

Art: A Form of Speech, But Not Like Any Other?

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ABSTRACT

Protection of art occurs under Australian law in only a narrow range of circumstances where works of artistic merit are exempted from otherwise unlawful acts. In this paper I suggest that this approach to protection appears to be based on the idea that while art may constitute a form of expression, it is a particularly benign form. In fact it is likely that when art attempts to engage in the realm of the political it is at risk of falling outside of these protections. I go on to examine a number of issues that arise as a result of art being regarded as protected speech under the United States' First Amendment. In conclusion I suggest that before entrenching a protection along the lines of the First Amendment in any future Australian Bill of Rights, further consideration is needed as such protection is limited by a provision that defines art as speech and offers protection solely against state censorship.

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In October 1996 students at the Victorian College of the Arts installed artwork on hoardings along a key boulevard in Melbourne. One work consisted of the statements and questions: ‘Why are you afraid of your vulnerability?’ ‘You know your superiority is an illusion’, and ‘Why do you control?’ The works were part of a project undertaken at the request of the builders of the City Link tunnel, Transfield-Obayashi. A public open day for this government showcase project was planned and the hoardings would feature prominently. The then Planning Minister, Mr Rob McLellan, made the decision to censor the work. This occurred with the agreement of the Premier, Jeff Kennett, who was also the Minister for the Arts. Newspaper reports suggested that Minister McLellan was of the view that: ‘it is not art work — at this stage we are only seeing some questions’ (Trioli 1996). The work was subsequently covered over with hessian.

In 2000 at a late stage of the passage of the Victorian Racial and Religious Tolerance legislation, an amendment to exempt works of artistic merit was proposed, at the instigation of the arts community. During the subsequent parliamentary debate frequent references were made to the Serrano exhibition and the play *Corpus Christi*, which portrays Jesus as gay. A number of members of parliament apparently considered these works as being so beyond the pale that they could not conceivably be regarded as having artistic merit: ‘I think the public has been outraged by a number of artistic works — if you call them that, over the past few years.’ Similarly, ‘we are not talking about mainstream artistic performances but about artistic performances that would, in the eyes of most people, be at the fringe of artistic pursuits’ (Hansard 2001).

Both of these stories of art, artistic merit and expression raise questions as to the capacity of artists, under present legislative frameworks and discursive constructs, to engage with issues in the public sphere. This is particularly the case for artists whose preoccupations may lie at the margins of condoned public discourse. In the absence of any explicit statutory or constitutional right to freedom of expression, an artist’s protection in Australia lies largely in specific exemption clauses in a number of pieces of legislation. However, these same provisions may pose problems for artists whose work is produced with the purpose of engaging in public political debates. The very existence of these exemptions, to what would be otherwise regarded as unlawful activity, suggests that such work is deemed benign by virtue of its status as art. Equally, within this framework the more a work appears to articulate a position or challenge a view, the less likely it is to be considered ‘art’.

In this paper I seek to unravel the contradictions generated by claims for art that it is inherently uplifting and elevating, and the problems this presents for artists attempting to engage in worldly political debates. Exemptions in legislation for artistic work inevitably require it to meet some sort of test of artistic merit, either in the legislation itself, or more commonly determined by the Courts. Rather than argue

for a self-defining approach to art — it is art because the maker of it says so, or for a more inclusive definition of art, I explore the potential offered by an approach that would view art as a form of expression, and to seek protection for expression more generally. The freedom to make, and show, art of whatever nature may be better served by protecting expression in all forms, rather than continuing with an approach which privileges only particular forms of artistic expression and implicitly denies others the status of art.

I start with a general discussion about art and censorship in the public sphere, then consider the range of legal considerations of art in the Australian legal system. I examine the attitudes to art that are implicit in this legal framework, and, through an examination of the views of a number of legal writers, compare these with the free speech regime in the United States. Key distinctions emerge between ‘speech’ and ‘expression’ and between approaches to censorship based on fears of state power and those more concerned with censorship in all forms. Finally, I make some brief observations as to how we might approach the issue of art and censorship within a broader discussion of a Bill of Rights.

Censorship in the Public Sphere

I take as my starting point the public space as a dynamic construct, or as Habermas would have it a space in which a common will is discursively shaped and clarified (1987, 1989). For many artists this is the very project for which their art is intended. Debates provoked by proposed censorship are in themselves part of this discursive process and will often demonstrate the very way in which the public sphere is constantly being constructed and regulated. Such debates frequently occur in the United States where any attempt to censor art will at least need to engage with the premise that art constitutes speech and therefore raises issues of First Amendment rights. Art is seen to be saying something. In Australia we appear to commence from the opposite position: that art is benign or silent; does not, and should not, contribute to a wider debate. Many instances of artistic censorship occur without any framework whereby questions of power and speech can be debated. A number of examples of censorship of works in the public space have occurred in recent years in Victoria, and other than a brief news item, in the main these works disappeared quietly.

Two works in particular stand out as likely to have provoked wider debate and discussion — had they been visible for any length of time. Melbourne has a number of public art spaces. One places visual art in bus stops around the metropolitan area. A few years ago an artist made an ironic, and potent, comment on pornography through the use of images which might loosely be described as ‘dog porn’. Animals lay on their backs, legs in the air, each offering a provocative ‘come-on’ caption. The images were somehow regarded as so offensive that they had to be removed. The second case also involves a public art space, this time a number of light boxes on the

side of a privately owned building, in this instance a bank. An artist had placed in this space a number of images that commented on credit card use and consumer society: no specific reference was made to any particular lending institution. These too were removed, this time at the insistence of the bank.

On each of these occasions there was no legal framework, and neither did there appear to be a political framework, for consideration of the fundamental restriction on expression that the censorship of these works represented. Such a debate might have considered what the art sought to express, whether its removal was a form of censorship or social control and more broadly why some works of art appear to be protected, and others not. For works in public spaces and institutions or in receipt of any public monies, appear to be more closely policed than those that circulate solely in the private sphere. The fate of such art works in the United States could only be a matter of speculation, however any attempt to remove them would have invariably led to a public debate and possible litigation. This would be based on the proposition that both works constituted 'political speech' and therefore would be protected by the First Amendment.

Works of Artistic Merit

In Australian law there is no positive right that would protect an artist's work from censorship. The provisions that do exist take the form of a set of limited exemptions, or defences, in legislation that offer some indirect form of protection for artists from what would otherwise be unlawful acts. Obscenity law in many states prohibits the display of obscene works or publications yet the legislation will usually create an exemption for works of artistic merit.¹ *The Racial and Religious Tolerance Act* in Victoria similarly makes unlawful conduct that 'incites hatred against or serious contempt for' a person or class of persons yet exempts from prosecution conduct in the course of an artistic work or discussion for artistic purposes.²

¹ For example section 33 (5) (b) of the *South Australian Summary Offences Act 1953* provides that 'no offence is committed by reason of the production ... of a work of artistic merit if, having regard to the artistic nature and purposes of the work as a whole, there is no undue emphasis on its indecent or offensive aspects' and section 58 of the *Censorship Act 1996* (Western Australia) creates a defence to offences in relation to the sale, supply, publication etc of obscene or indecent articles if the article is of recognized literary, artistic or scientific merit.'

² *Racial And Religious Tolerance Act 2001* (Victoria) Sect 11 Exceptions — public conduct reads: 'A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith — (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for — (i) any genuine academic, artistic, religious or scientific purpose...'

These provisions appear to be based on an assumption that art is not a form of speech; a view that represents a fundamentally different notion of art than that which informs First Amendment rights and protections in the United States. For if the obscenity and anti-vilification laws are to prevent harm, and that harm is not to be found within art, then art must take on an entirely different purpose than that of the expression of ideas or even opinion. Such a framework implies that art is incapable of conveying the very ideas that the legislation has been intended to prevent. And if it does succeed in conveying such ideas it may all too readily be deemed ‘non-art’ as the following discussion of legal interpretations of ‘art’ and ‘artistic merit’ reveals.

The framing of the protections for artistic works in the form of exemptions or defences in Australian statutes requires that courts from time to time must determine the artistic merit of a particular work. Factors that come into play at times like this appear based on a particular view of the function and impact of art. Some examples of legal treatments of art will illustrate this point. A trade practices case involved an assessment of the degree of artistic merit conveyed by a cookery book. The conclusion was that the book had an artistic individuality, arising from amongst other features, the size and shape of the book, its glossy hard cover, and the lacework appearing on the front cover along with a fine line drawing of old buildings.³ In a tax case a ceramic bowl was considered art on the basis that almost any ‘worthwhile Art Gallery would collect and display ceramics as works worthy to be cherished, contemplated and preserved.’⁴

A more detailed discussion of artistic merit occurred in a case under the movable heritage legislation. An expert witness was of the view that: ‘We’re not talking artistic merit, we’re not talking about... Turner, we’re not talking about the great topographers and painters of the late 18th, early 19th century in England, this is not what we’re talking about in these pictures.’ Another expert described the works as, ‘whilst important for social and historical reasons, (having) no real artistic merit’ and as a work of art they ‘would be at the very, very bottom of the scale’.⁵

Whilst judges have declined to take on the task of assessing artistic merit without expert evidence, such reliance does not guarantee an inclusive response. An expert might testify that art embodies ‘a desire to create and maintain a sharp distinction between art and the rest of life. It emphasises purity, exclusivity, and severance of art from any political, social, or cultural influences’ (Harmon 1994, p. 401). Or in the words of Lord Kenneth Clark in a submission to the Longford Committee, ‘art exists

³ Bowen CJ and Franki J in *Brock and others v Terrace Times Pty Ltd* [1982 56 F.L.R.] 464.

⁴ R.K. Todd (Deputy President) in 1989 AAT Case 4887, 20 ATR 3295, 3303.

⁵ *J B Hawkins Antiques v. Minister for Communications and the Arts* No. N94/966 AAT No. 10293 [accessed online] <http://www.austlii.edu.au/>.

in the realm of the contemplation, and is bound by some sort of imaginative transposition. The moment art becomes an incentive to action it loses its true character' (Longford 1972, p. 100). Whilst this comment was specifically directed at drawing a distinction between art and pornography, this qualification has proved an obstacle for much political artwork gaining protection against obscenity charges. For art's 'merit' is questioned far more frequently when it challenges dominant and exclusive constructions of sexuality and gender (Sperling 1992).

Others have written at length about the difficulties faced by artists working within, now quite accepted conventions of post modern art practice. In an article examining obscenity law in the light of such practices Amy Adler forcibly argues that the disruption of the conventional notion of 'art' is inherent in the very nature of much contemporary art. She characterises the post-modern as attacking 'the Modernist distinctions between good art and bad, between high art and popular culture, between the sanctity of the art context and real life' (Adler 1990, p. 1364).

The law of obscenity is not the only area in which such issues emerge — as was seen in the defamation action against the ABC arising out of the playing of the performance artist, Pauline Pantsdown's, parody of Pauline Hanson's political views.⁶ The Court of Appeal regarded the work as a 'fairly mindless effort at cheap denigration' and rejected the ABC's arguments that it was a satirical and ironic comment on Hanson's political views. Equally the publication of a guide 'How to Shoplift' in a student newspaper was not considered funny enough, or perhaps clever enough, to gain protection as art:

the writing was not without humour, but lacked indicators that it was intended to be satirical. The tone was at times considered by the Board to border on malicious, and was seen to lack literary or artistic merit.⁷

In these two cases the work in question has entered the realm of political discourse, and thereby appears to leave itself open to challenge as to the strength of its artistic merit. This would appear to create a significant problem for artists who seek to explore such themes within their work.

Art as Protected Speech, More or Less

The recognition of art as a form of speech and, in turn the protection of speech as a fundamental right would seem an appropriate proposition to pursue within a broader

⁶ *Australian Broadcasting Corporation v Hanson, Queensland Court of Appeal*, September 1998 (unreported).

⁷ *Brown and others v Members of the Classification Review Board of the Office of Film and Literature Classification* [1997] 145 ALR 464, 469.

debate about an Australian Bill of Rights. However, in holding this view, it is instructive to consider some writings from the United States that explore the possible limitations of such an approach. In this part I outline some of the theoretical underpinnings of First Amendment protection. I then briefly examine recent explorations of the intersection of free speech and artistic expression with a view to better understanding what might be an appropriate scope of a protection for art in any future codification of rights of this nature.

The essentially political purpose of the First Amendment has been described by a leading United States jurist and vigorous defender of free speech, Justice Brennan, as: 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'⁸ However two distinctions are central to the moral assertion and judicial application of First Amendment rights, and serve as significant limitations. The first distinction is that the First Amendment creates a freedom from state censorship but does not create a legal right that can be asserted more generally. Frederick Schauer, a leading US free speech theorist, describes the First Amendment as 'a distinct restraint on government power' (1982, p. 9). The second, and most pertinent to a discussion of art as an instrument of change, is that 'speech' is granted protection but not necessarily 'expression.' The implications of the failure to protect expression have yet to be fully explored. Although art works have frequently received First Amendment protection Schauer argues that this has been 'not *because* they are art, but because they are political communications' (1982, p. 110). It is not so much that Schauer would argue against the protection of artistic expression in general, and he in fact contemplates that a more general protection of liberty might extend to the right to self-expression, but that this is not the business of First Amendment.

So in practice what might these limitations mean for the ability of the First Amendment to ensure that art contributes to the construction of the public sphere? In large part this depends on the view that one takes about the role of the state, the manner in which political debate takes place and the way in which power is distributed and exercised. Marci Hamilton, in her advocacy of an expanded First Amendment, argues that representative democracy demands the means to challenge government and that art performs this function in a singular way (Hamilton 1996). From her perspective it is the over reach of state power that needs to be guarded against for a 'culture rich in a variety of art works presses back the ever-encroaching reach of governmental ideology' (Hamilton 1996, p. 111). The framers of the First Amendment had such views in mind, with the underlying philosophy of the First Amendment being described as classical liberalism's 'sharp dichotomy between state and citizen' (Fiss 1996, pp. 17–18).

⁸ *Roth v US*, 354 U.S. 476 (1957).

However not all contemporary commentators share Hamilton's characterisation of government as inevitably the enemy of a diverse and vigorous public debate so necessary for a healthy democracy. Owen Fiss refers to the belief by some in the possibility that the state can function as 'the friend of freedom'. He provides the example of the regulation of campaign finances as illustrating the role that the state can play in balancing the volume of the voices of various candidates in order to contribute to the quality of public discourse (1996, p. 5). The same arguments have been made in relation to state funding for the arts — that it is necessary to redress, what might be described as, a market failure; one that ensures that only certain works of art are produced. These works might be those that are financially viable through ticket sales or are likely to attract private funding.

If one has concerns about the ability of agents outside government to constrain the capacity of art to contribute to the health of our public debate then we also must address the limitation in the First Amendment that would see art protected only from government censorship. Quite how this might be achieved requires greater thought. The street corner governed by a local municipality, the imagined popular site of vigorous political debate, is today just as likely to be part of a privately owned mall, or a virtual corner located in a chat room. Private interests control large tracts of what might casually be regarded as public spaces — the majority of surfaces in the city would be privately owned. No First Amendment protection could have prevented the credit card art, with its clear political content, from removal at the hands of the bank. The Victorian College of the Arts and the private construction company may have been able to resist government pressure to remove the slogans from St. Kilda Road on the basis of freedom of speech but no recourse would have been available had Transfield-Obayashi made the decision.

Equally, regarding the state exclusively as the embodiment of the public will has itself become a rather unpopular framing. No more so perhaps than in the US Supreme Court where a distinction has developed between government acting in a regulatory fashion and government acting in its proprietary capacity so as to lessen the First Amendment constraints that apply in the case of the latter (Fiss 1996, pp. 61–63). The Court determined that when a government agency banned activity in an airport terminal it was acting in its capacity as an operator of a shopping centre rather than in any governmental capacity. This blurring of public and private entities and functions suggests that the protection of a healthy public debate may not be achieved solely through limitations on the state's regulatory functions.

While Hamilton would vigorously defend the preoccupation that the First Amendment has with the restriction of state activity she does take issue with the prevailing view that it protects art only in so far as it can be regarded as speech. Characterising art as a form of expression unlike any other, going beyond the 'logical,

rationale and discursive' forms of communication, she argues for protection over and above that afforded by the First Amendment.

The protection of art as a form of expression might appear closer to the Anglo-Australian legal approach which as we have seen regards art as encompassing a non-discursive form of expression. However Hamilton would reject any suggestion that this weakened the political potential of art, arguing that this is in fact its strength:

art plays a critical role in unsettling the government's hegemony by increasing the people's capacity to question government on their own terms, rather than the government's (Hamilton 1996, pp. 85–86).

If instead of government we read a concept such as 'dominant political discourse' this represents a rather exciting proposition. For how many artists feel unable to adopt the textual language of political debate yet conceive of their artistic expression as an intervention in the public sphere? With greater recognition of the contribution that visual imagery and modes of representation make to the construction of the public sphere it seems timely to examine the fixation with speech and text as being the most privileged forms of communication.

Problems of definition and meaning would no doubt persist under any model and determining whether a particular work is an artistic expression may prove just as problematic as asserting its meaning as constituting political speech. However while Robert Mapplethorpe's photographs have successfully been defended on the basis of their artistic merit the argument advanced by Fiss that they 'invited us — all of us — to reconsider our understanding of homosexual orientation and practice' (1996, p. 105) may have been harder to win. Equally the ability to assert a right to artistic expression may prove more useful than being obliged to explain the 'political' content of the 'dog porn' example cited previously.

Conclusion

In this paper I have sought to highlight the lack of comprehensive protection for artistic expression as of right in Australia. What protections exist operate in such a way as to diminish the capacity of art to engage with public discourse. Attempts by artists to address issues of public importance, or to represent those at the margins of the public sphere, risk their work being regarded as non-art. In this way while the naming as 'art' functions as a means of legitimising work at the same time it effectively corrals it from social and political concerns. In contrast, in the United States it is this very potential of art to engage in political discourse that provides the basis for its First Amendment protection as speech. If we wish to ensure the protection of artistic expression however we would also be well advised to consider whether art as 'speech' adequately describes the multitude of interventions that artists make in the public sphere.

Equally a certain caution should be adopted when pursuing an approach to law, funding and policy which relies on an understanding of the state as the only site of regulatory power in the circulation of artistic work. If a Bill of Rights is to be fashioned today it needs to be framed within a contemporary understanding of the nature of private political power and the fragmentation of state power. The cases of censorship detailed in relation to public spaces in Melbourne occurred as much as a consequence of actions by non government project partners as they did as a result of government intervention.

Underpinning many of the concerns regarding censorship of art, and of that other communications, is the desire to foster open public debate. In seeking to codify the means by which this may be ensured we need to give greater thought to where and how that debate takes place. The protection of some form of public sphere as a place in which diverse views may find expression, even though not all will find their way into the rules, laws and codes of social mores, may provide a more useful starting point than the limited provisions of the First Amendment.

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