



Australian Government

Classification Review Board

7 July 2004

**23-33 MARY STREET
SURRY HILLS, NSW**

MEMBERS: Ms Maureen Shelley (Convenor)
Dr Robin Harvey
Ms Dawn Grassick
Mr Robert Shilkin

APPLICANTS: The Australian Family Association (AFA)
Represented by Mr Damien Tudehope, Solicitor

The Attorney-General
Not represented

**INTERESTED
PARTIES:** Potential Films (Original Applicant)
Represented by Ms Raena Lea-Shannon, Michael Frankel &
Co. Solicitors; Mr Mark Spratt, Director, Potential Films; Mr
Julian Wood, Former Classifier, Expert Witness

BUSINESS:

- To consider whether the AFA's application for review of the decision was made within the time period prescribed by the *Classification (Publications, Film and Computer Games) Act 1995*.
- To consider whether the AFA has standing to apply for review of the decision.
- To simultaneously consider the AFA and the Attorney-General's applications for review.
- To review the Classification Board's decision to classify the film *Anatomie De L'enfer (Anatomy of Hell)* (the film) R18+

with the consumer advice ‘Strong themes, sexual activity, high-level sex scenes’.

DECISION AND REASONS FOR DECISION

1. Decision

The Classification Review Board (the Review Board) classified the film R18+ with the consumer advice ‘Actual sex, high-level sex scenes, high-level themes’.

2. Legislative provisions

The *Classification (Publications, Film and Computer Games) Act 1995* (the Act) governs the classification of films and the review of classification decisions. Section 9 of the Act provides that films are to be classified in accordance with the National Classification Code (the Code) and the classification guidelines (the Guidelines).

Relevantly, the Code in paragraph 3 of the Table under the heading ‘Films’ provides that films (except RC films, X films) that are unsuitable for a minor to see, are to be classified ‘R’. The Code also states various principles for classifications, including that ‘adults should be able to read, hear and see what they want’ and that ‘minors should be protected from material likely to harm or disturb them’.

Section 11 of the Act requires that the matters to be taken into account in making a decision on the classification of a film include the:

- (a) standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) literary, artistic or educational merit (if any) of the film; and
- (c) general character of the film, including whether it is of a medical, legal or scientific character; and
- (d) persons or class of persons to or amongst whom it is published or is intended or likely to be published.

Three essential principles underlie the use of the Guidelines, determined under s.12 of the Act:

- The importance of context
- Assessing impact
- Six classifiable elements – themes, violence, sex, language, drug use and nudity.

3. Procedure

a) Viewing the film

The Review Board viewed the film and then accepted submissions from the AFA, the Attorney-General and Potential Films regarding whether the AFA’s application was made in time and whether the AFA had standing as a person aggrieved under the Act.

b). AFA application made within time

In the first instance the Review Board determined that the AFA's application was either made in time under section 43(3)(a) or, in the alternative, the Review Board exercised its discretion to hear the matter under section 43(3)(b) should it be otherwise determined that the application was made out of time.

The classification certificate for the film was issued on 5 May 2004 and posted on the Office of Film and Literature Classification (OFLC) website on the same day. On 4 June 2004 the AFA lodged an application for review and applied for a waiver of fees.

It has been the practice of the Review Board to accept that the date an applicant has received notice of the classification decision is the date of the posting of the decision to the OFLC website – i.e. the date it becomes public information.

Further, it has been the practice of the Review Board that in the event of a fee waiver being granted then the date of the receipt of the application for fee waiver will be the date used in establishing the date that an application has been made.

Under section 91(2) of the Act the Director may take 28 days to notify an applicant for waiver of fees of the outcome of their application. If the date that the fee waiver was granted and advised to the applicant were used, then ostensibly an applicant for review who also requested a fee waiver may only have two days in which to lodge an application. This would appear contrary to the sensible operation of the scheme of review under the Act.

On 22 June 2004 the Director advised the AFA that the application for fee waiver had been granted.

c). AFA has standing as person aggrieved

Majority decision

In the second instance the Review Board determined, in the majority, that the AFA had standing as a "person aggrieved by the decision" in respect of this film. The Review Board noted the submissions of the AFA and Potential Films on the standing of the AFA as a "person aggrieved". The Review Board sought legal advice from the Australian Government Solicitor on the issue of the AFA's standing as a "person aggrieved".

The Review Board determined, in the majority, that the AFA had standing for the following reasons.

For the AFA to be a "person aggrieved" by the Classification Board's decision, it would need to fall within subsection 42(3)(b) of the Classification ((Publications, Films and Computer Games) Act, which expands the definition of "person aggrieved" from the common law meaning of that term, by providing that an organisation shall be a person aggrieved if its "objects or purposes include, and whose activities relate to, the contentious aspects of (the) theme or subject matter" of the film.

It is stated in paragraph 3.1 (b) of the AFA constitution that it is one objective of the AFA to "analyse laws and policies for their effect on the family and to formulate and promote corrective measures as necessary to uphold and protect the rights and responsibilities of families" It is noted that the AFA's activities include publication of material on pornography, violence, censorship and the media and the making of submissions to the Senate on portrayal of violence in the media and in relation to the Guidelines and to the Review Board.

Further, the Review Board, in the majority, accepted the submission of the AFA that “offensive depictions involving a child” have or may have a detrimental effect on the family. The Review Board accepted the AFA’s argument that it seeks to promote “corrective measures” in relation to the Classification Board’s treatment of the contentious aspects of the film and that in doing so it would be acting within the scope of the objective set out above.

The majority accepted the AFA’s submission that its objectives included dealing with issues such as the contentious aspects of the film and that its activities relate to the contentious aspects of the film.

The majority of the Review Board determined that the depiction of a naked child in a sexualised setting is a contentious aspect of the subject matter of the film. Based on the inclusion of this scene the Review Board in the majority determined that s.42(3)(b) of the Act applies to the AFA in this instance.

Minority view – AFA has standing

A minority was satisfied that the AFA had standing in relation to the above aspect of the film and further that s.42(3)(b) of the Act also applied with respect to the contentious aspect of explicit sexual activity as depicted in the film.

It was the AFA’s submission that sexual activity that dehumanises and debases another human being impacts on ways that marriages work and families operate. Further, it was the AFA’s submission that sexual activity was a “sacred” component in family life and explicit depictions of sexual activity, with particular emphasis on such depictions that debase others, have or may have an adverse impact on marriages and the way that marital relationships operate.

It was the minority view that the explicit sexual depictions in the film could be considered demeaning and accordingly, are a contentious aspect of the film to which the AFA’s objectives and activities relate.

Minority view – AFA does not have standing

A different minority was not satisfied the AFA was a “person aggrieved” by the Classification Board’s decision to classify the film R18+.

In the Minister's second reading speech for the *Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 1999*, which introduced subsection 42(3) of the Act, specific reference is made to precedents in Commonwealth legislation for expanding the definition of the term "persons aggrieved", including the *Administrative Appeals Tribunal Act 1975*. The relevant provision of that Act, subsection 27(2), uses almost identical terminology to subsection 42(3) of the *Classification ((Publications, Films and Computer Games) Act*:

"an organisation ... shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the object or purposes of the organisation or association".

In determining whether the AFA’s objects or purposes include the contentious aspects of the theme or subject matter of the film, the minority obtained guidance from case

law that has interpreted subsection 27(2) of the Administrative Appeals Tribunal Act, in particular *Re Control Investments Pty Ltd v Australian Broadcasting Tribunal (No.1) (1980) 3 ALD 74*, in which Davies J, commenting on subsection 27(2), stated:

“It is not sufficient that the objects or purposes of (the association) permit the association to concern itself with the decisions under review; rather, it is required that the decisions under review concern themselves with a matter that is an object or purpose of the association.”

The AFA's objects or purposes of "analys(ing) laws and policies" and "promot(ing) corrective measures" may permit it to concern itself with the Classification Board's decisions. However, as set out in *Re Control Investments*, this of itself does not mean that the AFA's objects or purposes include the contentious aspects of the theme or subject matter of the film, as required by subsection 42(3) of the Act.

A general interest in classification matters and the operation and effect of Australia's classification system on Australian families is not sufficient of itself to attract the operation of subsection 42(3). If it were sufficient, there would be no need for the specific requirement in subsection 42(3) that the objects relate to the “contentious aspects of the themes or subject matter of the film”.

The minority formed the view that, while the film may contain some scenes that may be offensive to some sections of the adult community, there is nothing in the contentious aspects of the theme or subject matter of the film itself that relates to, or depicts, or comments on, aspects of families or family relationships.

d). Advice to parties

After an adjournment to consider the matter the Review Board made its determination. It advised the parties that it unanimously determined that the application had been made in time and, in the majority, that the AFA had standing as a person aggrieved in respect of this decision and the reasons for these determinations.

e). Submissions on substantive application for review

Having determined that the Review Board had received valid written applications for review from the AFA and the Attorney-General, four members received oral submission from Mr Tudehope representing the AFA, which was confirmed and added to by written submission; written submission from the Attorney-General; and oral submission from Ms Raena Lea-Shannon on behalf of Potential Films. Mr Julian Wood and Mr Mark Spratt also made oral submissions on behalf of Potential Films. Written submissions were also received from Potential Films.

f). Meeting in camera

The Review Board then met in camera to consider the substantive matter.

4. Evidence and other material taken into account

In reaching its decision the Review Board had regard to the following:

- (i) The Australian Family Association's application for review;
- (ii) The Australian Family Association's written and oral submissions;

- (iii) Attorney-General’s application for review;
- (iv) The Attorney-General’s written submissions;
- (v) Potential Films’ written and oral submissions;
- (vi) the relevant provisions in the Act;
- (vii) the relevant provisions in the Code, as amended in accordance with s.6 of the Act; and
- (viii) the *Guidelines for the Classification of Films and Computer Games 2003*.

5 Synopsis

The film is a French language film with English subtitles that explores the relationship between a gay man (anonymously called “the guy” in the film) and an apparently heterosexual woman whom he prevents from committing suicide in the bathroom of a night club. The woman (anonymously called “the girl” in the film) challenges the guy about his and all men’s ultimate hatred of and for women and offers to pay him to watch her during an investigation of her femaleness and sexuality – “watch her through where she can’t be watched”. During four nights he visits to watch her perform and participate with her in intimate and sexual acts.

6 Findings on material questions of fact

The Review Board found that the film contains aspects or scenes particularly worthy of mention under various classifiable elements:

(a) **Themes** – there are high-level themes relating to exploring subjects of sexual preference including homosexuality, sado-masochism, and of female sexual identity including menstruation and men’s responses to menstruating women. For the most part, these are justified by context. The theme of suicide has a strong impact and is justified by context. The theme of the exploration of menstruation has a high impact particularly at 56 minutes when the girl inserts the “bloodied” tampon in a glass of water, swirls it and then drinks from the glass and offers the remains to the guy who also drinks from the glass. The contents of the glass have the appearance of guava juice or similar drink and the scene lacks authenticity. As such, its impact is lower than if it had been realistically depicted.

(b) **Violence** – there is an attempt at suicide at approximately 4 minutes. The girl slashes her wrists across the horizontal whilst in the toilet. Blood is shown coming from the wound and the scene is realistic. The guy finds her and stops her and takes her to a pharmacist to have first aid. At approximately 5 minutes the guy “sees” the girl slash her throat with a razor blade – this is a “fantasy” scene and it quickly becomes apparent that this is something he is imagining. There are other scenes of violence in the film that have a moderate to strong impact. Overall, the violence is justified by context.

(c) **Sex** – at approximately 1.25 minutes a scene of explicit fellatio from a teenage male to a man (actual sex) is depicted – the scene is fleeting.

At 8 minutes the guy's erect penis is shown and the girl implicitly fellates him. At approximately 9 minutes the girl moves her head away from the guy's groin area with some viscous-appearing fluid (implicitly semen) dripping from her mouth.

At approximately 23 minutes the girl stimulates her vaginal area with her hand (actual sex) – the scene is neither prolonged nor detailed.

At 26 minutes a “flash back” scene of children playing is depicted. A young girl – approximately 8 to 10 years of age – is shown removing her underpants and then lying down under a bush. A medium shot of what appears to be the naked girl is shown. A group of boys watch her and laugh. One boy removes the glasses of another and implicitly inserts the arm of the glasses into the girl's vagina. The boy then looks at a mucous-like fluid on the arm of the glasses. The impact of the scene is high.

In the minority view, this scene is an offensive depiction of a person who is or looks like a child under 16 years particularly when given its juxtaposition to the adult scene that follows and repeats some of the actions involved in the flash back.

In the majority view this scene is of high impact but interpreted the actions of the children as exploratory play and the intention of the filmmaker as not attempting to titillate viewers, but to provide a context for future scenes. The impact was also moderated by the fleeting nature of the explicit scene and the somewhat positive interactions between the children.

At 30 minutes a man's hand is explicitly inserted into a vagina (actual sex). He removes his hand with a mucous-like substance on it and rubs the substance into his hair. The scene is not prolonged.

At 36 minutes the guy explicitly draws on the girl's anal and genital area with red lipstick and then on her mouth. The scene is quite detailed. At 37 minutes the guy is seen with an erect penis and then implicitly has sex with the girl.

At 50 minutes the guy implicitly inserts the handle of a garden implement into the girl's vaginal/anal area. The girl is depicted with the implement, supporting its own weight, extruding at a right angle to her body for more than a metre – like a pitchforked tail. The impact of the scene would have been higher had it been at all believable. Instead of being a scene of sexual violence it is ludicrous. This is emphasised by the lack of reaction from the girl. During this event she appears to sleep and only wakes to turn and lightly gasp when she sees the implement protruding from her body. The scene is unrealistic.

At 60 minutes the girls expels a stone dildo from her vagina (actual sex) and “blood” gushes forth onto the bed. The guy implicitly reinserts the dildo into the girl and moves it back and forth. The expelling of the stone dildo by the girl is clinically portrayed and has the impression more of a medical procedure or acrobatic trick rather than that of a sex scene. The impact of the scene is high due to the detail of vaginal area depicted, the dildo being explicitly expelled and the “blood” gushing on to the sheets. In the context of the exploration of femaleness the scene is in context and whilst somewhat gratuitous has more the impact of a high-level theme rather than as a sex scene.

The guy is shown at 64 minutes with an erect penis, which he manually stimulates (actual sex) before implicitly having intercourse with the girl. The scene is brief.

At 65 minutes the guy implicitly withdraws his penis from the girl. The penis is covered in what appears to be blood. The “blood” spurts out onto the bed.

At 66 minutes he fondles his “bloody” and still erect penis (actual sex). The girl stands and watches with what appears to be blood on the inside of her thighs.

(d) **Language** – there is minimal use of coarse language. At 6 minutes the guy slaps the girl and calls her a “dumb bitch”. Most of the coarse language occurs at 67 to 68 minutes (“she was a bitch, a slut like any other”, “she was the queen of sluts”, “I reamed her pussy so hard no one will want her again”, and “hump them like goats”) in a conversation between the guy and his friend in a bar. The context of the use of the language and the imagery associated with it increased the impact of the language to strong.

(e) **Drug use** – men smoking marijuana at 2 minutes. This scene is justified by context.

(f) **Nudity** – the film is an exploration about female sexuality and men’s response to it. As such it contains extensive nudity with full male and female nudity including genital detail. The nudity is shown in context and is justified by the theme of the film.

The Review Board found in the majority that the overall impact of the material was ‘high’. The majority believed there was not sufficient strength in the behaviour of the protagonists to cause a higher level of impact for any individual scene or cumulatively. Scenes were dealt with, for the most part, in a realistic manner. Some scenes had a lower impact because of their lack of credibility. The majority concluded that each scene was justified by the context in which it was presented and the overall theme of the film.

The film depicts scenes of actual sex but these are for the most part fleeting and not detailed and it was the decision of the majority that these scenes were justified by the context.

7 Reasons for the decision

The Review Board based its majority decision to classify the film ‘R18+’ with the consumer advice ‘Actual sex, high-level sex scenes, high-level themes’ on the content of the film as set out in 6 above.

The Applicant submitted, “the film is an intellectual work, artfully filmed, acted and presented, and one that requires a mature perspective correctly covered by the R18+ rating. The film’s strategy is deliberately confrontational”. The Review Board accepted that the film was a serious attempt at a complex subject and that it had some artistic intent. Having regard to the matters required to be considered in the Act, the Code and the Guidelines, the majority felt that the film was most appropriately assigned an R18+ classification. The Review Board believed in the majority that the various controversial scenes were depicted in context and could be accommodated in the R18+ classification.

The Review Board therefore found in the majority that the treatment of the high-level themes was justified by context, as were the sex and depiction of the scene involving the girl child. Further, the Board found that the impact of the material was high, but not so high as to warrant a more restrictive rating than the legally restrictive R18+ classification. The majority were mindful of the principle contained within the Code that adults should be able to read, hear and see what they want. The majority considered that minors would be protected through the legally restrictive R18+ classification.

The minority view was that the number of actual sex scenes coupled with the demeaning depiction of the girl, and to a lesser extent the guy, and the girl child in these sexualised scenes provided a cumulative impact that was very high and as such the film should be refused classification. In addition, the minority view was that the scene involving the girl child was an offensive depiction of a person under 16 years of age and the film should have been refused classification.

8 Summary

While the classifiable elements and the impact in the overall context of the film did not in the view of the majority justify an RC classification, they did make the film unsuitable for minors. Therefore an R18+ classification was warranted with specific consumer advice relating to the actual sex, high-level sex scenes and high-level themes contained in the film.

The Review Board's classification decision in relation to the film was determinative of both applications for review.