

EXPLANATORY STATEMENT  
AUSTRALIAN CAPITAL TERRITORY  
PUBLICATIONS CONTROL ORDINANCE 1989

No. 47, 1989

Previously, under the Classification of Publications Ordinance 1983 (Classification Ordinance), the responsibility for classifying publications (including films and videos) and regulating the distribution of classified publications lay with the Minister responsible for the Australian Capital Territory.

However, the actual examination and classification of publications has always been dealt with by the Attorney-General's Department and done by officers appointed by the Attorney-General.

The Australian Capital Territory Self-Government Act 1988 provides that, after self-government, the Australian Capital Territory Assembly is not empowered to make laws with respect to the classification of materials for the purpose of censorship. It will, however, be able to regulate the availability of classified material.

In order to formalise existing administrative arrangements and prepare for self-government, the Publications Control Ordinance 1989 (the Ordinance) re-enacts those provisions of the Classification Ordinance which relate to regulation of distribution and availability of classified publications.

The responsibility for the Classification Ordinance will return to the Attorney-General's Department and consequential amendments will be made to it to exclude provisions not relating to the classification of publications.

Although several provisions have, in the interests of better drafting style and to correct anomalies, been framed differently from existing provisions, no changes of legal substance have been made by the Ordinance, except the introduction of a standard provision dealing with evidence as to the state of mind of a person or corporation when something has been done by a director, servant or agent of that person or corporation. This provision is now commonly included in legislation which creates offences that require a certain state of mind, or intention, and which may be committed by a person acting on behalf of a body corporate or another person.

Details of the Ordinance are as follows.

## **PART I - PRELIMINARY**

Section 1 provides that the Ordinance may be cited as the Publications Control Ordinance 1989.

Section 2 provides for the Ordinance to commence on a date to be fixed by the Minister by notice in the Gazette.

Section 3 is an interpretation provision.

Section 4 provides that nothing in the Ordinance applies to a film which is registered under the Customs (Cinematograph Films) Regulations or has been made in Australia for an Australian television station.

## **PART II - OFFENCES**

### **DIVISION 1 - UNCLASSIFIED PUBLICATIONS**

Section 5 provides that a person must not advertise, sell, let on hire or distribute an objectionable publication. An objectionable publication is defined in section 3 as an unclassified publication, or unapproved film advertising matter, that:

- a) describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that is likely to cause offence to a reasonable adult;
- b) shows pictures of a child (whether engaged in sexual activity or otherwise) who is, or who is apparently, under the age of 16 in a manner that is likely to cause offence to a reasonable adult;
- c) promotes, incites or instructs in matters of crime or violence; or
- d) has been refused classification or approval.

Section 5 provides a penalty of \$2000 or 12 months imprisonment, or both, in the case of an objectionable child publication and \$1000 or 6 months imprisonment, or both, in any other case. Section 3 defines objectionable child publication as an objectionable publication of the kind described in paragraph (b) above.

Section 6 provides that a person must not possess an objectionable publication for the purpose of publishing it. The penalty is \$2000 or imprisonment for 12 months, or both, in the case of an objectionable child publication and \$1000 or imprisonment for 6 months, or both, in any other case.

Section 7 provides that the occupier of premises must not keep or allow to be kept at those premises any objectionable publication for the purpose of publishing it. The penalty is \$2000 or imprisonment for 12 months, or both in the case of an objectionable child publication and \$1000 or imprisonment for 6 months, or both, in any other case.

Section 8 provides that a person must not display in a public place or so that it is visible to a person in a public place an objectionable publication. The penalty is \$2000 or imprisonment for 12 months, or both in the case of an objectionable child publication and \$1000 or imprisonment for 6 months, or both, in any other case.

Section 9 provides that a person must not deposit or cause to be deposited an objectionable publication in a public place. The penalty is \$2000 or imprisonment for 12 months, or both, in the case of an objectionable child publication and \$1000 or imprisonment for 6 months, or both, in any other case.

Section 10 provides that a person must not deposit or cause to be deposited an objectionable publication on private premises without the occupier's permission. The penalty is \$2000 or imprisonment for 12 months, or both, in the case of an objectionable child publication and \$1000 or imprisonment for 6 months, or both, in any other case.

Section 11 prohibits the printing or production otherwise of an objectionable child publication for the purpose of publishing it. The penalty is \$2000 or imprisonment for 12 months, or both.

Section 12 prohibits the sale, hiring out or distribution of video tapes or discs which have not been classified or have been refused classification. The penalty is as follows:

- a) in the case of an unclassified video tape or disc that is subsequently classified as a "G" film - \$100
- b) in the case of an unclassified video tape or disc that is subsequently classified as a "PG" film - \$200
- c) in the case of an unclassified video tape or disc that is subsequently classified as an "M" film - \$400
- d) in the case of an unclassified video tape or disc that is subsequently classified as an "R" film - \$600
- e) in the case of an unclassified video tape or disc that is subsequently classified as an "X" film - \$800

- f) in the case of a video tape or disc that has been refused classification under subsection 25(3) or paragraph 25(4)(b) of the Classification Ordinance or that was at the time of the offence unclassified and is subsequently refused classification under those provisions - \$1000 or imprisonment for 6 months, or both
- g) in the case of a video tape or disc that has been refused classification under paragraph 25(4)(a) of the Classification Ordinance or that was at the time of the offence unclassified and was subsequently refused classification under that provision - \$2000 or imprisonment for 12 months, or both.

Subsection 25(3) of the Classification Ordinance provides that the Censorship Board is to refuse to approve the classification of a film if the Board is satisfied that it depicts, expresses or deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that it so far offends the standards of morality, decency and propriety generally accepted by reasonable adults that it should not be classified. Paragraphs 25(4)(a) and (b) of that Ordinance provide that the Board is to refuse to approve the classification of a film which depicts a child (whether or not engaged in sexual activity) who is or is apparently under the age of 16 in a way which is likely to cause offence to a reasonable adult, or which promotes incites or instructs in matters of crime or violence.

Subsection (2) provides that proceedings for an offence under subsection (1) are not to be commenced until the video has been classified or refused classification.

Section 13 prohibits the advertising of a video tape or disc that is not classified or has been refused classification. The penalty is \$100.

Section 14 prohibits the selling, hiring out or distribution of an unclassified publication if the publication or its container or wrapping indicates that it is a classified publication. The penalty is \$500 or 3 months imprisonment, or both.

Section 15 provides in subsection (1) that in determining whether a publication or advertising matter is objectionable the Court shall consider the general character of the publication or advertising. Subsection (2) excludes from the application of the first subsection a publication which has been refused classification and film advertising which has been refused approval.

Section 16 provides in subsection (1) that the Court shall not find that a publication is objectionable if it has literary or artistic merit or is a medical, legal or scientific publication unless the Court is satisfied that the conduct of the person accused of an offence against a provision of Division 1 in relation to the publication was not justified in the circumstances, in particular having regard to the persons or classes of persons who are likely to see the publication.

Subsection (2) excludes subsection (1) from applying to a publication which has been refused classification, film advertising material which has been refused approval, an objectionable child publication, or a publication which promotes, incites or instructs in matters of crime or violence.

Section 17 provides that a person is not to be convicted of an offence set out in this Division in relation to an objectionable publication (except a video tape or disc) if he or she can show that since the offence was alleged to have been committed the publication has been classified and the act alleged to constitute the offence did not contravene any of the conditions set out in section 19 other than those relating to the prescribed markings which would have applied to the publication if it had been classified at the time, or, in the case of film advertising, the advertising has been approved since the offence was alleged to have been committed.

#### DIVISION 2 - CLASSIFIED PUBLICATIONS

Section 18 prohibits the publication of a Category 1 or Category 2 restricted publication or an "R" or "X" film otherwise than in accordance with the applicable conditions set out in section 19. The penalty is \$500 or 3 months imprisonment or both.

Section 19 sets out the conditions applying to classified publications.

Subsection (1) provides the conditions applying to Category 1 restricted publications. They are:

- . The publication shall not be sold, hired or delivered to a minor except by a parent or guardian of the minor;
- . The publication shall not be displayed for sale or hire in a public place unless it is contained in a sealed package;
- . If the sealed package is of transparent material the publication must bear the prescribed markings; and
- . If the sealed package is of opaque material the publication and the package must bear the prescribed markings.

Subsection (2) provides that an "R" film must not be sold, hired or delivered to a minor except by a parent or guardian of the minor. An "R" film must not be displayed in a public place unless its container, wrapping and casing bear the prescribed markings.

In relation to an "X" film or a publication that is a Category 2 restricted publication, subsection (3) provides the following conditions:

- . It must not be sold, hired or delivered to a minor except by a parent or guardian of the minor;
- . It must not be displayed except in a restricted publications area;
- . The publication must not be sold, hired or exhibited, displayed or delivered for sale or hire unless it bears the appropriate markings;
- . The publication must not be delivered to a person who has not made a direct request for it; and
- . The publication must not be delivered to a person unless it is in a package of plain opaque material.

Section 20 prohibits persons from depositing or causing to be deposited in a public place a Category 1 or Category 2 restricted publication or an "R" or "X" film. The penalty is \$1000 or imprisonment for 6 months, or both.

Section 21 prohibits persons from depositing or causing to be deposited in private premises without the occupier's permission a Category 1 or Category 2 restricted publication or an "R" or "X" film. The penalty is \$1000 or imprisonment for 6 months, or both.

Section 22 provides that a classified video disc or tape is not to be sold, hired out, exhibited for sale or hire in a public place or displayed in a public place if, after classification a trailer advertising another film has been included unless, in the case of an "R" film the trailer is advertising a "G" "PG" "M" or "R" film, or, in the case of an "X" film, the trailer is advertising an "X" film. The penalty is \$500 or imprisonment for 3 months, or both.

Section 23 prohibits publication of advertising for a classified video which indicates that the video is not classified or is differently classified. The penalty is \$100.

Section 24 prohibits the exhibition or display in a public place of a video tape or disc of a "G", "PG" or "M" film in a container or wrapping which does not carry the relevant determined markings. The penalty is \$1000 or imprisonment for 6 months, or both.

Section 25 prohibits the sale, hiring out or distribution of a film, other than a video disc or tape, that is a "G", "PG" or "M" film if the film or its container or wrapping indicates that the film is not so classified or is differently classified. The penalty is \$500 or imprisonment for 3 months, or both.

Section 26 provides that a person who sells, lets on hire or distributes classified films shall display a notice about classification in the form determined by the Chief Censor [being the person appointed as such under the Customs (Cinematograph Films) Regulations] by notice in the Gazette. The penalty is

\$500 or imprisonment for 3 months, or both. The notice is to be displayed on premises open to the public for the purposes of sale, hire or distribution of the film in a conspicuous place so that it can conveniently be read by anyone on the premises.

#### DIVISION 3 - MISCELLANEOUS

Section 27 prohibits, in subsection (1), the selling, hiring out or distribution of any film in association with advertising matter which has been refused approval.

Subsection (2) prohibits publication of approved advertising matter in relation to a film except in accordance with any conditions to which the approval is subject. The penalty is \$500 or imprisonment for 3 months, or both.

Section 28 provides in subsection (1) that a person who is in charge of a restricted publications area must not allow a minor to enter that area. The penalty is \$500 or imprisonment for 3 months, or both.

A restricted publications area is defined in section 3 as any premises or part of any premises constructed, conducted and managed in accordance with the requirements in the Regulations made under the Ordinance.

Subsection (2) provides that a person who is in charge of a restricted publications area must ensure that there is a notice prominently displayed near each entrance to the area so that it is clearly visible from outside. The notice is to be in the prescribed form. The penalty is \$500 or imprisonment for 3 months, or both.

Subsection (3) provides that a person in charge of a restricted publications area is not to allow "R" or "X" films to be screened in that area except by means of a slot machine operated by a coin or token. The penalty is \$500 or imprisonment for 3 months, or both.

Subsection (4) provides that a person is not to be convicted of an offence against subsection (1) if there is evidence which is not rebutted to show that the person believed on reasonable grounds that the other person concerned was an adult.

Section 29 contains provisions dealing with the conduct of directors, servants and agents of corporations, particularly in relation to the application of offence provisions.

Subsection (1) provides the means to establish the state of mind of a body corporate in relation to particular conduct where it is necessary to do so in proceedings for an offence. In such a situation it is sufficient to show that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority and that that person had the necessary state of mind.

Subsection (2) provides that conduct on behalf of a body corporate by a director, servant or agent within his or her actual or apparent authority is to be taken, for the purposes of a prosecution under the Ordinance, to have been the conduct of the body corporate unless it shows that it took reasonable precautions and exercised due diligence to avoid the conduct.

Subsection (3) provides that where in proceedings for an offence it is necessary to establish the state of mind of a person (other than a body corporate) in relation to certain conduct it is sufficient to show that a servant or agent of the person had the state of mind and that the conduct was engaged in by the servant or agent within the scope of his or her actual or apparent authority.

Subsection (4) provides that conduct by a servant or agent of a person (other than a body corporate) within the scope of the agent's actual or apparent authority is to be taken, for the purposes of a prosecution under the Ordinance, to have been engaged in by the person unless that person can establish that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

However subsection (5) provides that where a person (other than a body corporate) is convicted of an offence only because of the effect of subsections (3) and (4) that person is not liable for imprisonment for that offence.

Subsections (6) and (7) are interpretation provisions.

Section 30 provides that where a body corporate is convicted of an offence under the Ordinance the Court may impose a fine of five times the normal maximum pecuniary penalty for that offence.

### **PART III - ENFORCEMENT**

Section 31 is an interpretation provision.

Section 32 provides that a police officer may enter any place and search for and seize anything which he or she believes on reasonable grounds is connected with an offence. However, that may only be done if the consent of the occupier of the place has been obtained or the search and seizure is made in pursuance of a warrant issued under the Ordinance.

Section 33 deals with obtaining consent to search. It provides in subsection (1) that before obtaining consent for the purposes of section 32 a police officer must inform the person that he or she may refuse to give consent.

Subsection (2) requires the police officer to ask the person to sign an acknowledgement that he or she has been informed that consent may be refused, that he or she has given consent and the date and time the consent was given.

Subsection (3) provides that where in any proceedings it is material for the Court to be satisfied that a person gave consent



for the purposes of section 32 failure to produce an acknowledgement as described in subsection (2) establishes a rebuttable presumption that consent was not given.

Section 34 deals with search warrants.

Subsection (1) gives power to a Magistrate to issue a search warrant.

The warrant can only be issued after information on oath is laid before the Magistrate. The information must allege that there are reasonable grounds for suspecting that on the day the information is laid or within 28 days afterwards there will be a thing or things of a particular kind connected with a particular offence at a certain place. The grounds for suspicion must be set out in the information. When issued, the search warrant authorises a named police officer with such assistance and force as is necessary and reasonable to enter the place, search for things of the kind described in the information and seize anything of that kind found in the place that the police officer believes on reasonable grounds to be connected with that offence.

Subsection (2) provides that a Magistrate shall not issue a warrant unless he or she has received any further information he or she requires concerning the grounds on which the issue of the warrant is being sought and the Magistrate is satisfied that there are reasonable grounds for issuing the warrant.

Subsection (3) provides that a warrant is to set out:

- a) the purpose for which it was issued including a reference to the kind of offence involved;
- b) whether the entry is authorised to be made at any time or only during specified hours;
- c) the kind of things authorised to be seized;
- d) any conditions to which the warrant is subject; and
- e) the date, which must be no more than 28 days after the date of issue, on which the warrant will cease to have effect.

Subsection (4) allows a police officer who, in the course of searching in accordance with a warrant, finds something which is connected with the offence although not the kind of thing specified in the warrant or something connected with another offence to seize that thing provided that he or she believes on reasonable grounds that it is necessary to do so in order to prevent the thing from being concealed, lost or destroyed or used in committing, continuing or repeating the offence.

Section 35 allows the Court to order that an objectionable publication be forfeited to the Commonwealth where a person is charged with an offence in relation to the publication and the Court is satisfied that the person committed the offence.

Subsection (2) provides that where a publication has been seized as an objectionable publication but no one has been charged with an offence in respect of it, a Magistrate shall on application by a police officer within 60 days of the seizure, issue a summons requiring the occupier of the premises from which the publication was seized or the person from whom it was seized or both to appear before the Court and show cause why the publication should not be forfeited to the Commonwealth. When such a summons is issued subsection (3) requires the Magistrate to give notice of the proceedings to every person whose name appears on the publication as author, publisher, printer, manufacturer or owner of the publication, so far as is reasonably practicable to do so.

Subsection (4) provides that in proceedings under this section the Court may allow a person who claims to be the author, publisher, printer, manufacturer or owner of the publication who appears or is represented in the proceedings to intervene for the purpose of maintaining that the publication is not objectionable.

Subsection (5) provides that on the hearing of a summons issued under subsection (2) the Court shall:

- a) if it is satisfied that there was a contravention of the Ordinance in respect of the publication and that it is desirable that the publication be forfeited to the Commonwealth, order that it be forfeited to the Commonwealth; or
- b) if it is not so satisfied, order that it be given to the person who appears to the Court to have been entitled to possession of it immediately prior to seizure.

Subsection (6) provides that a forfeited publication may be destroyed or otherwise dealt with as directed by the Minister. However that is subject to subsection (7) which provides that the Minister is not to order the destruction of the publication until the time allowed for institution of an appeal against the forfeiture order has expired or if an appeal is lodged, before the appeal is determined.

Section 36 provides in subsection (1) that where a person is charged with an offence, the Court after hearing the matter is to order that any publication relating to the prosecution which has been seized, be delivered to the person who appears to the Court to have been entitled to possession immediately before the seizure. By virtue of subsection (2) this provision does not apply to publications forfeited to the Commonwealth under subsection 35(1).

Subsection (3) deals with publications seized by a police officer. If within 60 days of seizure no person has been charged with an offence in respect of the publication and no summons has been issued under subsection 35(2) in respect of it the publication is to be returned to the person from whom it was seized or the occupier of the place from which it was seized.

Section 37 makes provision for a certificate signed by the Chief Censor, Acting Chief Censor, Deputy Chief Censor or Acting Deputy Chief Censor appointed under the Customs (Cinematograph Films) Regulations to be evidence that:

- a) a film has been classified or refused classification;
- b) a film has not been classified;
- c) film advertising matter has been approved or refused approval; or
- d) film advertising matter has not been approved.

Section 38 provides in subsection (1) that regulations may exempt a specified person or body from specified provisions of the Ordinance.

Subsection (2) provides that it is not an offence for a person to publish to a prescribed person or body a Category 1 or Category 2 restricted publication, an "R" film or an "X" film or a video tape or disc that is unclassified or has been refused classification. Nor is it an offence for a person to do anything which is within the scope of a prescribed exemption under subsection (1) and is done in accordance with any conditions to which the exemption is subject.

Section 39 is a general regulation making power.

Issued by authority of  
the Minister for the  
Arts and Territories.