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‘Fisting is not permitted’: criminal intimacies, queer sexualities and feminist porn in the Australian legal context

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This article demonstrates how classification and criminal laws in Australia reinforce a heteronormative and big business model for pornography, while reducing the ability of local, independent producers to produce pornography that challenges this model. The legal framework actively engineers specific types of bodies that can be viewed – bodies with large breasts and neat labia, bodies that do not participate in kink or fetish, and bodies that demonstrate their physical responses in restricted ways. Significant penalties for the production, exhibition and distribution of pornography in most states hinder the emergence of the kinds of pornography that have the ability to diversify the genre. Laws make it difficult and often illegal for people to represent themselves. Feminist, queer and independent pornographers report making compromises in terms of aesthetics and ethics in order to meet classification requirements and avoid law enforcement. The regulatory system criminalizes queer intimacies and non-normative sexual practices. Australia’s unique classification system, which bans all depictions of violence (even consensual) in X-rated films, prohibits opportunities to model safer practices, health promotion and the negotiation of risk.

Keywords: pornography; Australia; classification; queer theory; feminism; regulation

Pioneers and police: a snapshot

Australia has a small and growing number of increasingly visible queer, feminist and independent pornographers who are contributing to international discourses on ethical production, self-representation and community-building alongside Annie Sprinkle, Candida Royalle and Tristan Taormino in the United States, and Anna Span, Petra Joy, Jennifer Lyon Bell and Erika Lust in Europe. These figures are linked to an increasing body of literature about the politics of pornography (Kipnis 1999; Williams 2004; Milne 2005; Blue 2006; Span 2006; Sprinkle 2006; Smith 2007; Lust 2010; Stüttgen 2010; Sabo 2012; Taormino et al. 2013).

In recent years, Australian producers such as Ms Naughty, Sensate Films, Poison Apple Productions, Liandra Dahl, Light Southern, Aeryn Walker, Permission 4 Pleasure and the author have screened work at the Feminist Porn Conference (Ms. Naughty and Stardust 2014; Stardust 2014b; Stardust 2014d), the Berlin Porn Film

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Festival (Sensate Films 2012), Cinekink in New York (Brownfield 2014; Ms. Naughty 2014), the first International Festival of Female Porn Directors in Mexico (Dahl 2012), Pop Porn in Vienna (Stardust 2014a) and Muestra Marrana in Barcelona (Stardust 2014c). Australian content appears on video-on-demand sites such as Pink Label TV (Sensate Films 2014) in San Francisco and in seminal publications such as *The Feminist Porn Book* (Taormino et al. 2013). An increased academic, political and community focus on queer, feminist and independent pornography is creating new opportunities for Australian pornographers to collaborate, skill-share and exchange resources. These emerging producers are communicating and networking, and held their first informal gathering and then panel discussion in 2013 (Vanting et al. 2013). The result of this international movement is the development of genres that are increasingly diverse, accessible and user-generated, fostering values of self-determination and DIY culture.

Meanwhile, the Australian legal framework presents barriers for individual artists, collaborators and companies aiming to create independent, feminist or queer pornography. Federal, state and territory laws impose tight control upon where, how and what kind of pornography can be made, sold and exhibited in Australia, with penalties of fines and imprisonment. As a result, queer and feminist pornographers in Australia report making compromises in terms of aesthetics and ethics in order to meet classification requirements and avoid law enforcement. This article explores the ways in which the Australian legal framework understands practices that are about intimacy, consent, trust and safety as violent, objectionable or abhorrent. In effect, the regulatory system prohibits the kinds of pornographies with the potential to challenge hegemonic representations and to model safety and consent.

Classifying pornographic films in Australia

The current classification system for pornographic material in Australia is legislated at a federal level by the Commonwealth Classification (Publications, Films and Computer Games) Act 1995 (the Classification Act), which determines the process for labelling and classifying content. States and territories determine the level of prohibition and censorship, enforce what material can be created and sold, and apply penalties for contravention. These systems have created confusion for producers, who have lobbied for a uniform scheme at a national level.

Federally, films, publications and video games are classified G (General Viewing), PG (Parental Guidance), M (Mature Audiences), MA (15+ Restricted), R (18+ Restricted), X (18+ Restricted) and RC (Refused Classification). Under the Classification Act, the matters to be taken into account in making a decision on the classification of a film include 'the standards of morality, decency and propriety generally accepted by reasonable adults' (s11). Under the Commonwealth National Classification Code 2005, classification decisions are to give effect, as far as possible, to the following principles:

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

Every film must be classified before it can legally be made public (distributed, sold or exhibited). To classify a film for sale or hire costs between Au\$550 for 60 minutes and Au\$8090 for 200 minutes of footage. To classify a film to show at a 'cinema' (regardless of whether this is a blockbuster or community projector screen) costs Au\$1180 for 60 minutes and Au\$2760 for 180 minutes, plus a Au\$190 title charge (Commonwealth Classification (Publications, Films and Computer Games) Regulations 2005, Schedule 1.). These high costs favour big business and act as a barrier for independent producers. Meanwhile, law-enforcement bodies who seize adult material and then seek to classify it for the purposes of prosecution can classify up to 100 films per year for free (Australian Classification 2014).

Strict application and special treatment of X18+: context cannot be considered

The Commonwealth Classification Act (1995), National Classification Code (2005) and Guidelines for the Classification of Films and Computer Games (2005) provide a number of mechanisms by which the context, impact, purpose and audience of a film must be considered. The Guidelines prescribe that 'the literary, artistic or educational merit' and 'the persons or class of persons to or amongst whom it is published or is intended or likely to be published' must be taken into account (2005, 2). However, the X18+ category is exempted from many of these protections, meaning that the existence of explicit sexual activity will make a film automatically X18+ or RC, regardless of whether it is educational, artistic or created for a niche audience (Guidelines, Categories - X18+ Restricted, 16–17).

For example, most classification categories involve an 'impact test', which requires consideration of a film's themes of violence, sex, language, drug use, nudity and their cumulative effect, as well as the purpose and tone of sequences. In considering the level of impact, the classification board may consider stylization, realism, repetition, special effects and detail. However, in classifying a film with explicit sex, *no* consideration is given to impact or context. The X18+ category is the only category in which the impact test is not applied (Guidelines, Assessing Impact, 4). No consideration can be given to the purpose, tone or stylization of the content. Similarly, some films do not require classification if they fall into an exemption category. Films may be exempt because they are 'professional', 'educational', a 'live artistic performance' or 'a documentary record of a community or cultural activity'. However a film cannot be exempt if it is 'likely' to be classified X18+, regardless of whether it falls into one of these categories (Classification Act, 5B(3)(d)).

This exclusion of X18+ is repeated in relation to film festival screenings and customs imports/exports. There is a process for waiving fees if a film is special interest material for a community or cultural group, for limited distribution (with consideration given to the likely demand and financial return), or a documentary record of an event or of a cultural or similar nature (Commonwealth Film Festival Guidelines 2007). However, fees cannot be waived for material likely to be restricted to adults (Film Festival Guidelines, s11; Classification (Waiver of Fees) Principles, s11. (2008)). It is also possible to apply for approval to screen unclassified films at a film festival or community event, having regard to the purpose of screening and the medical, scientific, educational, cultural or artistic nature of the film. Yet films that are or would be classified X18+ or RC – regardless of their purpose and merit – cannot be granted an exemption (Film Festival Guidelines s8, s10, s11). In 2013 the

Classification Board refused an exemption to the Melbourne Queer Film Festival to show Travis Mathews' *I Want Your Love*, featuring gay male sex, despite its screening at queer film festivals around the world (Hawker 2013). There is no appeal process.

These clauses of the Commonwealth Classification (Waiver of Fees) Principles 2008 mean that the X18+ category is subject to special conditions, and sexually explicit films are not afforded the same exemptions and protections available for other content. The Classification Board is not given discretion to contextualize explicit sexual activity or to consider whether an X18+ film may provide sex education, contribute to culture, archive or document community practices, represent diversity, contain political messages or have artistic value.

X18+: no violence, no fetish, no one who 'looks' under 18

Australia's X18+ category is unique in the activities it prohibits. Under the Classification Act, the category includes 'real depictions of actual sexual intercourse and sexual activity between consenting adults'. It provides the following three clauses:

No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the category. It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers.

Fetishes such as body piercing, application of substances such as candle wax, golden showers, bondage, spanking or fisting are not permitted.

It does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18 years. Nor does it permit persons 18 years of age or over to be portrayed as minors. (Classification Guidelines 2005, X18+ Category)

Any film that exceeds these criteria must then be RC.

These clauses are particularly problematic for queer and feminist pornographers, who may be aiming to represent non-normative sexualities, reveal intimacies in kink practices, demonstrate how BDSM can be safely negotiated, or show informed consent for such practices. The fact that specific practices are listed makes the X18+ category narrower than if it merely referenced 'objectionable' or 'obscene' material. It is easier, for example, to argue that fisting is not obscene because community standards of obscenity have changed, but impossible to justify fisting content when the practice is expressly prohibited.

Prohibiting violence: no room to model consensual negotiation of risk and desire

Anti-porn advocates have long argued that pornography *is* and *causes* violence against women (Dworkin 1981; MacKinnon and Dworkin 1998; Tankard Reist and Bray 2012). Some warn that the content currently available is 'new' and more 'extreme' than ever before – no longer 'your father's *Playboy*' (Whisnant 2007). However, these debates about violence in pornography do not make sense in the Australian context, where pornography is required to be non-violent *by law*.

The exclusion of violence is unique to the X18+ category. By contrast, within the R18+ category where sex is only simulated, violence is permitted and sexual violence

may be implied, there are virtually no restrictions on language, and nudity and drug use are permitted. Violence – physical or verbal – is permitted in all classification categories (including the G category, available to minors) except the X18+ category. Here the law prohibits the perception and performance of violence, regardless of whether negotiation is evident in the scene itself, whether consent is given, or whether the film is collaborative or self-made. This effectively removes all consideration about performer experience and reflects a misunderstanding about the diverse ways in which people consume porn, the critical eye they bring to it, and the significance they attribute to it (McKee, Albury, and Lumby 2008; Smith, Attwood, and Barker 2011). The definitions in the Code are broad, and potentially exclude dirty talk, rough sex and BDSM play, including practices such as piercings. ‘Demean’ includes material that ‘appears to debase’, making assumptions that performers inevitably find certain kinds of activity debasing and that consumers interpret these as such.

The exclusion of violence also limits opportunities for health promotion. It means that people can legally perform kink practices privately but cannot view them being carried out professionally. For example, people can legally fist each other at home, but cannot watch the techniques and precautions that are taken on film. International pornographic DVDs can feature pre and post interviews in which performers discuss their likes and dislikes and debrief on-screen after the scene (for example, as in Tristan Taormino’s [2009] *Rough Sex* collection from the United States). This practice both portrays consent and reduces the ability of the scene to be read by viewers as non-consensual or violent. It also actively models the mutual, consensual negotiation of risk and desire. Ironically, the practices that are excluded from representation are overwhelmingly represented in queer, kinkster and sex worker communities for whom dialogues around consent, communication and boundaries are historically well established.

Moreover, the prohibition goes beyond the prohibition of depictions of sexual violence. Films must be refused classification for any violence, even scenes that bear no relation to the sexual activity, and even if the violence appears unrealistic (e.g. the use of plastic swords). The world’s highest grossing pornographic film, *Pirates* (Joone 2005) was originally refused classification in Australia because it involved a scene with two skeletons fighting. The sword fight was later edited out to allow the film to be distributed in Australia. The prohibition on violence results in exclusions that are both dangerous (in terms of under-representation) and illogical.

No body piercing, candle wax, golden showers, bondage, spanking or fisting

At a fundamental level, the exclusion of fetish (defined as involving ‘a non-sexual part of the body that gives sexual gratification’ in the Classification Guidelines 2005) reduces sexuality to the genitals and by extension to an orgasm-centric, heterosexual focus. Prohibiting ‘fetish’ limits sexual representation to a certain set of erogenous zones, regardless of which parts of the body *feel* sexual. The list of prohibited activities – body piercing, use of candle wax, golden showers, bondage, spanking and fisting – reinforces outdated heteronormative models of sexual connectedness and experience. It would be difficult to argue that this exclusion resonates with community standards in 2014. Most adult retailers sell massage candles, Shibari

rope, paddles and floggers. Many straight, vanilla couples experiment with kink. Fisting and bondage are common in queer communities (Rubin 1984, 146; Rubin 1991, 232; Crozier 2012). Fisting and golden showers are common among gay men, lesbians, queers and sex workers.

There is no room for nuance. Any content containing ‘fetish’ automatically falls outside the X18+ category and must be RC, even if it contains safer sex information on how to negotiate a scene, articulate desire, assert boundaries and employ safe technique. As a result of this clause, in 2010 adult film importers reported that films featuring female ejaculation had been confiscated by Australian Customs officials following a decision by the Classification Board that female ejaculation would attract RC rather than X18+ rating. This decision suggests that female ejaculation is either considered not possible (and therefore banned as a ‘golden shower’) or that it is considered ‘offensive or abhorrent’ as defined under the RC category (Abrahams 2010). In addition, some website billing companies stipulate in their Terms of Usage that blood cannot be depicted, which may be intended to prohibit violence but effectively prohibits menstrual porn. While pornography is frequently accused of being homogeneous and plastic, the regulatory framework restricts the kinds of practices that tangibly illustrate that the performers are human – that they menstruate, bleed, ejaculate and urinate, and that their skin turns pink when smacked.

Excluding small breasts and schoolgirl outfits

The X18+ is further unique in that it prohibits not only the depiction of minors, but anyone who ‘looks like’ they could be under 18 years of age. Material imported from overseas is subject to similar restrictions (e.g. in the United States, producers must keep copies of a ‘2257’ performer identification and compliance statement to ensure the models are not minors). The Australian clause is much broader, potentially including adults in schoolgirl outfits and adult baby play, regardless of whether the models are over 18 and consenting. Attendees at the Classification Board’s training sessions have reported trainers referring to the size of women’s breasts as determinant of age, suggesting that small breasts could imply the model is under-age, and potentially leading to publications and films being refused classification on that basis (Patten 2014). If this is common practice, narrow ideas about body type mean that small-breasted women are less likely to be represented in Australian pornography, leading to less bodily diversity.

Refused Classification: exploitation, offence, abhorrence

If a film is RC, it cannot be sold, exhibited or possessed for the purposes of sale. Films may be deemed RC because they exceed the X18+ category, but also if they contain:

Gratuitous, exploitative or offensive depictions of:

- (i) Sexual activity accompanied by fetishes or practices which are offensive or abhorrent;
- (ii) Incest fantasies or other fantasies which are offensive or abhorrent.

In the Guidelines, ‘exploitative’ includes purposeful debasement ‘for the enjoyment of others’ (the prospect that a performer may enjoy debasement is not entertained). ‘Offensive’ is ‘material which causes outrage or extreme disgust’ (Guidelines, List of Terms, 20–21). There *is* room for the Classification Board to apply discretion in determining what is offensive, exploitative or abhorrent under the RC category. However, as discussed below, the lack of queer representation on the Board means the community standards applied in this category are fundamentally heteronormative.

Denying access to representation: sex education and health promotion

The shortfalls of the legislation are compounded by the significant gap in experiences of classifiers and enforcers, on the one hand, and producers and performers, on the other. The people creating pornography – largely queers, artists, feminists and kinksters – are regulated and monitored by governments, police and the Classification Board who have the power to decide which practices are offensive, exploitative or objectionable. This gap is amplified by the fact that there is no requirement for the Classification Board to include diverse sexualities or gender identities in its make-up, meaning that both the legislation and its interpretation are out of touch with queer, kink and sex-working communities.

Members of the Classification Board, appointed by the Governor-General, are required to be broadly representative of the Australian community, and to ‘have the capacity to assess, identify and represent community standards’ (Guidelines for the Selection of Members of the Classification Board 2008, s22). The Board must comprise men and women from different geographical locations, of a reasonable spread of ages, from diverse cultural backgrounds, and with experience of children through parenting or employment experience. The job does not require any professional qualifications. The focus on the ‘mix of men and women’ and ‘gender balance’ implies that there is no commitment to representation of trans*, intersex and sex and/or gender-diverse individuals. While the X18+ category prohibits practices overwhelmingly found in LGBTIQ communities, there is no requirement for there to be lesbian, gay, bisexual, or queer sexualities represented on the Board. The gap in experiences between pornographers and enforcers is also evident in the decision to classify a compilation film containing real sex scenes, *Viva Erotica*, as X18+ (Australian Classification Review Board 2006, 6.2). The Board grappled with questions of whether four fingers constituted fisting, whether a man slapping his own penis constituted spanking, whether toe licking constituted ‘fetish’, and whether sexually explicit material would cause offence to the reasonable adult. They reported there was no definition of ‘fisting’ in the *Macquarie Dictionary* so instead turned to Wikipedia for clarification.

The impact of sanitizing Australia’s X18+ category falls disproportionately on those historically excluded from representation as desirable sexual subjects. The limited availability of non-normative sexual content and diverse bodies precludes people from accessing representations of themselves. However, the effects of the legislation are not restricted to queers and kinksters – they extend to straight couples in suburbs practising fisting, golden showers or rough sex.

A 2002 La Trobe University Survey reveals that 25% of Australians are regular watchers of X-rated films. A 2006 AC Neilson Poll reveals that 76% of Australian adults support the legal and restricted availability of explicit non-violent films and

only 30% claim to be offended by explicit erotic films (Eros Association 2007). Yet in *Viva Erotica* the Board still found that an X18+-rated film would be offensive to a reasonable adult (Australian Classification Review Board 2006, 8.1). A key problem is that the majority of texts written about pornography, legislation introduced to regulate pornography, and decisions made about pornography are made by people who do not work in pornography and, for the large part, do not admit to consuming pornography:

the only people we hear from in public debates are church leaders, social scientists, politicians and commentators – people whose claim to expertise on the issue is the very fact that they themselves don't watch porn, aren't friendly with anybody who watches porn, and don't know anything about the everyday use of porn. (McKee, Albury and Lumby 2008, 25)

This distancing of oneself from pornography sets up a hierarchy by which academics/researchers/law-makers have knowledge and authority, while pornographers and porn consumers are in need of regulation and protection.

The exclusion of some practices from representation impinges on the ability of pornography to act as a medium for health promotion and sex education. The Australian government provides no national comprehensive sex education curriculum. In most states and territories, people are allowed to have sex at 16 but not to view sex until they are 18; people can participate in fetish practices but not view how to perform them safely; and young people can be prosecuted under child pornography offences for creating their own erotic images (Albury et al. 2013). While current affairs programmes warn of the 'dangerous' things young people are learning from pornography (Insight 2012), pornography has a potentially educative function, through depictions of anatomical and sexual diversity (Blue 2006, 8–9). Sex workers have high awareness of sexually transmissible infections and blood-borne viruses, high rates of testing, low rates of transmission and high awareness of body/sex/sexual/gender diversity (Kirby Institute 2012; Stardust 2012). Sex workers and gay men have played key roles in the Australian government's response to HIV and continue to engage in important health promotion (Mawulisa and Robinson 2003; Australian Broadcasting Corporation 2007; Department of Health and Ageing 2010).

Criminal intimacies: the law pathologizes non-normative sexual practices

The X18+ and RC categories demonstrate a pathologizing of non-normative sex practices. The kinds of practices that are perceived to be anonymous, transactional, casual, promiscuous, alienating, disconnected or degrading have long been recognized as intimate within queer, kink and sex-working communities. Public sex situations, says Samuel Delaney, 'are not Dionysian and uncontrolled but are rather some of the most highly socialized and conventionalized behaviour' (2001, 158). Intimacies that manifest in a way that is not related to the state, reproduction, property, coupledness or the nation have been pathologized and criminalized. Yet they are historical and cultural activities upon which entire communities, politics and identities have been built and relationships forged. As Berlant and Warner write:

Queer and other insurgents have long striven, often dangerously or scandalously, to cultivate what good folks used to call criminal intimacies. We have developed relations

and narratives that are only recognised as intimate in queer culture: girlfriends, gal pals, fuckbuddies, tricks. Queer culture has learned not only how to sexualize these and other relations, but also to use them as a context for witnessing intense and personal affect while elaborating a public world of belonging and transformation. Making a queer world has required the development of kinds of intimacy that bear no necessary relation to domestic space, to kinship, to the couple form, to property or to the nation. (1998, 558)

For many in kink communities, BDSM and fetish practices represent relationships of trust, with a strong emphasis on boundaries, consent and communication. A number of texts discuss protocols of initiation into BDSM, and the value of negotiation, consent, skills and safety (Wiseman 1996; Easton and Hardy 2001, 2003; Weal 2010; Thorne 2012). Margot Weiss speaks of a 'social, sexual and educational community' and 'SM as a form of belonging' (2011, 12). As Michael Warner writes, 'queer culture has long cultivated an alternative ethical culture that is almost never recognized by mainstream moralists as anything of the kind' (1999, viii). Porn performers' intimacies on-set often lead to relationships, networks, alliances and collaborations post production (Paulie and Pauline 2010, 88). Pamela Paul (2006) has criticized the sexual acts depicted in pornography for being about 'shame, humiliation, solitude, coldness and degradation' rather than about 'pleasure, intimacy and love'. Such stereotypes are reinforced by the Classification Act, contributing to stigmatization, marginalization and misrepresentation.

Sexual practices that legislation treats as 'degrading' or 'violent' may have an entirely different significance for those involved. Flogging may be about sensation play, higher states of being or testing emotional and physical thresholds. Margot Weiss writes about the feeling resulting from flogging as being 'like the relaxation of a deep tissue massage, the high of eating spicy food, or the cognitive release of meditation' (2011, x). Submission may be about indulgence, escape, pleasure. Golden showers/bukkake may be about negotiating safer sex. Voyeurism may be about exhibitionism. Edge play may be about processing experiences, harm reduction or healing. Fisting, in particular, potentially challenges heterosexism. Its focus is not phallic, it provides anal/vaginal/throat eroticism with 'intensity and duration of feeling, not climax', and is linked to 'expressions of subcultural development' (Halperin 1995, 101).

The practice is by nature gentle and ... requires care and skill on the part of its practitioners ... fisting also involves an elaborate web of communication strategies, as well as the often painstaking process of 'coaxing' the body into a position of comfort where this practice may become possible ... a connection and synergy between body organs. (Wadiwel 2009, 495–496)

Fisting, like other queer and kink activities, has transformative potential for pornography in a way that is not given credence by legislation.

Inconsistent state and territory laws: financial/legal/geographical barriers to making and selling pornography

It is not only federal classification law that poses obstacles for independent producers. While classification categories are determined at a federal level, each state and territory has their own prohibition and enforcement regimes that cover

where films can be possessed, screened and sold. These laws are inconsistent, and pose financial, legal and geographical barriers for independent pornographers.

Despite being legal to import and possess since 1983, the sale of X18+ films is prohibited in all states except the Australian Capital Territory (ACT) and prescribed areas of the Northern Territory. This means that despite being non-violent, containing no fetish and featuring performers who appear to be over 18 years of age, it is still an offence to sell X18+ material in six states. Adult retail outlets that sell X18+ films face penalties of up to 18 months imprisonment and fines of up to \$20,000. In Tasmania the penalty for selling a classified X18+ film is the same as for making child pornography (Eros Association 2007, 15–16).

In many states X18+ films are also illegal to produce and distribute. The Northern Territory does not differentiate between making an X18+ film and other films that would be RC. The New South Wales (NSW) Crimes Act 1900 prohibits the publishing of indecent articles, and the definition of ‘publish’ includes to ‘make’ for the purposes of distribution (s578C). The defence of artistic merit to the publication of indecent material has been removed. The Victorian Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 prohibits making objectionable films for gain, and the possession of commercial quantities of objectionable films.

States also regulate the possession of pornographic material. In the Northern Territory, pornography is prohibited in certain Indigenous communities following the Northern Territory Intervention, in which the former Howard government, under the guise of addressing child abuse, sent the military into Indigenous communities and initiated quarantining of welfare benefits, compulsory government acquisition of land, removal of customary law and increased police presence, in part suspending the Commonwealth Racial Discrimination Act 1975. As part of the intervention, amendments to the Commonwealth Classification Act now provide that the possession, control or supply of X18+ materials is a federal offence, with fines of up to \$11,000 and two years imprisonment. These provisions are premised upon racist assumptions about Indigenous communities being irresponsible and in need of protection from themselves.

Inconsistent state and territory enforcement laws are complex and confusing for producers and consumers, and pose barriers to making, selling and possessing pornography. They mean that people may have to travel to the ACT in order to film and sell material – no small feat in a country of Australia’s size. Australia covers a land mass of 7,692,024 square kilometres, and the ACT makes up a tiny territory of 2,358 square kilometres in the south east. Travelling to film in the ACT can be expensive and time consuming. Faced with prohibitions on advertising pornographic material, many producers opt to film and sell their material overseas instead. For small business owners, these costs can be unviable. But there are also political costs. The laws mean that people cannot showcase their own homes and natural environments. Instead, material ends up being produced in hired premises or hotels, losing its intimate and unique properties.

Customs: prohibiting imports and exports of objectionable material

Customs restrictions make it difficult for Australian producers to sell, share and network internationally. Items that are classified RC or prohibited under Customs

regulations cannot be imported or exported (Customs (Prohibited Imports) Regulations, 1956, s4A; Customs (Prohibited Exports) Regulations 1958), despite it being legal for someone to own or possess them (Australian Customs and Border Protection Service 2014b, 2014c). The Australian Customs and Border Protection Service may seize items considered to be 'objectionable goods' (Regulation 3, Customs [Prohibited Exports] Regulations 1958). In strictly limited circumstances, the Director of the Classification Board may grant permission to import or export such items legally, if they are of an artistic, educational, cultural or scientific nature and depending on the 'reputation' of the person seeking permission (Customs (Prohibited Imports) Regulations 1956, 4A(2AA)). 'Objectionable material' includes child pornography, bestiality and sexual violence, but also materials that:

describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a way that offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that the goods should not be exported. (Customs (Prohibited Exports) Regulations, 1958 Regulation 3)

In 2010 the Federal Government amended its custom arrival cards to require people arriving in Australia to declare any 'pornography' in their possession alongside firearms, weapons and illicit drugs (Australian Customs and Border Protection Service 2014a). The terminology was later changed to 'illegal pornography', with fines for making a false statement to a customs officer of up to \$11,000 and fines of up to \$275,000 and 10 years in jail for bringing in objectionable material. This poses further problems, generating confusion among both Australian residents and visitors who may be unaware of what constitutes 'illegal pornography'. Still, the amendments mean that customs officials can now seize laptops with personal home-made films and other private material. The Australian Customs Service does not make public which adult films they confiscate. Customs and Border Protection made 1373 detections of objectionable material in the 2009/10 financial year, across cargo and passenger streams, including 50% in the passenger stream. Penalties ranged from \$200 to \$20,000 fines, with sentences from good behaviour bonds to imprisonment (Ross 2011).

The cost of compliance

The legislative framework favours big business. The costs of production and classification, the need to travel to shoot and the limitations on sharing work internationally, combined with restrictions on where and what kind of content can be sold, are crippling for the small businesses and individuals that make up the majority of those producing and selling pornographic material in Australia.

While anti-porn feminists argue that pornographers profit from the objectification of women, the law makes it extraordinarily difficult for women to create their own representations and gain control of the means of production. By favouring big production companies who often require a limited range of body shapes and aesthetics in the performers they recruit, the government is limiting the kinds of pornographic aesthetics and practices that can be represented as sexually desirable.

The requirements of the legal framework encourage non-compliance and create a large group of people who are criminalized and vulnerable to police harassment and prosecution. For example, to sell pornographic DVDs in the ACT, retailers require a licence. In *Money Shot*, an adult retailer speaks to Jeff Sparrow about how the licensing scheme provides disincentives to compliance:

When [former Prime Minister] Howard was talking about banning X federally, the ACT said they wanted to keep the X industry because it provides good income for the state. So they put up the fee to \$10,000 a year for a licence to manufacture X-rated material, and \$10,000 to sell X-rated material per premises, and for that money they went round and controlled and monitored and inspected. Those figures were linked to inflation. So it's \$13,000 now ... we were paying \$13,000 to be inspected – harassed, if you liked – and charged \$800 in classification fees. It was too expensive. (2012, 62)

In other states, like NSW, the penalties are the same for selling X18+ or unclassified films, so there is no incentive to pay a fee for the material to be classified. As one retailer told Jeff Sparrow: 'We haven't sent anything to the classification board in five years. We used to spend \$50,000 a year on them and we struggled to get any of that back ... and now we just don't' (Sparrow 2012, 63). The fees charged for classification and licences in no way reflect accurately the time and labour involved in classification or issuing of licences. In some states, law-enforcement officers have discretion to seize and destroy unclassified material, meaning the producer can lose their assets. The fees operate as a kind of 'porno tax', penalizing those involved in the sex industry.

Police discretion, arbitrary enforcement and electoral politics

Police arbitrarily raid, arrest and – recently – imprison adult retailers and producers. The Classification Liaison Scheme, a joint federal, state and territory initiative and an investigatory arm of the Classification Board, aims to 'assist' retailers and distributors 'to comply with their legal obligations' by working alongside state and territory police and enforcement agencies. In effect, this means that Classification Liaison Officers visit sites as part of compliance-checking exercises and investigate complaints about alleged breaches of classification legislation (Australian Classification 2013).

A focus on policing, surveillance and raids has been particularly visible at state election times. Eros, the Adult Industry Association, reports that there have been 'approximately 50 prosecutions of adult shops around Australia over the past few years for selling X18+ films involving fines of up to \$40,000. Some husband and wife adult shop teams have lost their homes and others have gone bankrupt' (Eros Association 2011, 3). Adult industry raids have been politicized, anti-porn campaigns coinciding with electoral campaigns. As Eros states:

Before many state elections the tabloid press will run headline stories about a 'crackdown on porn'. Indeed before the 2006 NSW state election, NSW police were ordered to raid every adult shop in Kings Cross and closed all of them down with lurid stories about searches for child porn. The only charges laid were for selling federally classified X rated films.

In 2009 G Media, owner of Abby Winters, was raided and charged with 54 counts of making objectionable films for gain, one count of possessing a commercial quantity of objectionable films and two charges of possessing child pornography. Many of the initial charges were dropped, however the CEO Garion Hall subsequently pleaded guilty to charges of ‘possessing a commercial quantity of objectionable films it intended selling or exhibiting’ and ‘producing an objectionable film in Victoria’. G Media was fined \$6000 and agreed to re-locate to Amsterdam. Eros Association note in their submission to the Australian Law Reform Commission that, as part of the investigation, ‘police visited the performers [aged 18–25] many of whom lived at home with their parents, threatening to charge them as accessories to a crime’ (Eros Association 2011).

In 2010, the year of the NSW state election, adult retailer Darryl Cohen was jailed for selling unclassified and RC films in NSW. Of 4000 DVDs confiscated by police from the retail outlet on Oxford Street in Sydney’s gay district, 43 were sent to the Classification Board to be classified. Thirty-eight films were rated X18+ and five were deemed RC because of homosexual bondage and sadomasochistic acts. The District Court judge held that Cohen would be unable to pay the fine of \$11,000 for each of the 43 unclassified films and instead was sentenced to three months imprisonment (Barnett 2010). Cohen was the first person to be jailed for a censorship offence since 1945.

Online content: a narrow model for making and selling porn legally in Australia

The harsh legislative framework for the production and sale of DVDs means that many producers only create content for the web. Selling content online allows producers to avoid many (but not all) of the restrictions around the classification, advertising and sale of pornographic material, although there remain limitations. The Commonwealth Broadcasting Services Amendment (Online Services) Act 1999 makes it illegal for any Australian server to carry X18+-rated material, meaning that producers must host their content on overseas servers. When the Bill was originally drafted, it required Internet Service Providers to block adults’ access to content on sites outside Australia on threat of fines for non-compliance (Electronic Frontiers Australia 2002). As it stands, the current law requires films hosted by Australian sites to be classified (incurring the same fees as for DVD), and content is prohibited if it has been or would be classified X18+ or RC (Schedule 7 of the Commonwealth Broadcasting Services Act 1992). Schedule 7 provides grounds for a person to complain to the Australian Communications and Media Authority (ACMA) about prohibited or potentially prohibited content and gives ACMA powers to issue a take-down notice in the case of a hosting service, a service-cessation notice in the case of live content service, and a link-deletion notice in the case of a links service. ACMA may also investigate matters on its own initiative, without a complaint (Commonwealth Broadcasting Services Act 1992, Schedule 5, part 4 (s27)).

For these reasons, Australian pornography is usually made in the ACT or abroad, hosted online by overseas hosting companies, and advertised and sold to international consumers. However, the Broadcasting Services Act 1992 provides for extra-territorial application, meaning the Schedule extends to acts, omissions, matters and things outside Australia (Schedule 7 (s7)). If ACMA is satisfied that internet content hosted outside Australia is potential prohibited content, and if they

consider the content to be of a sufficiently serious nature, they must notify an Australian police force (Schedule 5 (s2)). Presumably this is intended to allow Australian police to investigate instances of child pornography, although ACMA has discretion on what is ‘sufficiently serious’ to warrant notification. This leaves Australian producers vulnerable to the discretion of ACMA in terms of what acts are considered serious enough to warrant police investigation. At the Berlin Porn Film Festival in 2012, Gala Vanting of Sensate Films discussed the implications of this model:

The main thing that affects the way we produce in Australia is the complicated laws. Your best way to make what you want to make, is to produce it for web. In our experience, producing for web is quite a rigid model. I think people sign up for websites online that cater to a very specific niche, fetish, body type, gender, etc. And our desire really is to explore intimacy in all formats, across all genders, in a very pansexual kind of style, and I think the web format makes that quite difficult or at least not commercially viable. Our desire is to be able to branch out into Video On Demand platforms, DVDs, print – we really enjoy making things that you can hold in your hand, we love the texture of those things and think that those elements are part of the erotic experience of consuming porn and erotic art ... hoping to broaden the modalities of production that are available to us. (Sensate Films 2012)

Conclusion: isolation, criminalization and barriers to community-building

Queer, feminist and independent pornographers aim to create material that is inclusive of and accessible to people of diverse sexes, genders, sexualities, races, abilities, ages, bodies and identities. Queer, feminist, independent porn makes new lenses through which to see bodies and desires, archiving women’s histories, documenting queer sexualities, and focusing on trans* inclusivity and self-deterministic representation. The movement is advocating for performers’ access to occupational health and safety and industrial rights, choice over safer sex practices and fair contracts. Central to the movement is a focus on process, not just the product.

Yet to work around Australia’s pornographic legal framework involves self-censorship (omitting sexual practices and compromising political vision), personal expense (travelling to/from the ACT or overseas, particularly if you live rurally; not being able to recruit or advertise locally; being restricted in the kind of content you can offer members), and working in isolation with limited opportunities for collaboration, networking and skill-sharing. Without a supportive legal structure, performers have less choice and autonomy in the kinds of work they are involved in. The prohibitions on screening unclassified, RC or X18+-rated material mean that Australia does not share the culture of some parts of Europe where communities can legally watch, share and discuss pornography together. Customs prohibitions on exporting material are a barrier to Australian producers sharing their work with the wider international independent porn movement.

In a documentary on queer/feminist/independent pornographers in Australia, producers speak of the obstacles to creating porn in Australia in terms of isolation, law reform and barriers to community-building (Sensate Films 2012). Aeryn Walker, who runs her own website, Naughty Nerdy, says:

It's quite hard making this in Australia simply because of law and money. We're so isolated here. The industry is really, really small. The industry is tiny – tiny tiny miniscule! So it's hard to find models, it's hard to find information about working, to skill share. And it's so expensive that we can't get other porn performers here.

In turn, this has meant that there are barriers to user-generated and self-representational pornography. Making pornography may require certain kinds of class, capital and residency in urban centres. Prohibiting certain populations from consuming and accessing material on the basis of race (as in the Northern Territory) has contributed to a porn community that is predominantly white with the under-representation and under-involvement of Indigenous people and people of colour. The Australian queer, feminist and independent porn community is urban-centric, able-bodied and comprised predominantly of cis-gendered, middle-class, white women. The prohibitive legal framework contributes to a focus on US porn stars and the importing of a US brand of feminist porn, rather than the recognition and fostering of community resources in Australia. Australian independent pornographers are part of an international community movement, focusing on ethical production and diversity in representation, yet this is curtailed and compromised by a framework that outlaws the very practices that are crucial and transformative to pornography as a genre.

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