Rabelais goes to Canberra

CENSORED

In a ground-breaking case, the High Court is soon to consider the implied right to freedom of speech following the banning of an article in La Trobe university's student magazine, Rabelais, about how to shoplift

The implied right to freedom of speech, as developed by the Mason High Court in cases such as Theophanous and Australian Capital Television, has rarely been considered in tandem with questions of the censorship of publications, films and computer games. Indeed the implied right has barely ever been invoked in current debates about our classification system. And perhaps rightly so. It is possible, even preferable, to argue for a more tolerant, accountable and equitable classification system without arguing for an expanded right to freedom of communication.

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"The Art of Shoplifting"

In July 1995, the student newspaper at La Trobe university, Rabelais, published an article titled "The Art of Shoplifting". The article was a typical piece of student journalism, rough and iconoclastic. The piece was part political treatise, part instructional manual, arguing that the poor and underprivileged have the right to steal from "the big corporate f–ers".

The article stated that: "The injunction against stealing from capitalism is itself a capitalist ideology and should be spurned as such". Nothing new here; these ideas are as old as the novels of Victor Hugo. But the more contentious part of the article was the handy and detailed hints on how to shoplift without getting caught. In September 1995, the former Chief Censor, John Dickie, refused to classify the particular edition of *Rabelais* in response to an application by the Retail Traders Association of Victoria. As media commentator Richard Ackland pointed out: "[Dickie's] refusal to classify meant that the editors could be liable criminally for distributing a publication instructing in matters of crime".

Under the (Cth) Classification (Publications, Films and Computer Games) Act 1995, a publication, film or computer game can be refused classification, effectively banned, if it is found to promote, incite or instruct in matters of crime or violence.

Brown v members of the Classification Review Board

The student editors appealed Dickie's decision to the Classification Review Board which upheld the initial RC classification. The students then appealed the Classification Review Board's decision to the Federal Court. The Federal Court, while affirming the reasoning in Theophanous and Nationwide News, made the point that the implied freedom of speech is not absolute and must give way to what the lawmakers see as legitimate countervailing interests, such as the protection of property and the restriction of conduct which is likely to be harmful to others.

In his decision, Justice Merkel sketched out a number of principles for the "proper construction" of the

National Classification Code. For example, that the Code should be given a sensible meaning which gives effect to its evident purpose. More importantly though, Justice Merkel held that the presumption against statutory interference with, for example, the common law right to freedom of expression should "rarely be treated as being displaced by general words". Furthermore, he held that a proper construction of the Code would have regard to the applicant's right to freedom of political communication and discussion as recognised by Article 19 of the International Covenant on Civil and Political Rights.

On the question of whether the article could be found to "instruct in matters of crime", Justice Merkel found against the students' editors. He held that for a publication, film or computer game to "instruct in matters of crime or violence", it must do more than state the obvious or inform or convey knowledge of matter in such a general way that, in a real and practical sense, no instruction has really been given.

In concluding his judgment, Justice Merkel argued that the article in question "strayed from political discussion and developed into a detailed and systematic instruction on the commission of the crime of theft".

He stated that: "Even strong advocates of free speech rights would concede that there is no public interest in instructing how, most effectively, to steal the property of others".

Despite the expansive and essentially rights-friendly approach of the Federal Court, Justice Merkel found that the Classification Review Board did not err in its interpretation of the Code or in its characterisation of the article and that it had sufficient regard to the substance of the freedom of communication (both in common law and under international law) in its approach to both. Furthermore, the Court found that the Classification Review Board did not give undue weight to the initial decision of the Chief Censor and formed its own, independent view on the merits of the case.

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Predictions for the decision in Brown

Constitutional expert Professor George Winterton sees it as "unlikely" that the High Court of Australia will refuse an application for special leave to appeal, largely because Brown is a "significant" case and the judges will be keen to express their views on the particular legal issues it raises. But Professor Winterton suspects that the High Court judges may well come to the same conclusion as their peers in the Federal Court. He states that even more liberal interpreters of the Constitution such as Justice Michael Kirby will agree with the Federal Court decision. Certainly the more conservative judges such as Hayne and Callahan will take the Federal Court line. Nevertheless the case will be the first opportunity to consider the implied right since the more circumspect decision in Lange. And since that decision the chemistry of the High Court has changed considerably.

Conclusion

Notwithstanding broader and more complex questions of implied rights and fundamental freedoms, the reality is that the *Rabelais* editors do face hefty fines and possible imprisonment if the High Court chooses not to overturn the Federal Court decision. Richard Ackland points to how farcical a situation this is, considering that the article is widely available through court transcripts and on the Internet and that no prosecutions are pending against "the countless other pieces of literature and film which conceivably promote, incite or instruct in matters of crime or violence". Ackland here highlights the essentially tokenistic and adhoc way in which publications and films are targeted by the censors and refused classification. In the light of this conclusion, it seems that the possible imprisonment of the *Rabelais* editors is the more serious infringement of fundamental rights and freedoms.

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