a real disincentive.

It is the case that most often controversy over artworks can erupt once they are on exhibition. Removal for them to be classified would cause a serious loss of opportunity for the artist to enhance their professional profile and to earn income. Once having lost their slot in a very hotly contested gallery exhibition calendar, the artist may have to wait another two years (if ever) for the opportunity to be offered again.

NAVA asserts that it is entirely unjustified that classification be undertaken as a matter of course for all artworks. A small proportion of the total number of artworks made public are the subject of community concern to the point where their banning is called for. In relation to their legality, there are very few cases which have proceeded to prosecution and judgment in the courts, and of these, almost all have resulted in acquittal.

***NAVA strongly recommends that:***

- classification not be mandatory for all artworks***
- artworks exhibited in bone fide art galleries be exempted from classification***
- the responsibilities of the Classification Board be widened to allow it to call in or receive artworks where there has been a complaint which is not deemed frivolous, vexatious, misconceived or lacking in substance***
- classification for artists be done either without charge if they bring the works to the Classification Board themselves, or with the cost being borne by the complainant if they are called in as the result of a complaint***
- the classification of artworks by the Classification Board should never be used as a means of censoring material that is otherwise legal.***

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<sup>6</sup> The series of studies undertaken over thirty years by cultural economist Professor David Throsby eg with Anita Zednik 'Do You Really Expect to Get Paid? An economic study of professional artists in Australia' 2010 Australia Council

<sup>7</sup> This applies to the period of 2007/2008 in 'Do You Really Expect to Get Paid, An economic study of professional artists in Australia' David Throsby and Anita Zednik 2010 pg. 45

## **4.2 The role of 'artistic merit' in decision-making**

Under the Classification Act, the literary, artistic or educational merit of works must be taken into account in making classification decisions. As has been demonstrated in several important cases considered by the Classification Board, the decision on whether works should receive or be refused classification hinges on the judgement of artistic merit by the board members.

In relation to the determination of 'artistic merit' NAVA would make the same recommendations here as it has previously proposed should be adopted by police and the DPP in NSW:

- establish an objective standard for 'artistic merit'
- establish a standing committee of art experts who would apply these standards.

### **4.2.1. Set an objective standard for 'artistic merit'**

NAVA proposes the following criteria for determining 'artistic merit':

#### **a) Establish whether or not the person is an artist.**

By assessing his/her practice profile against the following arts industry criteria assess whether the person:

- is a known visual arts, craft or design practitioner (artist)
- has worked as an artist for some time
- makes regular efforts to bring their work to the public
- has displayed and/or sold work through galleries, art agents or online through art sites
- has had work acquired for public or private art collections
- has had exhibitions of the work reviewed in art industry recognised art publications
- is eligible for or has secured art grants, awards, prizes, residencies, sponsorship and/or philanthropy
- is recognised by art peers through having work reviewed or discussed in art contexts
- teaches or comments about art and/or art practice through courses, workshops, lectures, seminars, conferences, public talks, blogs or other on-line means
- has appropriate art educational qualifications
- is a member of a professional art association

Emerging artists may not yet be able to meet many of these criteria, so the judgement of the 'artistic merit' of the artwork is an important safeguard (see b) below).

#### **b) Assess the works against criteria for artistic merit**

In relation to the term 'artistic merit', the issue of whether the work has merit as good or bad art is irrelevant in this context. NAVA maintains that image quality is not what is being assessed. Instead NAVA would recommend that 'artistic merit' be elaborated to include the following criteria against which evaluation could be made: intention; context; and meaning.

Suggested assessment questions:

*i) Intention:*

- was the intention of the work to be understood to be for artistic purposes of eg research, critique, irony, parody, satire, challenge to community attitudes, and/or sampling and reuse?

*ii) Context:*

- was the work made available to the public through arts venues eg a gallery or artist run space, artist studio or workshop, art website, art app or art publication?
- was the work commissioned as an artwork?
- was the work exhibited as an artwork in non-traditional spaces i.e retail business, parklands, public laneways?

*iii) Meaning:*

- what was the meaning of the work according to the artist's explanation and/or interpretation by art experts

- was it part of an installation or structure, series, sequence, moving image work or other larger art entity which contributed to its meaning

- did the title of the work or text or other graphic devices used in the image or associated with it, contribute to the meaning of the work?

#### 4.2.2. Establish a Standing Committee of Art Experts to advise on 'artistic merit'

To assist the NSW police and DPP, NAVA has proposed the appointment of a Standing Committee of Art Experts which could be convened as necessary to advise on 'artistic merit'. In relation to the Classification Board, NAVA would recommend that the same kinds of experts should be asked to advise on criteria for assessment and where matters of fine judgement are required about artworks which may be outside the experience of members the Classification Board.

NAVA would recommend that these experts should be drawn from amongst:

- senior curators at major art institutions
- art academics
- well established artists
- reputable gallery owners

***NAVA recommends that:***

***- if artworks are to be assessed by the Classification Board, this should be done through measuring them against clearly articulated criteria for 'artistic merit' and***

***- the criteria of 'artistic merit' should be devised in consultation with a Standing Committee of art experts (as indicated in 4.2.2 above).***

### **4.3 Consistency of Standards**

It is hard to see how different standards can be justified around a cohesive country with a small population like Australia, especially in the digital age where communication is instantaneous. These differences serve only to cause confusion, especially where state borders are simply lines on maps. This especially is the case where currently some state legislation can be used to override the decisions of the Classification Board.

For artists, it creates difficulties where their work may tour or be shown anywhere around the country, not necessarily in the state it was made. It may also be accessed on screen via any of the new technologies. The jurisdictional differences also will

present difficulties as Australia moves to digitize works in its art gallery, museum and library collections. The on-line environment makes such inconsistencies problematic to enforce and could result in the most restrictive conditions from amongst the different states being adopted without their coming under scrutiny.

This has been made even more complicated by the different, competing and opaque standards being applied by the Australia Communications and Media Authority (see further comment below at Clause 6).

***NAVA recommends that the Senate Committee proposes a re-examination of the various state laws with a view to standardization, but with the objective of ensuring the principle of all adults having the right to make informed choices within the law about what they want to experience, express and communicate.***

#### **4.4 International models**

*“There is no Federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten the vitality of a major cultural institution, as punishment for failing to abide by government demand for orthodoxy”*  
US District Judge Nina Gershon<sup>8</sup>

Internationally the arts and artists have continually had to deal with issues of censorship, criticism and restrictions on freedoms most recently with the detaining of Chinese activist artist Ai Wei Wei<sup>9</sup> and the attack on Paul Gauguin’s painting in the National Gallery of Washington<sup>10</sup>, or the self censorship of the Hayward Gallery in the UK in relation to Robert Mapplethorpe’s retrospective exhibition. However, international legislation has also sought to protect artists and arts institutions from censorship.

In regard to the self-censorship by the Hayward Gallery of the Mapplethorpe exhibition, if the gallery had decided to proceed, there are three particular areas of UK law that the police and the gallery could have considered: the Obscene Publications Acts, which specifically allow potentially obscene material to be published in the interests of art and scholarship; the Indecent Displays (Control) Act 1981 which specifically exempts art galleries and museums from prosecution; and The Indecent Displays (Control) Act 1981. Though this last Act creates an offence of displaying indecent matter publicly, Parliament went on from this basic prohibition, to allow in the Act that if people under 18 years of age were excluded by a warning notice, then the offence would not be committed. But more significant still, Parliament went on to exclude from prosecution “any matter included in the display of an art gallery or museum and visible only from within the gallery or museum.”<sup>11</sup>

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<sup>8</sup> “In 1999, then-New York Mayor Rudy Giuliani objected to the “Sensation” exhibit at the Brooklyn Museum of Art. He was particularly offended by a painting of the Virgin Mary which incorporated elephant dung, a ceremonial technique used by artist Chris Ofili. The city demanded that the art museum cancel the show. When it refused to do so, the city withheld about \$500,000 in funding. The money had been budgeted for general support of the museum. U.S. District Judge Nina Gershon ordered the funding reinstated, finding that the city had violated the First Amendment.”

([http://www.fac.org/speech/arts/overview.aspx?topic=arts\\_overview](http://www.fac.org/speech/arts/overview.aspx?topic=arts_overview))

<sup>9</sup> <http://www.guardian.co.uk/artanddesign/2011/apr/03/ai-weiwei-detained-chinese-police>

<sup>10</sup>

[http://www.nyartsmagazine.com/index.php?option=com\\_content&view=article&id=576609:visitor-attacks-gauguin-painting&catid=376:exhibitions&Itemid=24](http://www.nyartsmagazine.com/index.php?option=com_content&view=article&id=576609:visitor-attacks-gauguin-painting&catid=376:exhibitions&Itemid=24)

<sup>11</sup> Henry Lydiate 1996 (<http://www.artquest.org.uk/artlaw/censorship/legal-controls/mapplethorpe.htm>)

Article 10 of the *European Convention on Human Rights* has a provision for freedom of expression:

1. “ Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>12</sup>”

Previous submissions to this Senate Inquiry made by Civil Liberties Australia have also identified the international application of classification systems and how countries address these issues as a point of comparison with Australia.

In Britain, films are currently regulated and classified by the *British Board of Film Classification* (as mentioned in the Civil Liberties Australia submission) the BBFC has been subject to much criticism of censorship over classifications given and editing restrictions placed on film releases in the UK. However the guidelines for film classification are based on two main factors: legal requirements (for instance, unsimulated animal cruelty, indecent images of children) and the BBFC’s own policies. The latter have changed enormously over the last century, ranging from rigidly applied lists of forbidden topics to the current context-based system where artistic merit is a key factor in assessing individual films.<sup>13</sup>

In America *The Motion Picture Association of America* has a ratings system that distinguishes between films suitable for children and those clearly made for adults. This voluntary system is intended as a guide only, as any imposition of a ratings systems or restriction would contravene the US Constitution in relation to freedom of speech.<sup>14</sup>

## **5. Representations of Children**

### **5.1 Impact on Artistic Production**

The various changes to law, protocols and public discussions are having a markedly ‘chilling effect’ as nervous public authorities and private sector bodies try to avoid any possible controversy. For fear of attracting the approbation of sometimes overzealous special interest groups, artists, galleries and arts publications are self-censoring their work. An examination of the examples included in the case studies attached in Appendix 1 shows that interest groups which are acting as informal censors can include not only political parties, but also government bureaucrats (especially in local government), religious authorities and groups, child protection advocates, corporations and various public bodies like hospitals, libraries, education institutions and charitable foundations.

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<sup>12</sup> <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

<sup>13</sup> <http://www.screenonline.org.uk/film/id/445733/>

<sup>14</sup> Civil Liberties Australia Senate Inquiry submission

While NAVA takes it as self-evident that artistic freedom is an indispensable condition of a mature and civilised society, it does not in any regard condone the production or consumption of illegal material. However, it does not want to see artists become the scapegoats for community concern over the availability of material like child pornography on the internet and the increasing sexualisation of children in advertising. Because of sensationalising media coverage, in the public mind, there is increasing confusion over who is really responsible for law breaking material like child pornography and lewd or sexist advertising material.

## **5.2 Current provisions including Australia Council's Protocols**

Six months after the Bill Henson affair, and at the directive of the then Arts Minister Peter Garrett, the Australia Council published its *Protocols for Working with Children in Art* (December 2008), a set of rules and contractual requirements described as "the minimum standards for those seeking or receiving" the Council's financial support. The Protocols relate to the creation of images, their exhibition, and wider distribution (especially via the internet). They are intended to operate in conjunction with State and Territory laws. They apply to all 'creative works', which are defined to include photography, painting, print-making, performance, sculpture, written text, drawing and digital imagery. Any artist or arts organisation funded by the Council and planning to work with, or show or distribute images of anyone under 18 must agree to abide by the Protocols.

By any standards, the Protocols are stringent and far-reaching. They impose funding conditions and layers of accountability were never previously required by arts funding bodies, and are more onerous than any required by law.

## **5.3 Ripple Effect and Unintended Consequences**

Over recent years and particularly since the public debate about the Henson case, representation of children, even the most inoffensive, have disappeared from the public domain. It is almost like a Pied Piper scenario.

NAVA is concerned that the current increase in community anxiety over protection of the rights of children against abuse is resulting in the unfair representation of artists as perpetrators. As an example to put things in proportion, as mentioned in the report of the NSW Child Protection Working Party, only one case was found and quoted of the attempted use of the 'artistic defence' in a court case, and it seemed clear that the perpetrator was not an artist.

The Australia Council Protocols have had a far-reaching impact and contributed to an increasing environment of anxiety about the relationship between adults and children. Firstly, they have been adopted by some state arts funding authorities, so many more artists, exhibition venues, hard copy and virtual publishers have been swept up in this regime. Secondly, they have been used by various non-government bodies as the de facto standard even where they don't apply.

### **i) Case Study: Perth artist Nicole Boenig McGrade.**

In 2009 Subiaco Council library asked Ms Boenig McGrade not to display her artwork *Kids in Suburbia*. The two children in her photograph, aged three and 18 months, were naked from the waist up. The work had been commissioned by the children's parents. The library expressed concern that the image might contravene the Australia Council protocols even though it was not bound by them. The artist agreed to the request, but the media publicised her case and the show went ahead as planned with her work included.



*ii) Case Study: Sydney artist Del Kathryn Barton*

The withdrawal of the Sydney Children's Hospital (SCH) from being associated with a fundraising exhibition held in its honour was due to the content of one particular artwork, *Eye Land of Kell*, submitted by 2008 Archibald Prize winner Del Kathryn Barton. The photograph, produced as part of the 'Out of the Comfort Zone' exhibition, depicted the artist's son wearing only jeans standing in front of a floral display with decorative elements superimposed on his face and torso. This was outside the scope of the Australia Council protocols and also the child was not by their definition 'naked or partly naked'. Nevertheless, the hospital adopted the most cautious possible position and decided not to continue its partnership as charity recipient from the art exhibition stating that some members of the community might find the image inappropriate as part of a fundraiser for a children's hospital charity.

Many onlookers, including the National Association for the Visual Arts (NAVA), immediately questioned what was 'inappropriate' about the artwork, and whether the perceived views of "some members of the community" really warranted the hospital passing up some surely much needed funds. Even though in this case, there were absolutely no sexual, abusive or other exploitative connotations, what was most concerning was the hospital's implication that any image of a partially clad child might be viewed with mistrust by the community.

What we are seeing is the gradual disappearance of representations of children in the media and certainly artists and the public media are much more reluctant to get involved in any form of representation of children, whether clothed or unclothed. This fear being engendered around the representation of children is rendering them invisible.

**6. The interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority in supervising broadcast standards for television and Internet content**

**6.1 Areas of concern and negative impact**

NAVA is concerned that currently there is no clear authority or relationship between the National Classification Scheme and the Australian Communications Media Authority (ACMA). The jurisdiction of the National Classification Scheme under the federal *Classification (Publications, Films and Computer Games) Act 1995* regulates publications, film and video and games, and the ACMA under the *Broadcasting Services Act 1992* acts as the regulator for television broadcasts and the internet. This means that both the Classification Board and the ACMA are making decisions on similar content that often crosses between different mediums i.e. publications, film and the internet. The implication of this is that there is no single authority which is able to regulate all mediums. Because the ACMA is not operating according to the same terms of reference as the Classification Board and is applying different criteria in making classification assessments, this is resulting in inconsistencies in decision-making and the banning of what could be deemed 'legal' content.

NAVA supports the Arts Law submission to this Inquiry, which suggests that this current system, "requires the ACMA to essentially make classification decisions over content that should be made by the Classification Board by guessing at what the Classification Board would decide." ACMA is thus not only able to take down legal content that has been restricted, but also classified material that is restricted if the age of users cannot be verified. Essentially this means that the ACMA can blacklist legal material that should legitimately be available in Australia restricting an adult's

capacity to access legal information and content. It also highlights the discrepancies in classifying material across different mediums.

A major discrepancy in access to information between the Classification Board and the ACMA has been noted in the Arts Law Inquiry submission where in 2009, images by artist Bill Henson were included on the ACMA blacklist even though the Classification Board had given them a PG and Unrestricted rating. By being included on the ACMA blacklist, Bill Henson's images were considered 'prohibited content'. This is a completely incongruous situation where an internationally renowned artist's work, an artist who has represented Australia in major international exhibitions, had countless retrospectives and been published nationally and internationally, has had his work restricted online. This blacklisting was reportedly an error, however, it raises the question of why legal content is being restricted and points to the lack of transparency in the ACMA's process.

The Australian citizenry is entitled to have access to legal content via the internet. However, this is being compromised because the regulatory authority is without transparent operating procedures and, unlike the Classification Board which has a review process, there are no methods of appeal. The right to freedom of expression and access to content is being compromised by disparate and conflicting regulatory regimes.

## **6.2 Needs for standard procedures**

The example provided in 6.1 in regard to the discrepancies between the processes of the Classification Board and the ACMA clearly articulates the need for a standardisation of rules applying to the creation, access to and use of legal and illegal material.

***NAVA recommends that:***

***- a review system, similar to the one used by the Classification Board be established for the ACMA, which should only be able to prohibit and blacklist 'illegal' content, and***

***- that this blacklist or prohibition be transparent and open to scrutiny.***

## **7. The effectiveness of the National Classification Scheme in dealing with new technologies and new media, including mobile phone applications, which have the capacity to deliver content to children, young people and adults;**

"Communications theory tells us that, although we might read or watch 'alone', we receive the message through social and personal screens put in place by the wider society as well as our primary groups and the experiences, which formed us - family, friends, education, workplace, ethics."<sup>15</sup>

We are no longer simply passive audiences but audiences that actively seek information, information that is available instantaneously at our fingertips and is drawn from across the social, political, cultural and economic spectrums. We are able to connect with the globalised world, no longer restricted by traditional boundaries or geography and the speed and scope of access to information is vastly increased. The pace at which technology and information access is changing makes it almost impossible to regulate the online environment.

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<sup>15</sup> <http://www.abc.net.au/news/stories/2007/03/21/1876658.htm> - comments

In Australia and in certain western democratic countries internet regulations and censorship have been proposed by governments. Current examples listed below<sup>16</sup>:

- Australian Commonwealth Internet censorship legislation commenced (1 Jan 2000)
- US Court of Appeals upheld injunction restraining enforcement of US Child Online Protection Act (COPA). (Jun 2000)
- UK censorship of sexually explicit material became less restrictive following an appeal case (Jul 2000).
- Australian censorship of sexually explicit material became more restrictive following a government decision to ban depictions of various types of legal activity between adults. (Sep 2000)
- UK Courts became able to test the compatibility of UK law with the European Convention on Human Rights (commencement of relevant provisions of the UK Human Rights Bill 1998). (Oct 2000)
- South Australian State Government tabled an Internet censorship Bill (Nov 2000)
- UK Government issued Communications White Paper indicating no intent to enact Internet censorship legislation and stating policy of supporting means of enabling Internet users to control their own and their children's access, "rather than third party regulation". (Dec 2000)
- NSW State Government tabled an Internet Censorship Bill (Nov 2001)

Internationally and in Australia, proposed internet regulation has been met with judicial and community protest as it is seen as infringing the citizenry's rights to freedom of speech, expression and access. This is particularly relevant as many countries have different internet censorship laws and classification systems for website access. These international differentiators mean that regulating classification systems is not feasible as it is fundamentally unable to be applied to all internet content. Local prohibitions are relatively easy to bypass.

## **7.1 Implications of technology**

The internet and its access and usage through new smart phone technology, Wifi and public ISPs currently make it almost impossible to control what is viewed and accessed. NAVA recognises the need for ensuring vulnerable members of the community are not subject to harmful information. However this must be addressed through feasible actions. A singular approach taken to regulation will not be enforceable and has the potential for severely restricting access to legal content.

The shifts in technology have enabled artists to expand their business practices, develop new markets, income and creative capital. Artists who address particularly sensitive issues in their works are often self regulatory, providing warnings and descriptions of the content on their websites, alerting users to ensure they can make the choice whether to access content or not. This is pertinent in recognising the responsibility and role of individual users, parents or guardians of vulnerable individuals in monitoring and restricting access to information.

## **7.2 Controls and protocols**

Currently certain sites already have protocols in place to restrict access by users under 18, as well as warning systems notifying users of the content they would be viewing. Examples of this include Youtube and other sites that require users to enter

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<sup>16</sup> Examples of legislation came from <http://www.efa.org.au/Issues/Censor/cens3.html>

a date of birth before viewing certain music videos or other types of legal content. Whilst users can access this information through deceptive means, it does provide a landing page that will stop users and make them consider their actions. This is a preferred method to regulation of content through ISPs, which can infringe citizens legal right to information and create a state regulated environment that is prone to mistakes, as in the ACMA and Bill Henson case.

Classification and ratings systems can be applied to Australian internet content. However, the sheer volume of information would make this activity impracticable. What NAVA recommends is access to free software that would allow users, especially those responsible for the care of minors or other vulnerable people, to restrict access to certain legal information that may cause harm or offence. The most practical method is to provide users with all the information before they make a decision about whether to view certain information or not. This software should not be mandatory, but readily available free of charge for households and individuals that may want to restrict viewing access by vulnerable individuals.

***NAVA recommends that:***

***- in relation to Refused Classification, X18+, R18+ and MA 15+ content in any virtual environment, the Classification Board recommend that access be mediated through a filter landing page where the nature of the content is described according to the same categories used for film and television.***

***- the Classification Board and the ACMA allow access to legal material deemed unsuitable for under 18s, by requiring the adoption of an age verification scheme in virtual environments***

***- the Senate Committee recommend to the Commonwealth Government that it endorses and supports free distribution of software programs for Australian households that will act as filters for unsolicited material. This software would have the capacity to generate landing pages that require the users to log in with their date of birth if wishing to view content that would be given a MA 15+, R18+ or X18+ rating.***

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**8. Appendix 1 - Case Studies**  
***from NAVA's 'Art Censorship Guide', published 2010***

***Political Sensitivities & Sedition***

There are many highly respected artists who have made deeply concerned and thoughtful comments on the September 11 terrorist attacks in New York, Australia's detention of asylum seekers, the involvement of Australia in the Iraq war and other government actions with which they disagreed. These and other politically sensitive matters dealt with in art works are often threatened with censorship or actually removed.

***i) Overseas artist (wants to be anonymous)***

NAVA learned of an incident in 2005 where an invited artist visiting from overseas was taking documentary video footage in public places. Twice in ten days the artist was told that her name would be sent for possible inclusion in a terrorist watch list. In the first instance, despite previously having been given authorisation to film in an airport, the artist was apprehended by a security official who took her identification details and said she would be noted as a possible security risk. Some of her video footage was deleted. The second time the artist was approached by the police while videoing road signs and the same threat made. The artist became concerned that her name would be on terrorism suspect lists, and that when travelling internationally in future, she could be treated as a suspect and have visa and travel permits declined.

***ii) Azlan McLennan and Trocadero Art Space***

In January 2006 Trocadero Art Space exhibited the work of Azlan McLennan on its external billboard exhibition space. McLennan's work, *Proudly unAustralian*, was fabricated from a partially burnt Australian flag, installed directly on the billboard. The exhibition of the work was intended to coincide with Australia Day. Unfortunately the exhibition was mounted just after the Cronulla race riots in Sydney. A couple of days after the work was installed, the Footscray Police gained access to the exhibition space, without prior notice or a search warrant and outside of gallery hours while the space was un-staffed. Climbing through the window of a neighbouring business, two officers walked along a first floor awning to where the billboard exhibition space was located and ripped down the artwork. It was taken back to the Footscray Police station as 'evidence'. On enquiry, staff from Trocadero Art Space were informed that the work had been removed due to "a number of complaints from the community" and that investigations were taking place to ascertain whether any laws had been broken and therefore whether charges would result.

A media storm erupted and the issue was picked up by local, state and national newspapers, ABC Radio National, ABC TV's 7:30 Report, and numerous web-based news and discussion sites. As a result of the public furore and the questions raised, the then Prime Minister John Howard publicly confirmed that burning an Australian flag was not illegal. As interest slowly waned in the media, the Footscray Police maintained that they would continue their investigation and cited the possibility of action being taken because of "Offensive Public Behaviour". However some time later the artwork was returned to the artist and later still the artist and gallery were informed by letter that it had been decided that no further action would be taken against them and no charges pursued. The artwork was re-installed for the final hours of its scheduled exhibition, coinciding with a public forum on the issue.

***iii) Van Thanh Rudd***

In 2007 artist Van Thanh Rudd undertook a performance in which he carried his painting *Portrait of an Exploding Terrorist* in various public locations around the

country as part of his *The Carriers* project. The project had received a government grant. When he attempted to perform the act through Queen St Mall, Brisbane, Rudd was warned by Brisbane City Council officers to leave the area. The council officers told Rudd that he “shouldn’t be showing an image like that—it may scare people”. The following day he was approached by police and threatened with arrest under public nuisance laws and told that he was “obstructing public safety”. Police also said there had been a number of complaints from the public regarding the hazardous nature of carrying a painting that size in public. This threat caused Rudd to cancel the last day of the exhibition on the Brisbane segment of the tour. The Courier Mail newspaper on 7th July ‘07 reported that the Lord Mayor had said that Rudd “did not appear to have obtained the necessary permits performance artists needed to operate in the mall”.

#### iv) Michael Agzarian

In 2005 Michael Agzarian, an artist and art school lecturer, exhibited his artwork *No More Lies* as part of the *Conduit* exhibition at the Wagga Art Gallery. The exhibition was of work by several staff in the School of Visual and Performing Arts at Charles Sturt University. The work showed digitally enhanced images of the then Prime Minister, Attorney General and Immigration Minister with their lips sewn together at a time of sensitivity around the detention of asylum seekers. A member of the public visiting the gallery lodged a complaint with the Prime Minister's Office that the work might be regarded as an act of treason. The then Department for Communication, Information Technology and the Arts then rang the gallery director following up the complaint and asked whether the exhibition was funded by the federal government's 'Visions' program. If taken any further this could reasonably be understood to be an implied threat. The artist was understandably concerned that his work may be censored, or worse that he could be charged with sedition. The gallery was also concerned that their funding might be in jeopardy because of adverse publicity.

#### v) Zanny Begg

In 2004, artist Zanny Begg was asked by local government staff to remove her work from the Blacktown *Out of Gallery* project because it was deemed inappropriate in the climate of terrorism. The work *Checkpoint for Weapons of Mass Distraction* consisted of life size cutout stencils of armed American soldiers, to be installed in public places around Blacktown, Sydney. The artist's aim was to satirise the US search for weapons of mass destruction in Iraq. Council staff threatened the artist with arrest during the installation process, later impounding the works and declaring the theme inappropriate.

It has been alleged the censorship was part of ongoing interference in the operation of the Blacktown Arts Centre by the then Mayor. Staff reported that state and federal funding was under threat because the mayor was imposing his personal taste on the Arts Centre. The previous year, the same mayor cancelled an exhibition entitled *Guerilla Art* because he said one of the artworks planned for display on Blacktown's streets "discredited the council".

In the wake of the controversy, all other artists involved in the *Out of Gallery* project were asked to change or move their works out of Blacktown. The work was re-exhibited at Mori Gallery in Sydney and over 120 artists contributed a work to show their opposition to art censorship.

#### vi) George Gittoes

In 2002, Melbourne property tycoon and architect Fender Katsalidis commissioned internationally recognised Australian war artist George Gittoes to produce a work for temporary display on the Melbourne city's Republic Tower apartment building. Just

before the painting was due to be unveiled, Gittoes was told the work had been rejected because of residents' concerns. Melbourne University art historian Christopher Heathcote commented in the Age newspaper that this was reflective of the kind of "censorship that occurs when there is warfare in the air." In protest at this act of censorship, the church across the road exhibited the work.

vii) Karen Lindner

In 1996, art student Karen Lindner, in a collaborative project involving the Victorian College of the Arts and Transfield Obayashi construction company, created an artwork for the Melbourne City Link Tunnel project which featured text messages such as "Why do you control?" and "Why are you afraid of your vulnerability?". During the state's fourth anniversary of the Kennett government celebrations, though there was no complaint from the construction company, the Victorian state government ordered that the work be covered up. When there was a community outcry, Premier Jeff Kennett responded by saying "if the community want, as they do, corporate sponsorship, they must decide whether to bite the hand that feeds them".

**Racial/Ethnic/Cultural Sensitivities**

viii) Van Thanh Rudd and Platform Artists Group

In March 2009 Van Rudd exhibited his work *Economy of Movement (A Piece of Palestine)* in the exhibition *Resisting Subversion of Subversive Resistance* at Platform gallery. The exhibition space is situated within the Degraives St railway subway. The pro Palestinian artwork was the cause of a number of complaints to the City of Melbourne which funds Platform gallery.

A number of Jewish lobby groups contacted Platform with complaints about the work. The Executive Officer of B'nai B'rith went to Platform unannounced and demanded that the artwork be removed and that Platform make a formal apology. Platform staff felt threatened by his behaviour and his threats of further action.

The Communications Manager for Connex Melbourne also contacted Platform and demanded the artwork be removed, threatened that multiple law suits would be filed against the artist, organisers and council and made further threats about Platform's lease and funding. Connex holds the contract to run the public transport system and whose parent company, Veolia, is part of a contract to build a light rail through disputed Palestinian territory. Connex said it would sue the council on the basis of an IP / trademarks breach. In a report in The Age newspaper on March 8 2009, Connex denied having made a complaint.

With the artist's permission, Platform made the decision to cover the work while they sought legal advice. The City of Melbourne then invoked their Protocol on Artworks and sent out a call for its Review Panel members to assess the situation. The Panel found there was no valid argument to prohibit the work in the public domain, while acknowledging potential concerns that might be raised by the artwork. It considered the concerns insufficient to override the freedom of expression principle articulated in the Victorian Charter of Human Rights and Responsibility. Platform undertook further legal checks and opened with the work on show on Friday 6 March 2009. The Review Panel's findings were posted and no further complaints were received.

ix) Mai Long

In May 2008 artist Mai Long's *Pho Dog* installation was exhibited in Perth as part of the Casula Powerhouse touring project *I Love Pho*. The work was an installation of 12 dog sculptures painted with several nations' flags. The artist explained Pho Dog as "a character that contemplates difference and tries to understand it in the broader

context of human nature and complex political histories". Due to hostile responses from the organisation Vietnamese Community in Western Australia, Long decided to shroud the entire installation with a black cloth. That artist said "The little mongrels are symbols of the need to find a bridge between different cultures. A little mongrel dog that's fluent across many different cultures and wherever it goes it can fit in and understand and just be empathetic towards whatever group it's in".

Earlier in the year, one of the dogs created an outcry among leaders of Australia's Vietnamese community. The offending dog was painted with images of flags, including the former flag of South Vietnam. Phong Nguyen, President of the Vietnamese Community In Australia said "Art should not hurt people. Art should make people feel uplifting and feel good about it, not about upsetting - not insulting people, insulting those who have died under that flag. There are millions of people who have died".

#### x) Treasures of Palestine at the Powerhouse Museum

Mr Ali Kazak, the head of the General Palestinian Delegation in Australia, created the exhibition *Treasures of Palestine* from works in his private collection. When the exhibition was mounted at the Canberra Museum and Gallery in 2003, director Peter Haynes rejected a request from the Israeli embassy to remove a number of the items. Later that year, when the exhibition moved to Sydney's Powerhouse Museum, some exhibits, including 44 photographs, political posters and two documentary films on the Intifada, were not displayed.

Paul Heywood-Smith of the Australian Friends of Palestine Association was quoted in The Advertiser newspaper as saying, "This exhibition confirms that in the 19th century Palestine had an advanced society with a highly-developed arts industry, cities and towns.... The exhibition also contains maps, coins and banknotes that trace the history of the Palestinians and their frustrated yearning for an independent homeland. Most controversially, it uses photographs, posters and documentary videos to portray their struggle. It is not possible to remain unmoved by these images of ugly refugee camps, houses being demolished, youths being beaten by Israeli soldiers and grieving families".

The president of the South Australia's Jewish Community Council, Norman Schueler, was quoted in the Murdoch press saying that *Treasures* contained "dishonest and tendentious material" that was "calculated to incite anti-Israeli hatred and, by extension, anti-Semitism". By contrast, on the Arab Council Australia (ACA) website, Chairperson Hassan Moussa said: "What this represents is the deliberate suppression of one community's narrative in favour of another's. This is an issue that must concern the public. In the interests of transparency and community relations, the ACA has called on the Powerhouse Museum to explain why the exhibition was cut and who influenced the decision to censor".

ABC TV's *Lateline* program revealed that some Museum staff had concerns about the way the project was being handled. In a confidential staff minute obtained by *Lateline*, staff expressed concern that "the influence of external stakeholders has taken on a much more influential role than has initially been indicated." The official reason finally given by museum management was that there was not enough room for the entire exhibition. However, the decisions regarding what was included was entirely in their hands after Kazak was obliged to sign those rights over to Powerhouse management. NSW Arts Ministry's then Director General later told a government Estimates Committee meeting that the museum's trustees "decided that they were not going to become a political football in what is a very difficult and vexed issue".



## ***Violence & Cruelty***

### ***xj) Azlan McLennan and the University of Melbourne's George Paton Gallery***

In 2009 artist Azlan McLennan was told that the University of Melbourne's George Paton Gallery would not include for exhibition, several of the artworks he had submitted for his Masters of Fine Art examination exhibition. The gallery had agreed to exhibit his graduating show but on learning about the violent nature of one component - a video work of the real life beheading of a hostage - discussions began between the artist and gallery staff about the work in question.

In an email to the artist, staff stated their intention not to include the work on the basis that they felt the material to be displayed would have direct impact on their own psychological well-being. Very close to the opening date it was finally agreed that the work could be shown in an isolated booth with prominent warning signs.

### ***xii) Emily Bullock***

In 2008, Emily Bullock was granted a solo show, which incorporated dead mynah birds, at the Tin Sheds Gallery in Sydney. One month before the show, the Sydney Morning Herald ran a story about the artist and her work. A week before the exhibition was due to open in January 2009, the gallery contacted the artist to say that the show could not proceed because of a complaint from two members of the community and because the gallery manager was not comfortable with the work. A mediation meeting was held between the artist and the Dean of the Architecture Department at Sydney University, which manages the Tin Sheds, and it was agreed that the exhibition could go ahead. In response to a complaint from the public, the RSPCA contacted the artist but did not find her at fault, other than noting that the trapping method she used was 'old fashioned but not illegal'.

### ***xiii) Mike Parr and the Sydney Biennale***

Artist Mike Parr is no stranger to controversy. Much of his performance work over his long life has involved the imposition of self-inflicted pain and physical endurance tests, often with social and political references. In 2008, police were called to Cockatoo Island in Sydney in response to complaints about a video which formed part of the huge Biennale of Sydney exhibition. An old dilapidated building had been used to house documentation over many years of Mike Parr's work. The particular video work which was the subject of the complaint, had been made and shown many years before. It filmed live chickens having their heads cut off. Though the media immediately picked it up with enthusiasm, the police did not proceed any further.

## ***Pornography, Indecency, Nudity etc***

### ***xiv) Bill Henson***

It would be hard to imagine that anyone in Australia was not fully aware of the controversy which erupted early in 2008 over the censorship of an exhibition by internationally recognised Australian photographic artist Bill Henson, so it will be dealt with only very briefly here. The exhibition at Roslyn Oxley9 Gallery in Sydney was raided by police on the day it was to open, the works were confiscated by police and the artist and gallery were threatened with legal proceedings. On request, the police received advice from the Public Prosecutor who said that a case was highly unlikely to succeed. The work was then referred to and cleared by the Classification Board. This seemed to settle the legal question, however, debates around whether the work was indecent or child pornography raged for months, fuelled by public pronouncements by everyone from the Prime Minister downwards.

There were innumerable repercussions which included instructions from the federal Arts Minister Peter Garrett to the Australia Council for the Arts to produce mandatory protocols for artists working with children for any grant recipients: artists; exhibitors; publishers and other distributors. Some state governments seem keen to follow suit. The NSW Attorney General tried unsuccessfully to convince his other state and territory counterparts to excise the artistic defence from the law and to tighten other laws about creating images of children and making them publicly available.

In March 2009 the federal Communications Minister admitted that images by Bill Henson had been added to the communications regulator's list of prohibited websites. The list had been compiled by the Australian Communications and Media Authority. The Minister said the inclusion was a technical error and because Henson's images had been cleared by the Classification Board they shouldn't have been on the list.

#### xv) Polixeni Papapetrou and Art Monthly magazine

In July 2008, Art Monthly magazine reproduced as its cover image, the work *Olympia as Lewis Carroll's Beatrice Hatch Before White Cliffs* (detail) 2003 by artist Polixeni Papapetrou. In the photograph the artist's daughter, Olympia at age 6, sits matter of factly naked on a painted backdrop. The photograph had previously been publicly exhibited 10 times both in Australia and overseas and included in 7 forms of publication, including a set of greeting cards made for a bank.

This quickly became a media story with journalists hounding the artist's family. The Prime Minister, Kevin Rudd, publicly said that the image was "undignified" and that he "could not stand the stuff". There were over 400 news articles and other media coverage around the world. Papapetrou has said: "I was dismayed to see how quickly the debate moved away from art censorship and the portrayal of nudity in art to personal attacks on us as a family and on my work."

The Art Monthly magazine articles had actually focused intelligently on the contemporary debate about nudity, consent and censorship. The magazine was submitted to the Classification Board and was given an Unrestricted classification with a consumer advice of M (Mature) not recommended for readers under 15 years. Directly after the furore, the federal government department Austrade cancelled its subscriptions to the magazine which it had distributed over many years to Australian embassies overseas. When NAVA asked why, it was told Austrade was making economies. In answer to the question, how many magazine subscriptions it had cancelled, Austrade said two.

#### xvi) Concetta Petrillo

In 1995 art student Concetta Petrillo made a series of photographic works which were studies of her young sons partly draped. The photo lab responsible for processing her film notified the police. She was charged by the CIB and threatened with a 10 year jail sentence. She was taken by the police and extensively questioned, all her work and equipment was confiscated, her supply of photographic paper was destroyed when her home and studio were searched without a warrant, and eventually some artworks were never returned as they had been apparently misplaced by the police. During the raid the police also took family snaps of the children growing up. Also taken were some art books of some of the world's best photographic artists that were on loan from the university library. The library was subsequently raided and this in turn led to all books that had any images that could be deemed to be risky being placed in a closed section of the library and could no longer be taken out on loan.

Petrillo was charged with the same charge as Bill Henson but, as there was no precedent at the time, she had to go through the trauma and tribulations of a trial in order to set this precedent. She was told that the work broke the law and she had committed a criminal offence, one that is punishable by a 10 year jail term. When the works were eventually shown in court the judge that presided over the case stated that she could not understand why the case had gone so far. At the end of the trial this same judge had the Clerk of Court hold up the work for the public to see and declared that it was beautiful and should be admired. She also came to the artist's subsequent exhibition at Perth Institute of Contemporary Art.

At the end of the trial, after the artist had been found not guilty by a jury, she returned home only to find that there was a second summons waiting for her with a twelve month jail term attached to it. She was charged with possession of pornographic material though the works had just been through a trial and had been deemed not indecent. The process started all over again with appearances in court. Eventually the case was thrown out of court as it was found that the police had no case.

xvii) Nicole Boenig McGrade

In 2009 Subiaco Library requested that photographer Nicole Boenig McGrade not submit for its art competition a work called *Kids In Suburbia*. The image had been commissioned by the parents of the two children in the photograph aged 3 and 18 months, who were naked from the waist up. The Library expressed concern that the public might object and the images might contravene the Australia Council's working with children protocols, though they were not being funded by the Australia Council and therefore not bound by these protocols. Although shocked by the request the artist agreed, but the decision was later overturned after the media ran a story questioning the decision.

xviii) Hazel Dooney

On the 24th April, 2007, just prior to the opening of *Art Melbourne '07*, artist Hazel Dooney was asked to take down four of five sexually explicit works in mixed media on paper that were being exhibited as part of an installation titled *Sex Tourist* which she had created, for Metro 5 Gallery of Melbourne, as part of a special segment of the overall event called *Renault New Generation Art*.

The organisers of Art Melbourne had been warned in advance that the images were sexually explicit. Close to the opening, Renault, a major event sponsor, and the Royal Exhibition Buildings expressed concern about the content of both the artworks and the overall installation being accessible to minors. They wanted the installation re-arranged so that the sexually explicit images would be invisible to those passing the cubicle. The artist refused because the work was conceived to tell a sequential story.

As the event opened, the exhibition centre's management had a white sheet draped across the entrance to the space where the work was displayed. The artist had not been told of this in advance so she scrawled 'CENSORED' across the sheet in red lipstick. Before long, the space was overflowing with viewers and over the next four days, *Sex Tourist* became, by far, the most popular exhibit at Art Melbourne. However, Renault Australia, was unhappy that its brand had been associated with this art. The company had originally asked the artist to execute large, artistic decals to be displayed on five Renault cars outside the entrance of the show at the Royal Exhibition Buildings. These were now removed, again without the artist being informed.

The national press, led by The Age newspaper and ABC television news took the view that this was corporate censorship of fine art and gave the controversy extensive coverage over the weekend. All the works were sold within 24 hours of the opening of Art Melbourne.

Since this event, the artist had to contend with other attempts to censor exhibitions of her work. For example last year, she was invited by World Vision to submit two works to a high profile charity art auction in Sydney to help raise funds for and awareness of the organisation. Despite the fact that neither of the works was at all sexual, they were removed from the public showing and catalogue just a day before the auction itself, the artist being told this was done on the instruction of senior World Vision management.

#### xix) Jill McFarlane

As a figurative narrative oil painter Jill has experienced objections to the nudity in her work over the course of her career. However, the following case was particularly difficult. In March 2007 Jill was selected for a solo exhibition at a gallery in a major urban retail/village complex in Brisbane; the exhibition was to open on 31st May 2007. The exhibition was brokered by a well known Queensland arts organisation which was selecting artists to exhibit on behalf of a large multinational development and construction firm which owns the gallery and complex.

The artist completed a body of work for the exhibition but at the beginning of May was informed by the arts organisation that the site owner had taken offence over her work, based on viewing the exhibition invitation, and would not agree to exhibit any paintings containing frontal nudity. This aspect of the artist's work was evident when she made the original application for the exhibition and in the majority of the artwork produced for the exhibition.

The artist did not want to modify the exhibition and so informed the arts organization that she had no choice but to cancel the exhibition. The arts organisation then discussed the matter with the site owner and later contacted the artist to say the exhibition could go ahead provided the invitation was changed to a different image and a written warning accompanied the exhibition. The artist reluctantly agreed and preparations for the exhibition progressed including press for the exhibition. On the 18th of May 2007 the arts organisation again contacted the artist and said that the site owner had changed their mind again and decided to cancel the exhibition. McFarlane was professionally embarrassed by the cancellation as well as having been caused distress and anxiety. The press articles were unable to be cancelled because they had already gone to print and the artist had to inform her clients of the last minute cancellation. McFarlane says that no form of compensation was offered by the site owner.

#### xx) Cherry Hood

NSW artist and Archibald Prize finalist Cherry Hood, known for her haunting portraits of young boys and girls, has also been at the receiving end of censorship. She had an exhibition closed by police and her home searched by detectives after she photoshopped penises on to images of prepubescent girls to transform them into boys. "I found there was an abundance of images of girls but none of young boys and I was making a political statement about this fact," Hood said. "My show was also closed by the police. I did not seek publicity about it but it did cause me to change my practice to focus on the face rather than the nude body."

xxi) Fiona Whitton and Kim Skinner

In 1999 the artists were given permission to use several empty shops to display artworks for a month long period in Newcastle. With satirical intent, Fiona Whitton and Kim Skinner invented a faux national awareness day called “Bums Out Against Racism Day”, and designed a logo of cartoon style people of all ages and races ‘mooning’. Literature placed in the window stated that the campaign was a call to all people to moon any racists that they encountered on the day. The window display also included a faux colouring in competition of the logo, with twenty or so ‘entries’ that were coloured in ‘children style’ by the artists. Also in the window were A3 laminated photocopies of ‘celebrity bums’ (photos of their friends’ bottoms) that they signed with faux celebrities’ signatures. Less than 48 hours after installation, the work was destroyed by the real estate agent through which they were loaned the shopfront. They were not given the opportunity to remove the work. They do not believe the destruction was the result of community complaint but because of the estate agent’s personal opinion about the work.

xxii) Mike Brown

In 1965, a famous censorship case occurred which now seems hard to credit, such is the shifting sand of community values. The Sydney Vice Squad visited the newly opened Gallery A in Paddington, Sydney to close down an exhibition titled *Paintin’ AGo-Go!*. The exhibition by artist Mike Brown contained a number of four-letter words. Brown was charged with obscenity, and the adverse reaction of the magistrate Gerry Locke to the work, resulted in the 27 year old artist being sentenced to three months hard labour. The move sent a wave of anger throughout the arts community, which was outraged and fearful of censorship. The sentence was converted to a modest fine on appeal, but it has stuck in the artworld’s collective memory.

**Blasphemy**

xxiii) National Gallery of Victoria and Andres Serrano

Dr Timothy Potts, the then director of the National Gallery of Victoria earned the ire of the arts community by making the decision to close an exhibition of works by American artist, Andres Serrano, on 12 October 1997. The particular work at issue was called “*Piss Christ*” and was an image of a crucifix purportedly suspended in urine. The reasons Potts gave were that the gallery could not guarantee the security of the visitors and staff or of the works of art after staff had been injured and very serious threats made. Firstly a man tried to remove the artwork shortly after the exhibition opened. He pleaded guilty to charges of criminal damage and burglary and was given a one month suspended sentence. Shortly after, two youths attacked the artwork with a hammer, and were charged with criminal damage and burglary.

Three days earlier Justice Harper of the Supreme Court of Victoria gave the exhibition the go ahead by refusing to grant an injunction to the Catholic Church to prevent the exhibition from opening on the ground that *Piss Christ* was blasphemous. Dr George Pell, Archbishop of Melbourne, had applied for an injunction on 8 October against the gallery to prevent the exhibition of *Piss Christ* on two grounds: that publicly exhibiting the photograph would constitute the criminal offence of blasphemous libel, and would contravene section 17 (1)(b) of the Summary Offences Act 1966 (Vic). Justice Harper decided the case on the technical point that a civil court will not exercise criminal jurisdiction. Thereby, he did not need to rule on whether the law of blasphemy existed in Victoria, or on whether the exhibition of *Piss Christ* would have constituted an offence of indecency or obscenity.

#### xxiv) Sensation Exhibition

In 1999, the *Sensation* exhibition from the UK was cancelled by the National Gallery of Australia's then director, Dr Brian Kennedy. Kennedy claimed it was because of "museum ethics" regarding sponsorship, but it was widely believed that there was political intervention and the exhibition was censored because of its controversial content. In New York the exhibition had sparked deep controversies over whether one of the works was blasphemous. Artist Chris Ofili had depicted the Virgin Mary as black, and used elephant dung in the image (a reference to his traditional Nigerian cultural practices).

#### xxv) Blake Prize for Religious Art

The Blake Prize, Australia's top prize for religious art is often embroiled in controversy. In 2008, one of its judges resigned in protest over the inclusion of a crucifixion painted by the artist Adam Cullen. The triptych showed Christ on the cross with the inscription "Only Women Bleed", a line in a song by the rock musician Alice Cooper.

The previous year there was also contention and media hype over two entries, one which was a statue of the Virgin Mary shrouded in a burqa and a second which was a hologram of Christ morphing with Osama bin Laden. These images had angered the Catholic Archbishop of Sydney, Cardinal George Pell and the then Prime Minister, John Howard, who called them "gratuitously offensive".

### **Health & Safety**

#### xxvi) Hannah Bertram

Artist Hannah Bertram's practice explores the use of worthless materials such as dust, ash, dirty water and grime. These are materials that normally settle as a patina over our domestic existence and are usually viewed as undesirable and removed. The artist is interested in ephemera in contrast to the usual status of art objects as collectable and saleable. Bertram's installations have been viewed by audiences in both public and domestic places and are often exposed to a variety of elements that affect the condition and duration of the work.

Recently a series of dust installations were commissioned and planned for the streets of Melbourne. After the first piece was installed raindrops splattered the work, then leaf litter blew onto it echoing the botanical patterns in the design, and finally pedestrians traipsed across it smudging the pattern and carrying away the residue of the work on the soles of their shoes. The full project was never completed as the Council refused a permit and threatened fines. It considered the work firstly to be graffiti, then an environmental hazard and lastly a potential liability.

#### xxvii) Antonio Dattilo-Rubbo

In April 2009 The Sydney Morning Herald newspaper reported that staff of the Manly Council had digitally altered a reproduction of a painting by Dattilo-Rubbo, who died in 1955. The image was being prepared for uploading to a website relating to an exhibition connected with the Manly Art Gallery. The painting was *The Artist and the Model*. The alteration removed two cigarettes from the painting. It was reported that the reason for the removal may have been because of the Council's anti-smoking policies. Council staff later said that the alteration to the image had been a misunderstanding. The instruction from Council had been to remove the whole image from the website.

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